HOUSE OF LORDS

Library Briefing

Human Rights of Older Persons, and their Comprehensive Care
Debate on 16 November 2017

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Summary

This briefing has been prepared for a debate scheduled to take place in the House of Lords on the following motion moved by Lord Foulkes of Cumnock (Labour): "that this House takes note of the human rights of older persons, and their comprehensive care".

The human rights of older people have been debated at international institutions, including the United Nations and the Council of Europe. Both organisations have adopted resolutions recognising the rights of older people and calling on nations to protect them. In May 2017, the Parliamentary Assembly of the Council of Europe adopted the report *Human Rights of Older Persons and their Comprehensive Care*, which recommended actions to combat ageism and social exclusion among older people, and to improve care. The report was drafted by the Council of Europe Committee on Social Affairs, Health and Sustainable Development. Lord Foulkes was the Rapporteur.

In England, social care for adults is provided informally, through family, friends and neighbours, or formally, privately purchased or financed by the local authority. Over two-thirds of adults receiving care through local authorities are aged 65 and over. Funding for formal care comes from a variety of sources. In addition to the funding local authorities receive from the Department for Communities and Local Government, the Department of Health also partly funds care and related services. Adult social care is the largest area of discretionary spending for local authorities. Local authority spending on social care has decreased in real terms since 2010/11, and cost pressures from a variety of factors have increased the cost of providing social care. A House of Commons Communities and Local Government Committee report, published in March 2017, argued that current Government funding commitments are not sufficient to close the funding gap in adult social care.

In England and Wales, if older people are deprived of their liberty for the purposes of care they can be covered by the Deprivation of Liberty Safeguards. These are intended to ensure that the deprivation of liberty is in the person's best interests. This legislation was criticised by a House of Lords committee and has been reviewed by the Law Commission, which recommended that it be replaced with a new system.

Emily Haves
6 November 2017

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1. Rights of Older People

1.1 United Nations

In 1991, the United Nations (UN) General Assembly passed a resolution to adopt *Principles for Older Persons*, a declaration which encourages governments to incorporate certain principles into their policies on older people. These principles are grouped under the headings of independence, participation, care, self-fulfilment and dignity and include the statement that:

> Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.[1]

In April 2002, at the UN Second World Assembly on Ageing, the *Madrid International Plan of Action on Ageing* was adopted. The aim of the plan was to "ensure that persons everywhere are able to age with security and dignity and to continue to participate in their societies as citizens with full rights".[2] It set out the following key goals for member states:

- the full realisation of all human rights and fundamental freedoms of all older persons;
- the achievement of secure ageing;
- empowerment of older persons to fully and effectively participate in the economic, political and social lives of their societies;
- provision of opportunities for individual development, self-fulfilment and well-being throughout life as well as in late life;
- ensuring the full enjoyment of economic, social and cultural rights, and civil and political rights of persons and the elimination of all forms of violence and discrimination against older persons;
- commitment to gender equality among older persons through, inter alia, elimination of gender-based discrimination;
- recognition of the crucial importance of families, intergenerational interdependence, solidarity and reciprocity for social development;
- provision of health care, support and social protection for older persons, including preventive and rehabilitative health care;

[1] United Nations, *Principles for Older Persons*, 16 December 1991, article 14.

[2] United Nations, *Political Declaration and Madrid International Plan of Action on Ageing*, April 2002, para 10.

- facilitating partnership between all levels of government, civil society, the private sector and older persons themselves in translating the International Plan of Action into practical action;
- harnessing of scientific research and expertise and realizing the potential of technology to focus on, inter alia, the individual, social and health implications of ageing, in particular in developing countries; and
- recognition of the situation of ageing indigenous persons, their unique circumstances and the need to seek means to give them an effective voice in decisions directly affecting them.[3]

An Open-Ended Working Group on Ageing was established by the UN General Assembly on 21 December 2010 to consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them. In December 2012, the General Assembly adopted a resolution calling on the Working Group on Ageing to consider proposals for an international legal instrument to promote and protect the rights and dignity of older persons.[4] The Group has continued to meet annually since it was formed, holding discussions with member states and civil society organisations.

1.2 Council of Europe

European Social Charter

The European Social Charter is a Council of Europe treaty that addresses social and economic rights and is a counterpart to the European Convention on Human Rights, which refers to civil and political rights.[5] It sets out a range of rights relating to employment, housing, health, education, social protection and welfare.

Article 23 of the revised European Social Charter, adopted in 1996, is entitled “the right of elderly persons to social protection” and obliges parties to undertake or encourage measures to enable elderly persons to remain full members of society for as long as possible, to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, and to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.[6]

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[3] United Nations, *Political Declaration and Madrid International Plan of Action on Ageing*, April 2002, para 12.
[4] United Nations, *Resolution Adopted by the General Assembly on 20 December 2012: Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons*, 13 February 2013, p 2.
[5] Council of Europe, ‘European Social Charter’, accessed 27 October 2017.
[6] Council of Europe, *European Social Charter (Revised)*, 1996, article 23.

2014 Recommendation

On 19 February 2014, the Committee of Ministers of the Council of Europe adopted CM Recommendation (2014) 2, which affirms that all human rights and freedoms apply to older persons.[7] It recommends that governments of member states take action to uphold specific rights relating to non-discrimination, autonomy and participation, protection from violence and abuse, social protection and employment, care, and administration of justice.

2. Council of Europe Report: Human Rights of Older Persons and their Comprehensive Care

2.1 Report

In May 2017, Lord Foulkes of Cumnock, as part of the Committee on Social Affairs, Health and Sustainable Development, presented a report entitled *Human Rights of Older Persons and their Comprehensive Care* to the Parliamentary Assembly of the Council of Europe.[8] This report examined the international human rights framework as it applies to older people and discussed issues affecting older people, focusing on discrimination, care, abuse and social exclusion.

The report made several recommendations concerning care, including that barriers to accessing health care should be removed, care should be provided in such a way as to enable people to maintain dignity, autonomy and quality of life, and health and social care should be integrated.[9] The report concluded:

> Europe, just like the rest of the world, needs to strengthen the provision of social and health service by adapting them to the changing needs of an ageing population, reorienting them towards a patient-centred approach and ensuring adequate management of long-term care.

The report noted that some stereotypes of older people are that they are "in poor health, dependent, unproductive, irrelevant and a burden". It consequently argued for awareness campaigns to increase knowledge about and understanding of ageing among the media, general public, policy makers,

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[7] Council of Europe, *CM Recommendation (2014) 2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons*, 19 February 2014.

[8] Council of Europe Parliamentary Assembly, *Human Rights of Older Persons and their Comprehensive Care*, 9 May 2017.

[9] ibid, pp 8–9.

employers and service providers.[10] It also highlighted the vulnerability of persons to abuse and social exclusion.[11]

The report also included a draft resolution calling on member states to take certain measures relating to combating ageism, improving care for older people and preventing their social exclusion.[12] This resolution and related recommendation were adopted by the Assembly on 30 May 2017.[13]

2.2 UK Government Response

On 11 July 2017, Lord Foulkes asked the Government whether it intended to implement the recommendation of the report.[14] Responding for the Government, Lord O'Shaughnessy, Parliamentary Under Secretary of State for Department of Health, said:

> The Government are pleased to note [the report's] publication and look forward to contributing to the response. This Government's ambition is to make the UK a good place for everyone to grow old, and we have put in place a programme of reforms across health, care, housing and other services to support older people to live independent and fulfilling lives.[15]

3. Key Issues

The Council of Europe report considered a number of issues in relation to the human rights and comprehensive care of older people. Background to some of these, in the UK context, are explored below.

3.1 Social Care

The report *Human Rights of Older Persons and their Comprehensive Care* states that "while there is no universally accepted definition of care, it usually encompasses services such as assistance with the activities of daily life, social income, protection and security, as well as health promotion and disease prevention, treatment and rehabilitation and the provision of health care, in

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[10] Council of Europe Parliamentary Assembly, *Human Rights of Older Persons and their Comprehensive Care*, 9 May 2017, p 7.
[11] ibid, p 10.
[12] ibid, pp 3–4.
[13] Council of Europe Parliamentary Assembly, *Human Rights of Older Persons and their Comprehensive Care Resolution 2168(2017)*, 30 May 2017; and *Human Rights of Older Persons and their Comprehensive Care Recommendation 2104(2017)*, 30 May 2017.
[14] HL *Hansard*, 11 July 2017, cols 1157–1160.
[15] ibid.

ambulatory, institutional or home settings”.[16] The provision of social care, encompassing some of these issues, is discussed below. Social care is a devolved area, therefore this section will cover provision in England only.

Providers

Care for adults is provided informally, through family, friends and neighbours, or formally, privately purchased or financed by the local authority. Over two-thirds of people receiving care through local authorities are aged 65 and over.[17] The National Audit Office found that in 2015/16 the value of informal care significantly outweighed that provided by local government and the NHS; the value of informal care was estimated at £108.4 billion, while local authority net spending combined with NHS spending on social care came to approximately £17.9 billion.[18]

Eligibility and Unmet needs

In April 2015, a national minimum threshold for eligibility for care was introduced.[19] This means that councils are required to provide care and support for people whose needs have a “significant impact on their wellbeing”.[20]

Analysis by Age UK suggests that in 2017 there are 1.2 million people in England living with unmet care needs.[21] The House of Commons Communities and Local Government Committee’s inquiry into adult social care emphasised the difficulty in identifying people with unmet needs, but found that the number of people receiving social care has decreased:

> As a result of changes in councils’ data reporting requirements, it is not possible to compare how the numbers of people receiving care have changed year-on-year over recent years. However, we know that the number of people receiving care from local authorities fell by 25 percent (427,000) between 2009–10 and 2013–14 and that there was a further fall of 2 percent (19,000) between 2014–15 and 2015–16.[22]

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[16] Council of Europe Parliamentary Assembly, *Human Rights of Older Persons and their Comprehensive Care*, 9 May 2017, p 8.
[17] National Audit Office, *Adult Social Care in England: Overview*, 13 March 2014, HC 1102 of session 2013–14, p 17.
[18] National Audit Office, *A Short Guide to Local Authorities*, October 2017, p 18.
[19] House of Commons Communities and Local Government Committee, *Adult Social Care*, 31 March 2017, HC 1103 of session 2016–17, p 13.
[20] Care and Support (Eligibility Criteria) Regulations 2015, s 2(c).
[21] Age UK, *Briefing: Health and Care of Older People in England 2017*, February 2017, p 4.
[22] House of Commons Communities and Local Government Committee, *Adult Social Care*, 31 March 2017, HC 1103 of session 2016–17, p 13.

Age UK estimates that an additional £4.8 billion a year is needed to ensure that every older person who currently has one or more unmet needs has access to social care, rising to £5.75 billion by 2020/21.[23]

Funding: Overview

Funding for formal care comes from a variety of sources. In addition to the funding local authorities receive from the Department for Communities and Local Government, the Department of Health also partly funds care and related services such as housing adaptations, or gives money to other organisations for this.[24] The Department for Work and Pensions provides funding for care and support through benefit payments. Certain parts of local authority revenue are allocated directly to schools, benefit recipients and other activities. It is at the local authority's discretion how it spends the remainder of its funding, though it must provide certain statutory services. Adult social care is the largest area of discretionary spending for local authorities.[25]

Trends in Local Authority Spending and Provision

Analysis by the House of Commons Library of Department of Communities and Local Government statistics shows that net current expenditure on adult social care in England increased in cash terms by 3.5 percent from 2010/11 to 2016/17 but decreased in real terms by 5.9 percent, from £15.8 billion in 2010/11 to £14.9 billion in 2016/17. Real terms expenditure fell year on year between 2011/12 and 2015/16, but increased by £0.2 billion in 2016/17.[26] The Association of Directors of Adult Social Services (ADASS) Budget Survey notes that savings on adult social care since 2010 cumulatively amount to £5.5 billion.[27]

This reduction in spending on social care is in the context of an overall reduction of spending by local authorities; total net current expenditure by local authorities fell by 16.8 percent between 2010/11 and 2016/17.[28]

Rising costs have also affected local authorities which provide social care. An evidence submission by the Local Government Association and ADASS

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[23] Age UK, *Briefing: Health and Care of Older People in England 2017*, February 2017, p 21.
[24] National Audit Office, *Adult Social Care in England: Overview*, 13 March 2014, HC 1102 of session 2013–14, p 26.
[25] House of Commons Health Committee, *Written Evidence Submitted to the House of Commons Health Select Committee by the Association of Directors of Adult Social Services (ADASS)*, 26 January 2016, para. 2 5.
[26] House of Commons Library, *Adult Social Care Funding (England)*, 23 October 2017, p 11.
[27] Association of Directors of Adult Social Services, *ADASS Budget Survey 2017*, 27 June 2017, p 6.
[28] ibid, p 12.

highlighted inflation, the National Minimum Wage, the introduction of the National Living Wage for workers aged 25 and above, and administration of Deprivation of Liberty Safeguards as significant causes of cost pressure on the provision of social care.[29]

Local authorities have responded to financial pressures by both undertaking initiatives to reduce inefficiencies and changing services provided. The Adult Social Care Efficiency Programme, which ran from 2011 to 2014, was set up to help councils to develop new and innovative approaches to making efficiency savings, and the final report highlights a number of ways in which councils achieved this.[30] However, in addition to efficiency savings there have also been reductions in service provision; the National Audit Office has stated that between 2010/11 and 2013/14 there was a reduction of 27 percent in the number of adults receiving social care, and a further 1 percent decrease between 2013/14 and 2014/15.[31]

Better Care Fund

There have been many initiatives to join up health and social care, however "they have not led to system-wide integrated services".[32] The report *Human Rights of Older Persons and their Comprehensive Care* argued that existing divisions between health and social care have many disadvantages, including increased bureaucracy, unnecessary duplication and inefficient use of resources, and as a result users of care services experience a lack of continuity in care. The report argued that "care should be understood in a complementary and integrated manner for the benefit of older persons".[33]

In the 2013 Spending Round the Coalition Government announced it would provide £3.8 billion for a pooled budget for health and social care services, to enable them to "work more closely together in local areas, in order to deliver better services to older and disabled people, keeping them out of hospital and avoiding long hospital stays".[34] The Better Care Fund, as the pooled funding was named, became fully operational in 2015/16.[35] In addition to funding from central Government, local authorities can choose to allocate

[29] Local Government Association, Association of Directors of Adult Social Services and Future Funding, *Adult Social Care, Health and Wellbeing: A Shared Commitment*, September 2015, p 3.

[30] Local Government Association, *LGA Adult Social Care Efficiency Programme: The Final Report*, July 2014.

[31] National Audit Office, *A Short Guide to Local Authorities*, October 2017, p 22.

[32] National Audit Office, *Health and Social Care Integration*, 8 February 2017, HC 1011 of session 2016–17, p 7.

[33] Council of Europe Parliamentary Assembly, *Human Rights of Older Persons and their Comprehensive Care*, 9 May 2017, p 9.

[34] HM Treasury, *Spending Round 2013*, June 2013, Cm 8639, p 6.

[35] National Audit Office, *Planning for the Better Care Fund*, 11 November 2014, HC 781 of session 2014–15, p 5.

existing resources to the fund. A total of £5.3bn was pooled in 2015/16, and in 2016/17 £5.8bn was pooled.[36]

Increased funding for the Better Care Fund was announced in the 2015 Spending Review and Autumn Statement:

> From 2017 the Spending Review makes available social care funds for local government, rising to £1.5 billion by 2019/20, to be included in an improved Better Care Fund.[37]

The annual ADASS Budget Survey found that in 2016/17, £1.27 billion from the Better Care Fund was spent on protection of adult social care, approximately the same amount as was transferred from the NHS to local authorities in 2014/15. ADASS argued that "the Better Care Fund has not provided much more benefit in budgetary terms to local authorities to protect adult social care beyond the original Government decision in 2010 to transfer resources from the NHS".[38]

The Spring Budget 2017 included an announcement of an additional £2 billion between 2017/18 and 2019/20 for local authorities to spend on social care, through the Better Care fund.[39]

Social Care Precept

The 2015 Spending Review also created a special permission for local authorities which provide social care to raise council tax by up to two percent above the existing threshold between 2016/17 and 2019/20, with the extra money raised to be spent exclusively on social care.[40] In December 2016, the Government announced that local authorities would be allowed to bring forward the social care precept, by raising council tax by up to 3 percent in 2017/18 and 2018/19.[41]

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[36] Department of Health and Department for Communities and Local Government, *2017–19 Integration and Better Care Fund*, March 2017, p 11.
[37] HM Treasury, *Spending Review and Autumn Statement 2015*, November 2015, Cm 9162, p 33.
[38] Association of Directors of Adult Social Services, *Budget Survey 2017*, 27 June 2017, p 27.
[39] HM Treasury, *Spring Budget 2017*, March 2017, HC 1025 of session 2016–17, p 15.
[40] HM Treasury, *Spending Review and Autumn Statement 2015*, November 2015, Cm 9162, p 33.
[41] Department for Communities and Local Government, 'Dedicated Adult Social Care Funding Forms Key Part of Continued Long-Term Funding Certainty for Councils', 15 December 2016.

Quality: Overview

The Care Quality Commission (CQC) is the independent regulator of health and adult social care services in England. Providers of social care services must register with the Care Quality Commission, which uses the registration process to check that providers meet certain fundamental standards:

- Care or treatment must be tailored to the individual and meet the individual's needs.
- Care must be provided with dignity and respect at all times.
- Appropriate consent must be obtained before any care or treatment is given.
- Users of care services must not be given unsafe care or treatment or be put at risk of harm that could be avoided.
- Users of care services must not suffer any form of abuse or improper treatment while receiving care.
- Adequate food and drink must be provided.
- The places where care and treatment are provided and the equipment used in it must be clean, suitable and looked after properly.
- There must be a system in place to handle complaints.
- Care providers must meet governance standards.
- Care providers must have enough suitably qualified, competent and experienced staff to make sure they can meet standards.
- Staff must be fit and proper people who can provide care and treatment appropriate to their role.
- Care providers must be open and transparent with users about care and treatment.
- Care providers must display their CQC rating.[42]

The CQC also carries out regular inspections of all providers of adult care services in England. It produces an annual report summarising its findings as well as publishing individual reports.

State of Care Report

The Care Quality Commission's annual *State of Care* report examines both health and social care in England. The 2017 report found that two percent of adult social care services were rated outstanding, 78 percent were rated as good, 19 percent were rated as requires improvement and 1 percent were

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[42] Care Quality Commission, 'Fundamental Standards', 29 May 2017.

rated as inadequate.[43] The CQC emphasised that while only 1 percent of services were rated inadequate, this represents 303 locations caring for approximately 16,000 people.[44]

There was some variation in quality ratings between different types of home. Community social care services were rated the best overall when compared with other services. Domiciliary care services and residential homes received similar ratings, with four out of five services rated as good. Nursing homes received the worst ratings, with 68 percent rated as good, 28 percent rated as requires improvement and 3 percent as inadequate.[45] The report also found that services caring for a small number of people were more likely to receive good ratings than those caring for more people.[46]

The Care Quality Commission highlighted strong leadership and person-centred care as key factors in ensuring high quality adult social care.[47]

Evidence of Poor Care

In April 2016, a Channel 4 documentary based on secret filming and undercover reporting revealed instances of poor care in Haringey. [48] This included workers cutting short appointments, missing visits, incorrectly administering medicine and falsifying log books. After taking evidence from the reporters involved in the documentary, the House of Commons Communities and Local Government Committee concluded:

> The evidence we have heard suggests that not all councils routinely monitor the care services they procure to ensure that they are sufficient to meet people's needs, and are of a high enough quality and adequately resourced, for example to pay for care workers' travel time and 'sleep ins'. Councils should undertake annual auditing of the services they commission and the Care Quality Commission's extended remit should also oversee councils' arrangements for monitoring the care services they have purchased and the effectiveness of that monitoring […] Councils should regularly carry out 'spot checks' to ensure that people are actually receiving the care they require and be alert to new technological developments in this area.[49]

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[43] Care Quality Commission, *The State of Health Care and Adult Social Care in England 2016/17*, 9 October 2017, HC 377 of session 2017–19, p 29.
[44] ibid, p 55.
[45] ibid, p 56.
[46] ibid, p 56.
[47] Care Quality Commission, *The State of Health Care and Adult Social Care in England 2016/17*, 9 October 2017, HC 377 of session 2017–19, p 57.
[48] Channel 4, 'Britain's Pensioner Care Scandal: Channel 4 Dispatches', 4 April 2016.
[49] House of Commons Communities and Local Government Committee, *Adult Social Care*, 31 March 2017, HC 1103 of session 2016–17, p 36.

Future of Social Care

It is expected that demand for social care will rise in the near and medium term.[50] People are living longer because of improvements in living standards and clinical treatments. The number of people aged 65 and over in England is projected to increase by 19 percent between 2015 and 2025, and the number of people 65 and over and in need is predicted to increase by 24 percent between 2015 and 2025.

As mentioned above, in the Spring Budget 2017 the Government announced an extra £2 billion of funding for social care by 2019/20, as well as the social care precept. However, several bodies, including the Association of Directors of Adult Social Services (ADASS), the CQC and the House of Commons Communities and Local Government Committee, have expressed concern that this funding is not sufficient. In evidence given to the House of Commons Communities and Local Government Committee, estimates of the funding gap for 2017/18 ranged from £1.3 billion to £1.6 billion, and estimates of the gap by 2019/2020 ranged from £1.1 billion to £2.6 billion.[51] The House of Commons Communities and Local Government Committee stated:

> While we welcome the Government's commitment to provide an additional £2 billion for social care over the next three years, this falls short of the amount we believe is required to close the funding gap.[52]

The ADASS 2017 Budget Survey found that local authorities are planning savings of £824 million from social care budgets in 2017/18.[53] However, only 31 percent of respondents are fully confident that planned savings for 2017/18 will be met and in spite of the additional funding which has been made available for adult social care, directors' confidence decreases when asked to predict further into the future; only 7 percent are fully confident that savings targets will be met in 2019/20.[54]

In its most recent report, the CQC highlighted the impact of the National Living Wage on councils, estimated at "£151 million plus at least £227.5 million in implementation and associated costs in 2017/18".[55] In addition, a recent court judgment means that councils may owe significant

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[50] National Audit Office, *A Short Guide to Local Authorities*, October 2017, p 22.

[51] House of Commons Communities and Local Government Committee, *Adult Social Care: A Pre-Budget Report*, 4 March 2017, HC 47 of session 2016–17, p 16.

[52] House of Commons Communities and Local Government Committee, *Adult Social Care*, 31 March 2017, HC 1103 of session 2016–17, p 4.

[53] Association of Directors of Adult Social Services, *Budget Survey 2017*, 27 June 2017, p 6.

[54] ibid, p 4.

[55] Care Quality Commission, *The State of Health Care and Adult Social Care in England 2016/17*, 9 October 2017, HC 377 of session 2017–19, p 24.

sums in back-dated wages for workers sleeping at the homes of people they care for, and some councils are facing fines from NHS bodies for delayed transfers of care.[56]

In the longer term, the House of Commons Communities and Local Government Committee noted that by 2019/20 local authorities will keep 100 percent of business rates and the revenue support grant will be phased out.[57] The Committee argued that:

> Given that council tax and business rate income will not meet current and future demand for social care, funding should be made available for adult social care via a central government grant linked to need and rising demand.[58]

Recent Proposals

The Conservative Party manifesto published ahead of the 2017 general election argued that "those who can should rightly contribute to their care from savings and accumulated wealth, rather than expecting current and future taxpayers to carry the cost on their behalf".[59] The manifesto included proposals to change the way assets are assessed when decisions are made about how much people should contribute to their care, extending the inclusion of the value of property in the assessment. It also proposed raising the minimum capital floor to £100,000, so that once individuals were judged to have less than this amount, the costs of care would be covered by the state.

The Conservative manifesto also included a commitment to publish a green paper on social care.[60] In a statement following the publication of the manifesto, the Prime Minister said that, although a cap on care costs was not addressed in the manifesto, the promised consultation paper would "include an absolute limit on the amount people have to pay for their care costs".[61]

The Labour Party manifesto stated that, if elected, the Labour Party would "increase the social care budgets by a further £8 billion over the lifetime of the next Parliament, including an additional £1 billion for the first year".[62] It

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[56] Care Quality Commission, *The State of Health Care and Adult Social Care in England 2016/17*, 9 October 2017, HC 377 of session 2017–19, p 25.
[57] House of Commons Communities and Local Government Committee, *Adult Social Care*, 31 March 2017, HC 1103 of session 2016–17, p 7.
[58] ibid, p 7.
[59] Conservative Party, *The Conservative Party Manifesto 2017*, 18 May 2017, p 65.
[60] ibid.
[61] Welsh Conservatives, 'Theresa May: Speech at the Welsh Conservative Manifesto Launch', 22 May 2017.
[62] Labour Party, *The Labour Party Manifesto 2017*, 16 May 2017, p 71.

argued for the creation of a National Care Service, "built alongside the NHS, with a shared requirement for single commissioning, partnership arrangements, pooled budgets and joint working arrangements".[63] It said it would seek consensus on a cross-party basis about how it should be funded.

The Liberal Democrat manifesto included proposals for a rise in income tax to be spent on NHS and social care services, to be replaced by a dedicated Health and Care Tax, and the integration of health and social care services.[64]

In the Queen's Speech at the opening of Parliament in June 2017, the Government said it would bring forward proposals on social care for consultation.[65] In a recent debate in the House of Commons on social care, the Parliamentary Under Secretary of State for Health, Jackie Doyle-Price, reiterated the commitment to publish a consultation paper:

> The Government have already invested an additional £2 billion to put social care on a more stable footing and alleviate short-term pressures across the health and care system. However, further long-term reform is required to ensure that we have a sustainable system for the future—one equipped to meet the challenges of the increasing numbers of people with care needs. To address these questions, the Government will work with partners—including those who use services, those who work to provide care, and all other agencies—to bring forward proposals for public consultation. The consultation will cover a wide range of options to encourage a very wide debate. It will set out options to improve the social care system and put it on a more secure financial footing, supporting people, families and communities to prepare for old age, and it will address issues related to the quality of care and variation in practice. It will include proposals on options for caps on overall care costs and means-tested floors.[66]

3.2 Deprivation of Liberty Safeguards

Overview

The Deprivation of Liberty Safeguards (DoLS) were introduced following a ruling from the European Court of Human Rights that a group of people who lacked capacity to consent to treatment were being deprived of liberty for the purpose of treatment under the common law, rather than under the Mental Health Act.[67] The court held that this group were being denied the

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[63] Labour Party, *The Labour Party Manifesto 2017*, 16 May 2017, p 71.

[64] Liberal Democrats, *The Liberal Democrat Manifesto 2017*, 17 May 2017, pp 15–22.

[65] Cabinet Office, *Queen's Speech 2017*, 21 June 2017.

[66] HC *Hansard*, 25 October 2017, col 323.

[67] Law Commission, *Mental Capacity and Deprivation of Liberty*, 13 March 2017, HC 1079 of session 2016–17, p 6.

necessary procedural safeguards demanded by Article 5 of the European Convention on Human Rights, which provides that everyone has the right to liberty and security of the person.

The DoLS were introduced as an amendment to the Mental Capacity Act 2005 by the Mental Health Act 2007, and apply to England and Wales. They provide a legal process to authorise the deprivation of liberty of people in hospitals or care homes who lack mental capacity to consent to their care or treatment. This can apply to people suffering from conditions commonly found in older people, such as dementia.[68]

The DoLS provide that a hospital or care home must apply to the "supervisory body" for authorisation of a deprivation of liberty on their premises. A supervisory body is the relevant local authority (usually the council for the place where the person is ordinarily resident), except in the case of hospitals in Wales where the supervisory body is the Local Health Board. The supervisory body must then arrange for six assessments to be conducted by a minimum of two assessors, a "best interests assessor" and a "mental health assessor", to see if the qualifying requirements are met. A report by the Law Commission summarises the qualifying requirements as follows:

1. the person is an adult aged 18 or over;
2. the person is suffering from a mental disorder within the meaning of the Mental Health Act ("any disorder or disability of the mind");
3. the person lacks capacity to decide whether or not they should be accommodated in the hospital or care home for the purpose of being given the relevant care or treatment;
4. the deprivation of liberty is in the person's best interests, is necessary to prevent harm to them and is a proportionate response to the likelihood and seriousness of that harm;
5. the person is "eligible" for deprivation of liberty under the DoLS—in very broad terms this means that they are not detained under the Mental Health Act or other similar legislation, the authorisation would not be inconsistent with a requirement imposed under certain other provisions of the Mental Health Act (such as guardianship or a community treatment order) or, if the person is "within the scope" of the Mental Health Act, they are not objecting to the proposed psychiatric treatment; and
6. the proposal to deprive the person of their liberty does not conflict with a valid advance decision by them to refuse any part of the treatment to be provided, or a valid decision by a donee of a

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[68] Alzheimer's Society, 'Deprivation of Liberty Safeguards (DoLS)', accessed 1 November 2017.

> lasting power of attorney or a deputy appointed by the Court of Protection about where the person should be cared for or treated.[69]

House of Lords Committee Report

On 13 March 2014, the House of Lords Committee on the Mental Capacity Act 2005 investigated the operation of the DoLS. The Committee found that the DoLS were overly complex and often poorly understood, stating that "Deprivation of Liberty Safeguards are frequently not used when they should be, leaving individuals without the safeguards Parliament intended".[70] They concluded that the legislation was not fit for purpose. The Committee expressed concerns regarding the interaction of the DoLS with the rest of the Mental Capacity Act 2005, and recommended that the Government "undertake a comprehensive review of the DoLS legislation with a view to replacing it with provisions that are compatible in style and ethos with the Mental Capacity Act".[71]

In its response to the Committee report, the Government stated:

> We do not believe that there is a fundamental flaw in the legislative framework underpinning the current deprivation of liberty system. However, in the light of recent developments, we need to make the current system work better in the short to medium term, whilst putting in place a sustainable, effective system in the long term.[72]

To address the need for a reformed system in the long term, the Government asked the Law Commission to undertake a review of the legislation.[73]

Court Judgment

The Mental Capacity Act 2005 defines deprivation of liberty by reference to the European Convention on Human Rights, stating that "in this Act, references to deprivation of a person's liberty have the same meaning as in Article 5(1) of the Human Rights Convention".[74]

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[69] Law Commission, *Mental Capacity and Deprivation of Liberty*, 13 March 2017, HC 1079 of session 2016–17, pp 31–32.

[70] House of Lords Mental Capacity Act 2005 Committee, *Mental Capacity Act 2005: Post-Legislative Scrutiny*, 13 March 2014, HL Paper 139 of session 2013–14, p 92.

[71] ibid, p 93.

[72] HM Government, *Valuing Every Voice, Respecting Every Right: Making the Case for the Mental Capacity Act: The Government's Response to the House of Lords Select Committee Report on the Mental Capacity Act 2005*, June 2014, Cm 8884, p 29.

[73] ibid, p 32.

[74] Mental Capacity Act 2005, s 64 (5).

On 19 March 2014, the Supreme Court handed down a judgment which addressed the definition of deprivation of liberty. This decision clarified and widened the definition of deprivation of liberty, so that two conditions must be met: first, that the person is subject to continuous supervision and control; and that the person is not free to leave.[75] The Law Commission stated that this widening of the definition led to a tenfold increase in DoLS applications in England and a 16 fold increase in Wales between March 2014 and May 2016, and "it is estimated that only half of these have been processed owing to the resulting pressures on local authorities and local health boards".[76]

Law Commission Review

The Law Commission submitted its review of the DoLS legislation and a draft bill, which would reform the framework, in March 2017. It recommended replacing the DoLS with a new scheme entitled Liberty Protection Safeguards, which would remove "those features of the DoLS that we have identified as both inherently inefficient and indeed actively detrimental to the interests of people who are deprived of their liberty".[77] This included the recommendation that except in exceptional circumstances, authorisations for deprivation of liberty must be obtained before care arrangements have been made.[78]

As of 26 October 2017, the Government was yet to respond to the Law Commission's review.[79]

3.3 Age Discrimination in Health Care

The Equality Act 2010 includes provisions that ban age discrimination against adults in the provision of services and employment, unless the practice is covered by an exception or a good reason can be shown for the differential treatment.[80] This applies to the health and social care sectors, with no specific exceptions.[81] This means that to be lawful, any decisions made which include age as a factor must be justifiable based on objective evidence.

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[75] Care Quality Commission, *Deprivation of Liberty in Health and Social Care*, 16 April 2017, p 2.
[76] Law Commission, *Mental Capacity and Deprivation of Liberty Interim Statement*, 25 May 2016, p 2.
[77] Law Commission, *Mental Capacity and Deprivation of Liberty*, 13 March 2017, HC 1079 of session 2016–17, p 10.
[78] ibid, pp 12–13
[79] Law Commission, 'Mental Capacity and Deprivation of Liberty', accessed 1 November 2017.
[80] Government Equalities Office, 'Equality Act 2010: Guidance', 16 June 2015.
[81] Government Equalities Office Equality Act 2010: *Banning Age Discrimination in Services, Public Functions and Associations; Government Response to the Consultation on Exceptions*, 11 June 2012, p 12.

The report *Human Rights of Older Persons and their Comprehensive Care* highlights the importance of tackling age discrimination, including in health care. The United Nations High Commissioner for Human Rights has argued that "age-based discrimination in the health system is a matter of great concern", and that some medicines, exams and treatments were denied based on an individual's age.[82]

Two reports, produced jointly by the Royal College of Surgeons and Age UK, examined the possibility that older patients may be discriminated against regarding access to surgery in England. The first report, published in 2012, found that elective surgical treatment rates declined for the over-65s across a range of common conditions, in spite of this age group's increased need for health interventions.[83] While acknowledging that clinical factors, such as the impact of existing conditions, might provide legitimate reasons surgery was not undertaken for older patients, the report also warned that in some cases older patients may not be recommended for surgery because of their age, rather than individual need and fitness level.[84]

A follow-up report, published in 2014, found wide variation in the rates of various types of surgery for people aged over 65 and 75 by clinical commissioning group.[85] The report also found that patients over the age of 75 living with breast and colorectal cancer, osteoarthritis of the knee and gallstones were less likely to receive surgical treatment for their condition than their over-65 counterparts.[86] The report did not adjust the data for levels of deprivation or age profile, and the authors do not argue that rates should be the same for all areas.[87] However, the report argues that clinical commissioning groups should use the data to examine whether the rates in their area were appropriate.

3.4 Abuse and Social Exclusion

The report *Human Rights of Older Persons and their Comprehensive Care* argued that abuse against older people may take many forms and occur in different settings, stating that "abuse may be physical, psychological, emotional, sexual or financial, or may be effected by neglect. It can take place in home and institutional care settings, by both formal and informal caregivers".[88]

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[82] United Nations Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, 20 April 2012, p 14.
[83] Royal College of Surgeons and Age UK, *Access All Ages*, 2012, p 4.
[84] ibid, p 5.
[85] Royal College of Surgeons, 'Age Still a Barrier to Surgery, RCS and Age UK Warn', 3 July 2014.
[86] Royal College of Surgeons and Age UK, *Access All Ages 2*, July 2014, p 4.
[87] ibid, p 6.
[88] Council of Europe Parliamentary Assembly, *Human Rights of Older Persons and their Comprehensive Care*, 9 May 2017, p 9.

In 2011, the World Health Organisation (WHO) estimated that in the WHO European region approximately 4 million older people have experienced physical abuse, 29 million have experienced mental abuse and 6 million have experienced financial abuse.[89] Age UK has expressed concern that statistics on domestic abuse are often based on the Crime Survey for England and Wales, the self-completion module of which has in the past only been completed by respondents aged 16 to 59.[90]

According to Age UK, loneliness and isolation can increase the risk of abuse and neglect in later life.[91] Nearly half of all people aged 75 and over live alone, nearly a quarter of pensioners do not go out socially at least once a month, and 1.2 million people aged 65 and over in England are chronically lonely.[92] The report *Human Rights of Older Persons and their Comprehensive Care* argued that "to combat loneliness and isolation, it is crucial to ensure that older persons remain integrated into society by promoting active ageing", including participation in social, economic, cultural and civic affairs.[93] The report recommended supporting active ageing by adapting structures and services to the specific needs and requirements of older persons.

Further Reading

- House of Commons Communities and Local Government Committee, *Adult Social Care: Pre-Budget Report*, 4 March 2017, HC 47 of session 2016–17; and *Adult Social Care*, 31 March 2017, HC 1103 of session 2016–17

- National Audit Office, *Health and Social Care Integration*, 8 February 2017, HC 1011 of session 2016–17; and *Care Quality Commission—Regulating Health and Social Care*, 13 October 2017, HC 409 of session 2017–19

- Care Quality Commission, *The State of Health Care and Adult Social Care in England 2016/17*, October 2017, HC 377 of session 2017–19; and *The State of Adult Social Care Services 2014 to 2017*, 16 August 2017

- House of Commons Library, *Adult Social Care Funding (England)*, 23 October 2017

[89] World Health Organisation, *European Report on Preventing Elder Maltreatment*, 2011, p 13.
[90] Age UK, *Briefing: Human Rights of Older Persons and their Comprehensive Care*, July 2017, p 6.
[91] ibid.
[92] Age UK, *Later Life in the United Kingdom*, August 2017, p 13.
[93] Council of Europe Parliamentary Assembly, *Human Rights of Older Persons and their Comprehensive Care*, 9 May 2017, p 10.