The Draft Care and Support Bill (2012)

Contribution to Pre-legislative Scrutiny

1. Process to date
   • Law Commission review, with In Control assistance and input (20010/11).
     [Link](http://lawcommission.justice.gov.uk/publications/1460.htm)

2. Overview
   • Many of the Law Commission recommendations are in the Bill. Frances Patterson has warmly welcomed the Bill.
   • These matters have been overshadowed by a mixed response to the White Paper, in particular dismay at lack of resolution of funding issues.
   • The Government states that it wishes to pursue personalisation more vigorously than implied by the Law Commission, in the direction of an entitlement-based approach. Para 8.20 of the government response states: *we want to go further than this recommendation in primary legislation to meet our ambitions for personal budgets. As the White Paper makes clear, we want personal budgets to be more clearly part of the user’s or carer’s entitlements to care and support.*
   • With this in mind, our overriding view is that the broad thrust of the proposed legislation is positive and there are a number of features that will promote choice & control and favour ‘prevention’. However, some of the weaknesses and concerns highlighted by In Control earlier in the process remain. These flaws may be a greater problem in the light of the government’s stated high level of ambition for personal budgets.
   • Our comments relate to *self-directed support;* that is the ‘process by which people take control of the support they need to live the life they choose.’ *Personal budgets are one (important) aspect of the technical means to achieve this.* It is important that the legislation, regulation and guidance which govern social care is supportive of all the important elements which make for self-directed support. These include the means to build community capacity through asset based approaches; to recognise and draw on all aspects of each adult’s ‘real wealth’; and to value and reward the contribution of family, friends and others who provide everyday help and support.
   • In our responses earlier in the process we commented on related issues of importance: in particular the process for determining eligibility; the issue of portability of assessments and resource allocation; and processes to assist people to stay safe whilst exercising choice & control. Our views on these matters remain unchanged, but our primary concerns at this stage relate to the core processes which facilitate and strengthen self-directed support.

In addition to the points below, and probably most relevant to regulations and guidance we want to stress the importance of how self-directed support and personal budgets are delivered in practice. There is increasingly strong evidence that personal budgets, delivered via the key principles and methods of self-directed support can be of great benefit to all groups of
people. It is equally clear, however, that it is very possible (and sadly very prevalent) to offer personal budgets in ways which do not enhance control for the people using them. Happily we are increasingly clear about the approaches that lead to better outcomes and that these are achievable at no extra cost. The recent personal health budgets evaluation replicated findings from our well-established POET survey of personal budget outcomes (see appendix). In achieving policy objectives it will therefore be critical to take all action possible in the final drafting of the Bill and in particular in regulations and guidance, to lever positive delivery practice. Our key points in this regard would be: For all groups of people using personal budgets (including older people) better outcomes are robustly associated with an experience of personal budgets that conforms to the underlying principles of the personal budget process:

- getting a personal budget in a form where the person can exercise self-determination,
- knowing what their personal budget is,
- having a budget adequate for the person’s needs,
- getting helpful support (with input from family and/or friends) to design a meaningful support plan,
- and getting support to guide the person through every aspect of the personal budget process.

Also important are:

- Local communities with the capability to support the person in using their personal budget meaningfully,
- Personal budgets being delivered in ways that make the person feel secure in their access to their personal budget, and where the local authority operates in ways that are transparent, fair and predictable to the person and their supporters.

3. Improving the Bill and the supporting documentation

When the Bill is enacted, it will be followed by supporting regulation and guidance. The Government response to the Law Commission report and draft Bill make reference to matters that will (and will not) be addressed in regulation. We would hope that some of the issues below, which may not fall within the purview of the legislation, are picked up through these means.

<table>
<thead>
<tr>
<th>Reference</th>
<th>Issue</th>
<th>Suggested amendment, improvement or comment</th>
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<tr>
<td>Throughout the Draft Bill</td>
<td>‘The wellbeing principle and focus on individuals’ needs and outcomes creates a defining purpose for care and support.’ (DH website).</td>
<td>We strongly support this approach and believe that if applied systematically and rigorously, it will require important changes to both practice and procedure, which are supportive of our aspirations for self-directed support. Some of these changes are matters for</td>
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regulation, some for guidance, and some are issues of good practice which government departments will need to promote through a variety of means. The changes will need to include: councils to adopt an operating model that is effective and efficient and takes account of the needs and circumstances of the whole adult population (‘eligible’ and ‘ineligible’); councils to be encouraged to adopt policies and procedures in order to govern personalization and personal budgets such that the maximum levels of control and decision-making are passed to adults, regardless of whether budgets are taken as a direct payment or not; councils and their partners to produce robust and coherent plans for the their local workforce (both council staff and non-council staff) for the promotion of practice supportive of personalization.

This is not intended to be an exhaustive list and our proposal is that work is commissioned to scope what is now required in terms of regulation/guidance/good practice exemplars to implement the well-being principle and focus on needs and outcomes.

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<tr>
<th>Throughout the Government response and the Draft Bill. Especially Para. 24 of the Draft Bill</th>
<th>Plans for individual adults are referred to in the Bill as ‘care &amp; support plans’; the family members who support them as ‘carers’ and the plans which set out how the needs of those ‘carers’ are met as ‘support plans.’ In Control has long championed a change in both practice and terminology, away from old-style care plans, led and owned by professionals, in favour of support plans which are person-centred and owned by people themselves. This usage is not the same as that employed in the Bill but is quite common now in local authorities, voluntary and community groups, the provider sector and amongst many of those people who control their own support. The usage proposed by the Bill will create confusion.</th>
<th>Preferred option: adopt the usage pioneered by In Control and now widely employed across the country. This is more than an issue of terminology, it is one of practice (see below). ALTERNATIVELY, give a clear definition of the new usage with a clear explanation of the rationale for the change.</th>
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<tr>
<td>Para. 24</td>
<td>Care &amp; Support Plan/Support Plan</td>
<td>It is apparent that the plans proposed in the Bill are hybrids (para. 24.1 ‘...a</td>
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document prepared by the local authority...'), responsibility for which may be delegated to a person (para. 24.6 ‘...including the adult for whom the plan is to be prepared.’ )

This is clearly NOT the model of self-directed support developed by In Control and tested across the country. Where this model is most successful, it is animated by individuals who are freed up by taking control of resources (a personal budget and other aspects of real wealth) and of the process to plan, that is to define outcomes which are meaningful for them; and to determine how the resources are used to achieve these outcomes.

We propose that instead, councils should have responsibility for ensuring that support plans (In Control’s definition) for individuals are in place; that those plans are genuinely person-centred; and that they are owned and understood by the adult concerned. The question of who draws up a plan or how must be a matter for local decision, based on individual circumstances and informed by lessons from best practice. Councils using an approach of this kind need to adopt procedures and systems that draw down the information they require for their own purposes (budget management, audit & review, commissioning, planning and so on) from these support plans. The nature of the support plans themselves is that of tools which are owned and actively used by the adult citizens who are directing their own support.

Para. 25

**Personal budgets.**

This paragraph requires that a council defines the financial sum that it determines is needed to meet the assessed needs of each eligible adult and sets out how that sum will be financed based on the results of a financial assessment. In sub-paragraph 2 it refers to the need to draw on ‘other amounts of public money that are available in adult care for spending on matters relating to housing, health or welfare.’

**Definition of the sum required and the means to arrive at it are important matters and we have no issue with the Bill’s broad approach. We are very conscious indeed however of the wide variation in current standards of practice in these regards and we take the strong view that regulation and guidance should be used to help to raise the level of practice standards.**

**We would make the point that the sum should be sufficient to allow the person to achieve independent living – it should not be acceptable for authorities to in effect drive people into institutional settings against their wishes.**

In relation to the need to draw on ‘other amounts of public money’ this has historically proved to be a difficult issue given differential purposes for which public money is allocated and differential eligibility criteria governing these. So, whilst strongly supporting the principle and welcoming its inclusion in the Bill we recommend additional guidance and possibly regulation in relation to the means councils might adopt to achieve this.

Para. 26

**Review.**

This paragraph requires that councils review ‘care & support plans’ and ‘support plans’; it sets out a requirement to consult with the adult and/or the carer and other persons when carrying out such a review; and

**Review is a critical part of the self-directed support process, and one which can provide significant reinforcement for adults as they seek to control the support they need to live the life they choose. Once more we are very aware of a high degree of variation in approach and in standards of practice across councils in England.**
it specifies the need to re-assess and carry out a new financial assessment when the review shows that having regard to outcomes previously specified, circumstances have now changed in a way that affects the plan.

There is no reference to the scope of this review (beyond the implication in relation to changed outcomes and circumstances) or of any timescales involved: councils are asked to ‘keep under review generally’ the plans that it has prepared.

Our view is that these matters will need to be addressed through regulation and guidance. There are several important aspects here, including: how a review is triggered and any ‘default time-scales’ proposed; the process for review, who ‘owns’ it (the person themselves, or the council) and who leads it; the threshold for triggering a new assessment and financial assessment; the ability to adjust plans when such a threshold is not reached; the means for involving other relevant people in the process; and the necessity to keep the process ‘light touch’ and as far as possible incorporating all aspects of the adult’s health, welfare and housing issues in one review.

Para. 28/29/30

Adults with and without capacity to request a direct payment and further direct payment provisions.

These paragraphs largely re-state and consolidate the existing law on direct payments.

Alongside this, the Government has picked up on the Law Commission recommendation about extending the use of direct payments to residential care and is currently seeking councils to test this.

In Control’s view is that it remains of the greatest importance that we maintain a diversity of approaches/choices for adults in the management of personal budgets; the options should include both direct payments and a range of ‘managed budget’ options. It is important that direct payments remain available to people who are deemed to lack capacity and we support the ‘authorised person’ arrangements re-stated here. However, as in other matters commented upon the nature and standards of practice across England are highly variable and we believe that regulation, guidance and good practice exemplars are required to improve standards.

We are supportive of extending direct payments to residential care. We are aware that there are risks and issues here (including reputational risks for direct payments) and are therefore pleased to see the approach to testing now proposed.

Appendix

Personal Budgets – Key learning relevant to the Care and Support Bill

Since 2003 In Control and Lancaster University have worked together to understand the cost and effectiveness of personal budgets. Over this time regular reports have been published and the work has led to the development of a widely accepted outcomes framework; the Personal Budgets Evaluation Tool (POET). The first National Personal Budget Survey using POET reached over 2000 people across 10 Local Authorities and was published by Think
Local Act Personal in June 2011. A second report involving about 20 additional councils will be published in March 2013.

Work using POET shows us that personal budgets can and do work well for both people who need support and their family carers.

Most personal budget holders reported personal budgets having a positive impact.

As well as reinforcing the value of personal budgets POET has shown that the way in which Local Authorities make personal budgets available is critical to their success. Outcomes across Local authorities varied substantially and positive outcomes increased greatly when certain process conditions were at play.

**Key lessons so far:**

**Personal budgets work in the long term:** People who had been using their personal budgets for longer reported increasingly positive outcomes.

**How personal budgets are held:** People with personal budgets paid directly to them reported more positive outcomes in over half of the areas of life we looked at. Conversely, people with personal budgets managed by the council tended to report less positive outcomes.

**Knowing the basics:** Too many people surveyed did not know how their personal budget was managed or did not know the amount of their personal budget; this group reported less positive outcomes.

**Where support to plan comes from:** People getting help from someone independent of the council or NHS reported more positive outcomes.

**Taking control of a Personal Budget:** People reported more positive outcomes across the board if they felt their council had made all aspects of the personal budget process easier.

**Personal Budgets work for different groups:** There appeared to be no differences in outcomes according to gender, ethnicity or religion.
Older adults: Tended to report less positive outcomes than other adults in less than half of the areas we asked about. However, these differences are ones of degree, older adults were more likely to record personal budgets as making no difference; they were not more likely to record personal budgets as making things worse. They were also less likely to be in receipt of direct payments, the means of holding a personal budget most associated with more positive outcomes.