

#SocialCareFuture

#SocialCareFuture's response to Bristol City Council's consultation on a proposed 'Fair and Affordable Care Policy'

1. Introduction

Social Care Future is a growing movement of people and organisations who believe that everyone should be able to 'live in the place we call home with the people and things that we love, in communities where we look out for one another, doing the things that matter to us' regardless of our age or stage of life or whether we have reason to draw on social care or not.

We believe that our vision aligns with the framework of domestic law governing how councils are required to discharge their obligations, including the Care Act 2014, Equality Act 2010 and Human Rights Act 1998, and with the UK's obligations under international law, arising from the UN Convention on the Rights of Persons with Disabilities (CRPD).

We note that Bristol City Council is consulting on a proposed policy which says that:

"where a care package to remain at home would substantially exceed the affordability of residential care, the Council will need to consider other cost-effective alternatives which might include:

- Offering a residential or nursing home placement that accepts the local authority rate (also referred to as 'the Bristol Rate') rather than in a home where fees are more expensive.
- Offering accommodation-based support such as supported living accommodation, extra care housing or a residential care home as an alternative to providing 24- hour paid care in the home.

We also note that the council argues: 'This is not a blanket policy and although exceptions are likely to be rare, each person's situation will be looked at individually. There is no rule that sets an upper limit on the level of a personal budget.'

It is our view that Bristol Council's proposed Fair and Affordable Care Policy is incompatible both with the pursuit of Social Care Future's vision and the framework of domestic and international law referred to above and that it should not be implemented.

2. Care Act 2014

The overarching duty of councils providing adult social care under the s1 of the Care Act 2014 is to promote individual wellbeing, in particular: control by the individual over day-to-day life (including over care and support, and the way in which it is provided); participation in work, education, training or recreation, suitability of living accommodation; domestic, family and personal relationships; personal dignity; physical and mental health and emotional wellbeing; and social and economic wellbeing. It is clear that the policy, if enacted, risks impacting extremely negatively on the individual wellbeing of those people with significant support needs who will be affected by it.

While the consultation paper is at pains to stress that the council is not proposing a blanket policy which would be unlawful, the accompanying Equality Impact Assessment is nevertheless able to identify 161 people who presently draw on council-funded social care to live in their own home who could be significantly affected because they are receiving a personal budget over 'either our standard or complex rate we pay for residential care (e.g. in excess of £1000 per week).' Further, the consultation paper says that the policy will only be disapplied in exceptional circumstances. As a result the policy, if enacted, risks creating a strong presumption in favour of institutional care for those with significant needs for support, who will otherwise not be in a position to pay for the support necessary to live independently and safely at home as a result of the policy placing an upper limit on a personal budget.

We contend that this is at odds with the law and spirit of the Care Act 2014.

Paragraph 10.27 of the Care Act 2014 Statutory Guidance permits a local authority to take into consideration its own finances and budgetary position in determining how to meet a person's eligible needs. However, it states clearly that a local authority "should not set arbitrary upper limits on the costs it is willing to pay to meet needs through certain routes - doing so would not deliver an approach that is person-centred or compatible with public law principles". Although cost is a relevant factor in deciding between suitable alternative options for meeting needs, the Statutory Guidance says that this "does not mean choosing the cheapest option; but the one which delivers the outcomes desired for the best value." The first paragraph of the Statutory Guidance states that, "The core purpose of adult care and support is to help people to achieve the outcomes that matter to them in their life." (paragraph 1.1).

Paragraph 11.7 of the Statutory states, "At all times, the wishes of the person must be considered and respected. For example, the personal budget should not assume that people are forced to accept specific care options, such as moving into care homes, against their will because this is perceived to be the cheapest option" (paragraph 11.7).

3. Human rights

Article 19 of the UN Convention on the Rights of Persons with Disabilities, ratified by the UK in 2009, says that States have undertaken to ensure that 'Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement' and that disabled people should 'have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.' Importantly paragraph 10 of the Preamble to the CRPD says that States Parties are, in ratifying the Convention 'Recognizing the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support

The draft policy, if enacted, risks leaving some people - those requiring the most extensive support - without any option but to move into institutional care when they would otherwise choose to continue living their lives in their own home with support as they currently do, violating their right under international law to choose where and with whom to live on an equal basis with others, and interfering in their right under domestic human rights law to private and family life.

We note that in 2017-8, the Equality and Human Rights Commission (EHRC) condemned similar policies adopted by 13 Clinical Commissioning Groups (CCGs). All 13 CCGs accepted the failings of their policies and agreed to revise them following legal letters from the EHRC challenging policies which in effect capped the amount of money available for NHS Continuing Healthcare, creating a risk that disabled people with high support needs would be moved from their homes into care homes against their wishes. The EHRC made clear in the letters that it was not sufficient for the policies to state that the cap would not apply in "exceptional" circumstances, because this did not "allow the decision-maker properly to undertake... a full evaluation of the particular considerations in favour of provision... as required by [amongst other things] ... Article 8 ECHR, Article 19 of the UNCRPD, the [Public Sector Equality Duty under the Equality Act]"¹

Disabled people around the world have fought over the past decades for the right to live independently and have the same rights as other citizens to choose where and with whom to live and this regressive policy would amount to a dangerous backward step, practically and symbolically, concerning respect for the human rights of disabled people.

4. Equality Act 2010

For public bodies subject to the Public Sector Equality Duty, meeting their general duty to have due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves the need to 'take steps to meet the

¹ <https://www.equalityhumanrights.com/nhs-u-turns-discriminatory-policies>

needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it'. The provision of support to facilitate the participation and inclusion of disabled people in the community on an equal basis with others is an example of doing so. The impact of any proposed policy, practice or criterion on eliminating discrimination and advancing equality of opportunity between disabled people and the wider community should be fully explored and evidenced to meet the Public Sector Equality Duty.

Those facing the greatest impact from this policy - disabled people with the most significant need for support to live independently - are already among those facing the greatest inequalities and risks to human rights in society. Further, the potential impact of the proposed policy on advancing equality for this group of disabled people is hugely significant. As a result the policy risks massively widening inequality between those disabled people with higher support needs and other residents in Bristol, by depriving people in such circumstances of control over where and with whom to live, over day-to-day living, and by isolating and segregating people in such circumstances from the wider community and preventing their participation in the life of their communities. The draft policy itself acknowledges that the policy could place at risk people's right to private and family life, and to wellbeing.

We note the lengthy Equality Impact Assessment (EqIA) published alongside the draft policy. We do not believe that it contends with the specific impacts that this policy may have on the council's ability to advance equality of opportunity, as detailed in s149 Equality Act 2010. The EqIA does not acknowledge the extent of inequality already likely to be faced by the cohort facing the most significant negative impact of the policy, nor does it appear to give weight to the disproportionate severity of the impact on those it identifies as most affected by the policy. It does not explain why it considers this to be a proportionate means of achieving a legitimate aim, taking account of the duty to eliminate discrimination and to advance equality of opportunity or outline other policy options considered and how these were weighted with respect to equality impact.

5. People at the heart of care & CQC Assurance

Finally, the Government's white paper People at the Heart of Care rehearses the Think Local, Act Personal Making It Real 'I statements' in setting out the goals of reform. These have also been incorporated into the Care Quality Commission's Assurance framework for local council adult social care. They state that people who draw on social care should be able to say, "I can live in my own home, with the necessary adaptations, technology, and personal support as designed by me, to enable me to be as independent as possible." This policy hence appears incongruent both with national social care policy and with the CQC Assurance Framework.

6. In conclusion

We acknowledge the challenging financial situation faced by many local councils. However, we do not believe that it is appropriate to balance budgets

on the back of disabled people's most fundamental human rights, with grave risks to health and wellbeing, and in particular on the backs of those already facing the greatest inequalities and risk of human rights violations as a result of their need for significant support, and who will experience a catastrophic impact on their rights, opportunities and wellbeing as a result. Further, we contend that the proposed policy is both unlawful and at odds with the spirit of the Care Act 2014, national policy and international human rights law.

It is clear that this consultation has caused a lot of fear, upset and distrust among disabled people in Bristol and nationally. Were it to be adopted it would set an extremely dangerous and worrying precedent, with considerable and long-lasting reputational harm to Bristol Council.

We therefore add our name to the list of organisations expressing our opposition to the adoption of this policy and hope that the council will reconsider.

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Social Care Future Conveners

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#SocialCareFuture is administered by the charity In Control