

The Community Care (Direct Payments) Bill [HL] Bill 64 of 1995/96

Research Paper 96/29

23 February 1996



This paper has been prepared for the Second Reading of the Community Care (Direct Payments) Bill which is due on Monday 4 March 1996. It describes the background to the introduction of the Bill, the Bill's contents and issues that have arisen during the debates in the House of Lords, both inside and outside Parliament.

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I Introduction And Summary

The Bill, which was introduced in the House of Lords in November 1995, is due for its Second Reading in the House of Commons on Monday 4 March. Its main purpose is to enable local authorities to make *cash* payments to individuals in order to give the recipients control over the money spent on meeting their community care needs. At the moment local authorities have powers and duties to provide community care *services* but in England and Wales they are expressly forbidden by several statutes from providing *cash* for such purposes. *Cash* payments are in general provided through the national social security system.

Community care services are for adults only. Social services departments can make cash payments for the benefit of children, services for whom are covered by separate legislation, but even then cash is mostly to be provided in exceptional circumstances. There is also provision for Scottish Social Work Departments (the equivalent of Social Services Departments in England and Wales) to provide cash for adults in certain circumstances but again this is restricted in that it is for emergencies only. In practice many local authorities in England and Wales have found ways round the cash ban but due to fears about the legality of such payments, they are nearly all *indirect* rather than *direct* payments, that is they are made through third parties; and there have been fears that even some of the third party schemes may be illegal.

Direct payments have therefore been described as a completely new way to deliver community care. For example, speaking about the introduction of direct payments during the passage of the Bill through the House of Lords, Lady Cumberlege, Minister for Health, said:

"It is radically different from the way local authorities currently arrange community care services. In many respects it is far more revolutionary than were the community care reforms that we introduced in 1993."¹

The starting point of the Bill is a local authority's assessment of an adult's community care needs. If it appears to the local authority that someone needs services - whether it be someone to provide personal assistance, an adaptation, special equipment, or any other service which the authority might provide - it has a duty under the NHS and Community Care Act 1990 section 47 (and related legislation) to assess his or her needs. If it concludes that the person does need services, then it can either provide those services itself or buy them on behalf of the individual from another agency. Under the Bill, the local authority will also have the option, in certain circumstances and within existing resources, to make direct payments to enable individuals to buy the services themselves.

¹ HL Deb 12 February 1996 c424

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The principle of direct payments for helping disabled people control their own lives has cross party support and is backed by a variety of organisations. In particular, the Disablement Income Group and the British Council of Organisations of Disabled People, which consists of 50 organisations representing disabled people, have both been campaigning for direct payments for some years. The principle is also supported by the local authority associations and the Association of Directors of Social Services.

In spite of wide support for the principle, there are concerns about the way that direct payments will, or might, be implemented. The question of who will be eligible to receive direct payments has been particularly controversial as the Government has suggested that regulations may exclude people over 65 and those with learning disabilities - at least initially. There were two Divisions on this issue during the Bill's passage through the House of Lords as well as one on the issue of means-testing. The Government view prevailed on all of these and amendments on other controversial issues were withdrawn or not moved with the result that the Bill was sent to the Commons with no amendments other than technical Government ones.

The question of support services, particularly for disabled people embarking on employing personal assistants, has also been controversial. The Government has said that it will issue guidance to local authorities to encourage them to provide such services but some groups would like a stronger commitment to the provision of support. Other issues include the question whether local authorities should be required, rather than permitted, to provide direct payments where there is the demand and it is reasonable; whether the proposed exclusion of family members as employees goes too far; whether personal assistant and/or care agencies should be regulated; and whether resources are adequate or some money should be ring-fenced for direct payments.

The Bill contains three clauses covering the provisions relating to England and Wales, two clauses for Scotland, one for an Order in Council to bring the provisions into effect in Northern Ireland, and a seventh, general clause. Much of the detail will be set out in guidance and regulations. Some indication of the Government's thinking on the details is evident from statements made during the passage of the Bill in the House of Lords and in the consultation paper, *Community Care (Direct Payments) Bill*, published in January this year. Views had to be submitted by February 23 - the end of the week in which the Bill was sent to the House of Commons.

II Background

A. Cash For Care: Existing "Direct Payments"

How will direct payments fit into existing provision? Local authority social services departments are mainly responsible for providing services and, in England and Wales, are specifically forbidden from providing cash for community care services. On this point, government guidance issued in 1990 said that:

"It may be possible for some service users to play a more active part in their own care management, for example, assuming responsibility for the day to day management of their carers may help to meet the aspirations of severely physically disabled people to be as independent as possible. In these circumstances systems of accountability will have to be clearly defined. Authorities are reminded that Section 29 of the 1948 Act and Schedule 8 to the 1977 Act, as well as Section 45 of the 1968 Act prohibit the making of cash payments in place of arranging service."²

Cash payments by social services departments for the benefit of children are not included under this ban but they are mostly for exceptional circumstances. For example, the Children Act section 17, which places a duty on local authorities to provide services for children in need, includes among its subsections the provision that: *"the services provided by a local authority in the exercise of functions conferred on them by this section may include giving assistance in kind or, in exceptional circumstances, in cash."*³ The Adoption Allowances Regulations 1991⁴ also indicate that such allowances are only for special cases although there is not the same kind of restriction in the case of fostering allowances.⁵

The situation in Scotland is slightly different in that payments may be made to adults but the circumstances in which this can be done are tightly defined. A recent Written Answer from Lord Lindsay, Minister for Scotland in the House of Lords, said that: *"Section 12 of the Social Work (Scotland) Act 1968 provides for a local authority to give cash to, or in respect*

² *Community Care In The Next Decade And Beyond*, HMSO 1990 Para 3.17. The legislation referred to is the National Assistance Act 1948 (welfare of disabled), the National Health Service Act 1977 (care of mothers & young children and prevention of illness & aftercare), and the Health Services and Public Health Act 1968 (welfare of old people).

³ This provision relates to England and Wales but there is a similar provision in the Children (Scotland) Act 1995 section 22.

⁴ SI 1991/2030 & amending SI 1991/2130

⁵ The legislative authority for these is contained in Section 23 (2) of the Children Act. A provision in Schedule 1 paragraph 15 of the Children Act also empowers a local authority to make payments where the child is living with someone as the result of a residence order (as long as the person with whom the child lives is not a parent of the child or the husband or wife of a parent of the child).

*of, any person aged at least 18 years who is in need, within the meaning of the Act, and requiring assistance in exceptional circumstances constituting an emergency, and where to do so would be more cost effective."*⁶

There are two main ways in which governments have made explicit provision for regular and direct payments for adults 1. through the social security system and 2. through the Independent Living Fund:

1. The social security system⁷

Relative to the way that social services are provided, the social security system is a highly regulated one with national rules that allow little discretion. Receipt of weekly payments is generally based on entitlement subject to specified conditions and, where there is disagreement as to whether the conditions have been fulfilled, individuals can challenge the decisions of officials at a tribunal and ultimately in the courts. Although benefits may be designed for specific purposes, eg Child Benefit for the costs of a child, there is generally no requirement that claimants spend the benefits for such purposes.⁸

In contrast, local authority social services departments, though subject to some government guidance and regulations, have more discretion in the way that they apply national policies. The emphasis in legislation is on the duties and powers of the local authority to provide social services rather than on the entitlement of individuals in defined circumstances. There is no system of tribunals although local authorities must have complaints procedures and can be challenged in the courts by judicial review if they act unreasonably.

Many of the social security benefits specifically for disabled people were developed during the 1970s and there is now a range of such benefits. In theory these and any other benefits payable to disabled people could be used to buy services of a kind more commonly provided or arranged by local authorities. But a report on the economic problems of disabled people published by the Policy Studies Institute (PSI), which synthesised the results of various studies, including the national surveys of disability conducted by the Office of Population Censuses and Surveys in 1985-88, concluded that most disabled people could not contemplate directly paid for assistance for the simple reason that they did not have the money. It reported

⁶ HL Deb 25 January 1995 c81W

⁷ Details of benefits for disabled people are contained in Department of Social Security leaflets. The Disability Alliance also produces an annual, *Disability Rights Handbook* which provide a guide to rights, benefits and services for disabled people and their families.

⁸ There are exceptions, in particular where deductions are being made for certain purposes such as arrears on fuel bills.

that only 4% of disabled people in the OPCS survey said that they were paying privately for domestic services or nursing.⁹

Two benefits in particular appear to be designed for care needs: the Attendance Allowance and the care component of the Disability Living Allowance (which also has a component for mobility needs). The former is payable to people aged over 65, and the latter is for people under 65. The test of entitlement is related to the need for practical support with daily living but there is no requirement that the money be spent in any particular way. The PSI study commented:

"It has never been clearly stated what the attendance allowance was for. A common assumption is that it was designed as a payment towards the costs of assistance with daily living. An alternative assumption is that it was intended to pay for the extra expenditures faced by many disabled people, and that the attendance criterion is simply used as an indicator of the extent of disability. In that light, the attendance allowance was no different from, say child benefit, which recognises the additional costs of family life without having any particular items of expenditure in mind."¹⁰

In 1995/96 the Attendance Allowance is worth £46.70 or £31.30 a week depending on the level of need. The DLA care component is payable at these two rates and has a third lower rate of £12.40. The benefits are tax free; they are not means-tested themselves and do not count as income for the purpose of other means-tested benefits. A severely disabled person receiving Income Support and one of these benefits could receive up to around £180 a week plus housing costs. But the PSI study, reporting research into ways in which the Attendance Allowance was spent, said that majority of claimants used it as a general contribution to the basic cost of living and did not feel that there was enough to pay for assistance.¹¹

There is also a benefit for carers, known as Invalid Care Allowance, and a higher rate of Income Support is payable to certain carers. Whatever the merits or drawbacks of the carers benefits, they do not embody the same principle as direct payments do as they are aimed at the carer rather than at giving the disabled person direct control.

⁹ *The Economic Problems of Disabled People*, Richard Berthoud et al. Policy Studies Institute 1993 pages 65-66.

¹⁰ As above pages 100-101.

¹¹ As above page 101.

2. The Independent Living Fund¹²

The Independent Living Fund is national charity which makes regular cash payments to individuals enabling them to buy in personal (as opposed to nursing) care to meet their needs. The case for direct payments has often drawn on the experience of the ILF and many of the current arguments, eg about eligibility, refer back to it. It is therefore described here in some detail and further information is available from the works cited.

The ILF rose from the ashes of a social security benefit which was for use as a payment towards domestic assistance: the Supplementary Benefit (SB) addition for domestic assistance, which was abolished when SB was transformed into Income Support in 1988. SB claimants had been, subject to certain qualifying conditions, entitled to various additions to the basic weekly benefit. These included help with laundry, heating, nursing needs and domestic assistance. The domestic assistance addition was equal to the amount paid subject to the condition that the charge was reasonable and, in exceptional cases, eg where someone was severely disabled, it could cover the cost of a permanent helper to live in, subject to a maximum amount of £47.70 a week, plus an amount to cover employer's national insurance contributions if necessary.

Many of the conditions for these payments were related to disability. When the system changed, these extra weekly amounts were consolidated into fixed weekly premiums and, among these is a disability premium (£19.80 a week in 1995-96) and a severe disability premium (£35.05 a week in 1995-96) which is payable in addition to the disability premium. Although many disabled claimants gained from the 1988 changes, some who would have received the highest amounts of money were expected to lose.

The ILF was therefore set up by the Government in co-operation with the Disablement Income Group in order to help people in this position. Although it developed out of social security changes and is financed by central government, it is an independent trust fund. It was initially set up for five years but a revised version, called the ILF (1993) Fund, was set up in 1993 to work more closely with local authority social services departments.¹³

At the time it was introduced, the ILF attracted criticism from Opposition MPs and from a number of groups representing disabled people who reportedly accused the Government of

¹² For more details about the development of Independent Living Funds, see Library Research Paper 93/29, *The Disability (Grants) Bill* by Pat Strickland, 11 March 1993 and the Funds' annual reports.

¹³ Those who were receiving payments at the time the first version of the ILF came to end continue to receive them from what is now the Independent Living (Extension) Fund.

abdicated their responsibilities.¹⁴ In practice, pressure of demand led the DSS to increase the Fund's Budget from £5 million for the first year to £97 million by the final year. Payments from the Fund were at the discretion of the Trustees although there were eligibility criteria which, in spite of the increased budget, had to be tightened in order to keep demand in check.

Originally those who qualified for consideration had to receive Attendance Allowance; have resources at or below income support level; live alone or with someone unable to care for them; be severely restricted in their ability to perform normal personal care or domestic tasks without extensive help; and be on income support or have income and capital below income support levels after they had met the costs of essential personal care and domestic help. Later, people getting the lower rate of Attendance Allowance and people aged under 16 or over 75 were excluded. Over 75s were then readmitted although the trustees eventually limited awards to people receiving income support.

Since it was revised in 1993, the ILF, now known as the ILF (1993) fund, is primarily for topping-up local authority services to people living in their own homes where the services would otherwise exceed the cost of residential care. In many respects it is similar to the old Fund. For example, it is government funded; has eligibility criteria; payments are made at the discretion of the trustees and the payments are not treated as income for means-tested benefit purposes. There are differences nevertheless. In particular access now requires local authority support; the budget is smaller at £17.3 million in 1995/96; and the criteria are on the whole more restrictive.¹⁵ All the following have to be met:

Age	be at least 16 and under 66 years of age
Disability	receive the highest rate of the care component of the Disability Living Allowance be able of independent living in the community for at least the next six months
Domestic Circumstances	live alone or with people who are unable to provide all the care needed
Income & Resources	have savings of less than £8,000; and have an income that is insufficient to cover the cost of the care needed
LA Involvement	be assessed by the LA as being at risk of entering residential care or as being capable of leaving it to live in the community; and

¹⁴ *Charities split over £5m to help severely disabled*, Independent 10 February 1988; *Government's new trust for disabled*, New Society, 12 February 1988.

¹⁵ The Budget of the ILF (Extension) Fund (ie the one that continues payments to those who were getting payments from the original ILF when it closed) is £93.4 million.

receive at least £200 worth of services per week from the LA (net of charges made to the applicant); and
be assessed as needing additional care but only to the extent that the combined value of contributions from the LA and the Fund would not exceed £500 a week

If a local authority agrees to provide services to a minimum value of £200 a week, the Fund can consider making cash payments of up to £300 a week directly to the disabled person. The combined value of the local authority services and the payments from the (1993) Fund must not exceed £500 a week. An award must be used to employ one or more people as care assistants and cannot be used for other purposes.¹⁶

B. Pressure For Change

1. Development of local authority schemes

The Disablement Income Group (DIG), which was instrumental in setting up the Independent Living Fund, describes the early days of local authority cash payments for independent living as follows :

"At the beginning of the 1980s, a handful of disabled people persuaded their local authority to enable them to move out of the residential home they had been living in and into their own homes. This was achieved by the local authority transferring funding from the residential home to individual disabled people. In 1983 the people involved set up a Centre for Independent Living in order to share their experiences with other disabled people. This marked the beginning of a process which has steadily gained momentum."¹⁷

A report on the development of payment schemes published in 1994 by the British Council of Organisations of Disabled People and the Policy Studies Institute (BCODP)¹⁸ found that 60% of local authorities who responded to their questionnaire were operating some sort of payments scheme. However, nearly all of the schemes involved indirect payments, some authorities having changed from direct to indirect payments after the government guidance was issued in 1990.¹⁹ Taking account of the fact that there was no information about the authorities that did not reply, that still meant that at least 38% of all authorities in Great

¹⁶ Budget figures from the annual report and eligibility criteria from the ILF's guidance notes to local authorities.

¹⁷ Personal Assistance Support Schemes And The Introduction Of Direct Payments, Disablement Income Group, February 1996 page 3.

¹⁸ Cashing In On Independence: comparing the costs and benefits of cash and services by Gery Zarb and Pamela Nadash, Policy Studies Institute for the British Council of Organisations of Disabled People, 1994.

¹⁹ See reference 2 above.

Britain were operating a payments scheme. Of those who responded, 90% said that they would make direct payments if legislation permitted.

As well as the postal survey of local authorities, the BCODP/PSI study interviewed 70 disabled people about their experiences of services and payments. The report concluded that payments clearly offered disabled people a greater degree of choice and control. In particular disabled people valued the fact that, compared with services, the assistance that they bought themselves was more reliable and met a wider range of assistance needs. Users of social services found it harder to get people at the time they needed them and to obtain back-up when the regular support was not available. The report also quoted an earlier survey of Social Services Directors which found that more than half of local authorities could only provide restricted services at weekends and a quarter could not provide any night time cover at all.²⁰

As far as costs were concerned, the hourly cost of assistance through direct payments was 30% to 40% lower than the equivalent through social services. The main factor accounting for the difference was the higher administrative cost of the latter. Against this positive finding had to be set some negative factors. In particular, there was considerable variation in the amount of support and advice for people to employ their own assistants and, although most disabled people were judged to be acting as responsible employers, for some personal assistants, employment conditions were "less than ideal". The report favoured the provision of support services for those employing their own assistants both in order to rectify this problem and to ensure greater efficiency. However, it concluded that even when the extra costs of these support arrangements were taken into account, local payments schemes were cheaper than services.

This report is one of many that have come out of the disability movement in favour of direct payments by local authorities. Another of these, published by DIG, also provides information about the development of local authority schemes but from a different angle. It examined the uses to which the Independent Living Transfer (ILT) had been put.²¹ The ILT was money which local authorities received from central government as a consequence of the changes to the Independent Living Fund, "to enable them to play a full part in meeting the needs of severely disabled people."²² It was paid to local authorities in the three years from 1993/94 to 1995/96, rising from £26 million in the first year to £100 million in the last. From 1996/7 it will no longer be a separately identified amount of money.

²⁰ *Causes For Concern: What Directors of Social Services Think About The Impact Of Changes To The Independent Living Fund*, Pauline Thompson, Disablement Income Group 1993

²¹ *An Opportunity Lost? social services use of the Independent Living Transfer* by Ann Kestenbaum, Disablement Income Group 1995

²² Virginia Bottomley, then Secretary of State for Health, HC Deb 26 November 1996 c809W

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The ILT has been paid to local authorities as part of the special grant for community care known as the Special Transitional Grant (STG) which is ring-fenced for community care, that is local authorities have to spend it on community care services. The latter include residential care as well as services for people living in their own home and the ILT was not separately ring-fenced for any particular purpose within the community care grant although some, like DIG, argued that it should have been.

The DIG report concluded that although the ILT had been used by some authorities to provide disabled people with cash so that they could employ their own care, its use varied greatly between authorities and some did not even treat it separately in their budgets. Overall, the report concluded that in some authorities it had a significant impact on provision for disabled people but in others it had none at all. It argued that the ILT should have been ring-fenced and that in future the central government allocation to local authorities should include a specified amount for helping disabled people living at home to maximise choice and control over their own lives.

2. Pressures inside Parliament

The pressure for change was also felt within Parliament. At the time of the passage of *the NHS & Community Care Act 1990* through Parliament, Andrew Rowe (Conservative) attempted to bring in a new clause to legalise direct payments for care or personal assistance services. He failed to obtain the unequivocal support of either Government or Opposition.²³ Two years later he introduced a Ten Minute Rule Bill on the same issue but failed to secure a Second Reading.²⁴

The next year Lord McColl introduced a bill with a similar purpose in the House of Lords which passed all its stages in the Lords but made no progress in the House of Commons.²⁵ He argued that:

"For years a number of severely disabled people have received direct payments from local authorities to allow them to buy and organise their own personal assistance services which enable them to preserve their dignity and independence and to live as normal a life as possible. When Westminster discovered this splendid arrangement during the Committee stage of the National Health Service and Community Care Act 1990, the congenital snag-hunters soon went to work and the direct payments were declared illegal. It is high time that matter was put right, and this Bill will do exactly that.

²³ SC E 22 February 1990 cc1223-1232

²⁴ *The Disabled Persons (Services) Bill*, HC Bill 44 of 1992/93.

²⁵ *The Disabled Persons (Services) (No.2) Bill [HL]*: Second Reading: 21 April 1993; Committee: 11 May 1993; Third Reading: 24 May 1995 of 1992

I wish to illustrate the problem by asking each of your Lordships to imagine yourselves as a person who is so severely disabled that you are unable to get up in the morning without someone entering your home to help you. You are unable to get out of bed, to attend to your toilet requirements or to dress yourself and do everything else that is necessary to get yourself ready for a day's work. There are two ways of coping with this state of affairs. The first way is to have the local authority provide you with a personal assistance service. You are not sure which assistant will arrive or the time she will arrive. The assistant may have been delayed with another client and she could not arrive early enough to get you to work on time because local authority employment provisions prevent her from coming at the hours that you would prefer. Nevertheless you just have to put up with that.

The personal assistant who arrives may be the one you do not particularly like and she does not appear to like you. Nevertheless she has to take you to the loo, wash you, dress you, get you up and carry out all those intimate and personal tasks you would prefer to be able to do yourself. However, because of your physical disability you are unable to do so. There are other small tasks you would like to have carried out but that is not possible because they are outside the given remit. You are just one of many and even though you tell the assistant what you want to have done, the assistant is an employee of the local authority and is ultimately responsible to that authority and not to you. There is no doubt that you are not in control.

The other way of dealing with this problem is to receive direct payments from the local authority to enable you to arrange your own care and to choose your personal assistant yourself. In fact, you could have two so that if one is unexpectedly ill and cannot come you have another to call on. You know and like the person who is coming to get you up. If you want another small task done you can just ask and it will be done. If you need to get up particularly early one morning that can be arranged. Most important of all, you know that if things do not work out, you can employ somebody else."²⁶

At about the same time as Lord McColl's Bill was being debated in the House of Lords, the Health Select Committee in the House of Commons was conducting an enquiry into the new arrangements for community care under the NHS and Community Care Act 1990 which had been introduced in April 1993. The Committee's report, published in the summer of 1993, examined the case for direct payments by local authorities and concluded that although it might be necessary at that stage to avoid further disruption as the community care reforms settled down, its members believed that the principle of giving *some* users the financial resources to purchase their own services merited investigation. It recommended that the Government review existing research and carry out further study if necessary.²⁷

²⁶ HL Deb1 April 1993 cc1640-1

²⁷ *Community Care: The Way Forward*, Health Committee, HC482 -1 of 1992/93 pp xv-vi

C. Government Response

1. Arguments Against Direct Payments

At the time of the passage of the *NHS & Community Care Bill* through Parliament, the Government initially responded to Andrew Rowe's proposed new clause by listing some of the problems but offered to consider bringing in an amendment at a later stage. Virginia Bottomley, then Secretary of State for Health, said:

"If this form of payment were widely available, it would be difficult to decide in some circumstances how widely available the payment should be. For example, with disabled people who are mentally frail or mentally handicapped, it would be hard to decide, without being unduly paternalistic, at what point one should draw the line. One would not want individual users to have undue pressure put upon them, for instance by their relatives. There would also be problems with the administrative burden, and with pricing and identifying the basic unit cost of the various elements of care. None of those reasons is sufficient for not considering the amendment...

With my hon. Friend's agreement, I shall reconsider the proposal because the issue is complex. Details need to be established, and it is possible that such a scheme cannot initially have the widest possible availability. The basic commitment is there, and we may table a clearer and more specific amendment when the Bill is in another place."²⁸

In the end no amendment was forthcoming. Lady Hooper, then Minister for Health, said at a later stage in the House of Lords that Ministers had reluctantly concluded that they were unable to introduce one. The difficulty hinged on "*the proper control of public expenditure and the need to ensure that the local authority is accountable for the expenditure that it makes*".²⁹ Soon after this statement, the Government issued the policy guidance which reminded local authorities that direct payments were illegal:³⁰

During the Second Reading debate on the McColl Bill, the Government's view was explained in more detail: Lady Cumberlege referred to research published by the Joseph Rowntree foundation which showed that some disabled people resented the attitude of some social service authorities which treated disabled people as recipients of charity but replied that if this was so, then something was awry - not with the notion of statutory services, but with the way that they were delivered. Independence for disabled people could be achieved without direct

²⁸ SC E 22 February 1990 c1230.

²⁹ HL Deb 18 June 1990 c664

³⁰ See reference 2 above

payments from local authorities. She also argued in favour of retaining separate roles for social services departments and the benefits system:

"Those are issues which the Community Care Act seeks to address. We fully support the aim of enabling disabled people to live independently and to exercise choice. We wish to give local authorities freedom and flexibility to meet those choices in innovative ways and to see disabled people placed at the centre of decision making.

The new Act is based on the conviction that people who are receiving care are entitled to say what support they would like, and that those views are given the weight they deserve. Personal assessment, which is the bedrock of the reforms, must be a joint exercise carried out by equal partners.

But the new arrangements for community care do not exist in a vacuum. Disabled people also have long-standing rights under the social security system...

The Government are doing a great deal, both through reforms to social services provision and through the benefits system, to ensure that people receive the support and care they need to live independent and fulfilled lives. That is rights and proper. But this support comes from two sources: local authority social services departments on the one hand and the social security system on the other. Both have important roles to play and to a great extent they work to the same end, supporting an individual in the community. However, they are different roles... It is the business of the social security system to provide cash to support individuals in need. It is not the business of local authorities. They are providers, enablers and facilitators of care services. It would be difficult for them to manage a general system of cash payments, including defining eligibility, and to carry out the necessary monitoring to keep control over public funds.

Social services authorities do not work like the social security system. The concept of simply trying to match a cash amount to a particular set of needs is at odds with the idea of a flexible response to individual circumstances. There is a real danger that all that would be achieved is the creation of a separate social security system within social services, with its accompanying rigidity. That in turn would restrict authorities' flexibility to meet local needs and their ability to obtain value for money for all the people they serve. The payment of cash to individuals is not a responsibility that we think it right to add to authorities' already very full agendas.

I hope I have made it quite clear, however, that we support the view that disabled people should not be passive recipients of care but should be in control of decisions about their lives. The new community care arrangements are designed to facilitate exactly that. There is no reason, for example, why disabled persons should not take on the day-to-day management of their carers if they wish to do so, or to help to choose them in the first place. Many already do this and it could quite easily be written into contracts with care providers.

... I do not doubt that in individual cases disabled people may be able to use money more effectively than certain authorities, but we need to look not only at the particular but at the overall effects of making direct payments part of the social services system. In our view there is a risk that over time they will lead to a degree of inflexibility and will adversely affect

authorities' availability to match their resources to all local needs, not just those of people receiving direct payments.

... It is important to distinguish between direct payments and care in the community. Of course a disabled person who is supported to live in his or her own home is more independent than someone in residential care. But people can and do achieve that independence without the need for direct cash payments."³¹

On Third Reading she announced "*with considerable regret*" that the Government could not support the Bill but did not seek to oppose it.³²

The Government's response to the Health Committee report on community care referred to above³³ was given in September 1993. In this it continued to express doubts about the introduction of direct payments to individuals in lieu of services and referred to the fact that the new community care arrangements had only just been put in place but concluded:

"The Government is committed to continuing to examine the issue of direct payments and it will give further careful consideration to the Committee's suggestions."

2. Decision to introduce direct payments

The change of view was announced on 24 November 1994. In the Written Answer in which the announcement was made, Virginia Bottomley, then Secretary of State for Health, also made clear that the proposal would be more limited than some of its advocates would have wished. Eligibility would be restricted to a small group and the intended power would be permissive:

"I intend to take, in conjunction with my right hon. Friends the Secretaries of State for Scotland and for Wales, a new power to enable social services authorities and social work departments to make direct cash payments to disabled people in lieu of community care services. Direct payments are a logical extension of the citizen's charter. They will give disabled people greater independence and choice and involve them and their carers more fully in their own care.

"This development will give disabled people greater independence and control over their lives. It fully complements the other important measure which my hon. Friend the Minister for Disabled People is announcing. But, as a new departure, direct payments carry some risks. So in the short term we intend to limit those able to receive such payments to a relatively small

³¹ HL Deb 21 April 1993 cc1663-5

³² HL Deb 24 May 1993 c81

³³ See reference 17 above

group, probably those disabled people who are able and willing to manage their care. The intended power will also be permissive - authorities themselves will need to decide whether to take advantage of it, based on their judgement of whether it will help them make better use of their resources. Direct payments will be an alternative to community care services, where authorities assess a need for them. There will be no overlap with social security benefits.

There are many complex issues to be resolved. We will be working with the key interests to make sure the details are right. It would be unwise to introduce legislation before we are satisfied that we have done so. We hope to move a Bill as soon as practicable."³⁴

A later Written Answer made clear that no additional resources would be provided³⁵ and another that a technical advisory group had been set up to consider the "complex issues" that remained to be resolved before legislation could be introduced.³⁶

A year after the original announcement, in the Queen's Speech on 15 November 1995, the Government announced that there would definitely be legislation in this Session of Parliament to enable local authorities to make payments to particular groups of people who want to purchase their own care.

³⁴ HC Deb 24 November 1994 c333W

³⁵ HC Deb 7 February 1995 c131W

³⁶ HC Deb 14 July 1995 c823W

III The Bill

A. The Contents of the Bill

The *Community Care (Direct Payments) Bill* [HL] was introduced in the House of Lords on 16 November 1995 and arrived in the House of Commons as Bill 64 of 1995/96 with hardly any changes. Its main purpose is to enable local authorities to make *cash* payments to individuals in order to give the recipients control over the money spent on meeting their community care needs. These *cash* payments would be an optional alternative to the *services* which local authorities now provide.

Many of the details of the provisions in the Bill are to be filled in later by Regulations. The Government has already given some idea of its intentions, both in debates on the Bill and in the Consultation Paper which was issued in January this year. These are described in the next section. This section outlines the contents of the Bill as set out in the explanatory and financial memorandum:

Clause 1 empowers a local authority to pay an individual a sum to be used by him to make his own arrangements to purchase care which would otherwise have been arranged by the authority.

Subsection (1) provides that, where a local authority has assessed an individual as needing community care services, that authority has a discretion to pay him all or part of what it would cost him to purchase any such services. This is subject to the individual being of a description specified in regulations by the Secretary of State and to the individual's consent.

Subsection (2) provides that a local authority may have regard to the individual's financial circumstances in determining the amount of direct payments.

Subsection (3) provides that a local authority may not have regard to the financial circumstances of an individual discharged from detention in a hospital in determining the amount of a payment in respect of his after-care which would otherwise have been provided under section 117 of the Mental Health Act 1983.

Subsections (2) and (3) create a framework for direct payments analogous to the existing situation for those services arranged by the local authority.

Subsection (4) allows the Secretary of State to specify in regulations categories of people who may not be paid to provide a service using direct payments.

Subsection (5) empowers the Secretary of State to specify in regulations a maximum period for which direct payments may be used to pay for residential accommodation.

Subsection (6) empowers a local authority to recover all or part of a payment where the authority is not satisfied that it has been used either to secure the service in respect of which it was made or in accordance with conditions upon its use.

Clause 2 enables an authority to arrange such care as might be necessary for the recipient of direct payments where, by reason of emergency or otherwise, his own arrangements do not meet his assessed needs. So long as the individual's arrangements are adequate then the local authority making direct payments is under no obligation to arrange the service(s), for which the payments substitute.

Clause 3 adds direct payments to the list of social services functions under the Local Authority Social Services Act 1970, and so enables the Secretary of State to issue guidance and directions and to order an enquiry. It also ensures that direct payments recipients can have the same access as service recipients to the complaints procedure under that Act.

Clause 4 empowers local authorities to make direct payments in Scotland, on a similar basis to that in England and Wales, by inserting new sections 12B & 12C into the Social Work (Scotland) Act 1968.³⁷

Clause 6 provides that an Order in Council making corresponding provision for Northern Ireland is to be subject to the negative resolution procedure.³⁸

Financial Effects Of The Bill The Bill will be implemented within existing resources. Local authorities may decide whether or not to offer direct payments to individuals.

Effect Of The Bill On Public Service Manpower The effect, if any, on public service manpower will depend on the way in which local authorities implement the Bill. It is expected that any effects will be small.

³⁷ Clause 5 contains a consequential amendment which is not described in the financial memorandum.

³⁸ There is also a Clause 7 which deals with the short title, commencement (on such day as the Secretary of State may by statutory instrument appoint) and extent.

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The main change made during the Bill's passage through the House of Lords followed the recommendation of the Delegated Powers Scrutiny Committee. It had said that the provision to enable local authorities to recover payments that have been improperly spent should be written onto the face of the Bill whereas the original Bill was going to enable this power to be made by Regulations. An equivalent change was made to the Scottish clause.

Another change is a new sub clause to make clear that, in England and Wales, payments made instead of services that would have been provided for after-care under the *Mental Health Act 1983* section 117 are excluded from the provision that local authorities may have regard to the financial circumstances of someone to whom they make direct payments (as they are currently excluded from the provision that local authorities may charge for local authority services). As Scottish mental health legislation allows charging for after-care, the equivalent provision was not written into the Scottish clause.

There is also a new note in the explanatory memorandum (see the joint note on subclauses 2 and 3 above) to say that the subclauses on means-testing create a framework analogous to the existing situation for those services arranged by the local authority. The question whether the provisions were analogous had been an issue during the debates on the Bill; because the wording is not the same as that contained in the existing legislation.³⁹ The Opposition considered that the test for direct payments would be harsher and had put forward amendments designed to put similar wording in place. The issue was pressed to a Division on Report⁴⁰ but it was defeated, the Government having argued that the amendment was not necessary because the provisions were in fact analogous.

³⁹ Health and Social Services and Social Security Adjudications Act section 17, which gives local authorities a discretionary power to charge for services.

⁴⁰ HL Deb 12 February 1996 cc432-7

B. Commitments, Clarification and Consultation

1. Commitments

At the end of the Third Reading in the House of Lords, Lady Cumberlege outlined the commitments which the Government had given during the debates and these are summarised below⁴¹:

- Report to Parliament: on the workings of the Act within three years of commencement.
- Means test: guidance to be issued to stress that local authorities must treat people fairly, and should treat those receiving direct payments in a manner equivalent to those receiving services.
- Adequacy of payments: guidance to be issued to make clear that payments should be sufficient to allow people to buy services of adequate quality, taking account of any legal liabilities involved in doing so.
- Support for recipients: practice guidance to encourage local authorities to give support to people who receive direct payments. Local authorities to be told that before people consent to receive direct payments they should ensure that they are made aware that they may have responsibilities as employers.
- Guide for people who receive direct payments: the government is thinking of producing one. If produced, it would certainly cover the issue of employing staff. The Technical Advisory Group has been asked to assist.
- Training materials for local authorities: to be produced in order to help them to train their staff. Disabled people and local authorities to be involved in the development of this policy. The Technical Advisory Group has been asked to assist.
- Draft guidance: Government to consult widely.

⁴¹ HL Deb 20 February 1996 cc1044-5

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- Eligibility: to be kept under review once direct payments are available.

2. Clarification and Consultation

Clarification of the Government's intentions is contained in the consultation paper, *The Community Care (Direct Payments) Bill Consultation Paper*, Department of Health, the Scottish Office, Welsh Office, Northern Ireland Office, issued in January 1996 just before the Committee Stage of the Bill in the House of Lords. Details of the consultation are summarised below:

The Bill does not *require* local authorities to make direct payments. It is up to them to decide whether to offer them but the person concerned must consent. Individuals cannot be obliged to have a direct payment instead of a service against their will.

The money must be spent on services to meet the need which the local authority has accepted and the local authority will be able to recover the money.

There is nothing in the Bill to stop someone else acting on the individual's behalf as his or her agent but the disabled recipient of the payment is ultimately responsible for the way that it is managed.

Regulation-making powers in the Bill will be used to limit eligibility to a small group in the first instance : "*The Government is inclined to the view that, in the first instance, eligibility for direct payments should be limited to adults under 65 years who are physically disabled and who are able and willing to manage direct payments, with help if necessary*" but other groups might be considered, in particular adults under 65 with learning disabilities. Those who would definitely be excluded were also listed, eg certain people subject to mental health or criminal justice legislation.

The Bill contains no floor or ceiling on the level at which direct payments could be given but the Government will spell out in guidance its view that direct payments should not be offered to an eligible person unless they are at least as cost effective as the services which the local authority would otherwise arrange.

The Government intends to use the regulation-making power in the Bill to specify categories of people who may not be paid to provide a service using direct payments to prevent

payments recipients from paying their spouse, partner or a close relative living in the same household to provide a service. For this purpose the Government intends to use the following definition of a close relative: a parent, parent-in-law, aunt, uncle, grandparent, son daughter, son-in-law, daughter-in-law, step son or daughter, brother, sister or spouse or partner of any of the preceding. In addition, the Government intends to issue guidance to say that local authorities should not make direct payments where the recipient intends to employ or contract with close relatives who live elsewhere, or other people living in the same household (unless they are people who were specifically recruited to be live-in personal assistants).

Local authorities will have discretion to make exceptions to the rules set out in this guidance in exceptional circumstances, where they are satisfied that it is not possible to find a suitable person to provide care who does not fall into one of these categories. For example, the recipient may live in a sparsely populated rural area, or may have cultural or religious reasons for needing to employ only people from the same ethnic background. In certain areas, such a person may only be available within the recipient's family.

The only community care service which people will not be able to buy using direct payments is permanent residential care but they will be able to purchase temporary residential care (respite care). The maximum period will be specified in regulations. The Government proposes to set this at four weeks in any 12 month period, which would avoid inconsistency with certain social security benefits payable to people in residential care.

Recovery of misspent money is to be a power of local authorities rather than a duty. This is so that they can be flexible and reasonable in handling individual cases, eg in cases of hardship where money has been mismanaged innocently.

Recipients will be expected to make arrangements for cover in emergencies but ultimately the local authority still has a responsibility for emergency care.

The normal community care review process will apply to direct payments.

Under current legislation local authorities cannot sell services. People receiving direct payments will not be able to use them to purchase services from their local authorities although they can receive a mixture of local authority services and direct payments.

Existing local authority complaints procedures will be applicable, eg for complaints about the level of the direct payment but not about the services purchased as these will not be the

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responsibility of the local authority. Nor will personal assistant employed by means of direct payments have access to the complaints procedures.

Access to the Independent Living Fund will continue as now regardless of whether the local authority provides services or direct payments or a combination of the two.

Direct payments will be disregarded for the purpose of income-related benefits and child support maintenance assessments. They will not be taxable and will not affect entitlement to legal aid. They will not replace care provided by the NHS and are not available to meet housing costs.

The consultation paper asked for views on any of the matters in the paper or related issues and asked in particular about three of the areas to be covered in regulations:

- Who will be eligible to receive direct payments
- Who can and cannot be employed and paid out of a direct payment
- The maximum period of residential care for which direct payments can be used

C. Issues And Responses To The Bill

Although the Bill had cross party support in the House of Lords, there were some controversial issues. This section lists issues that have been raised both inside and outside Parliament not only in relation to the Bill but also in relation to the proposed content of regulations and guidance. Some concerns depend to some extent on the time at which they were expressed - many were expressed in briefing papers written for the Second Reading in the House of Lords in December. At the time of writing (week ending 23 February), it is too soon to quote results of the consultation exercise.

Some of the original concerns have been answered by Government statements during debates in the Lords or in the material summarised in the previous section. For example, amendments on the need for regulation of domiciliary care (see below) were withdrawn when the Government replied that a review of the way that social services is regulated and inspected was currently under way. In some cases, whether the concerns were answered satisfactorily

will depend on the eye of the beholder although many initial concerns that have now been clarified have not been repeated here.⁴²

- **Eligibility** : In the House of Lords the most outstanding issue was who would be eligible to receive direct payments. It was twice pressed to a Division both on Report and Third Reading.⁴³ It was also discussed in Committee.⁴⁴ The reason was that many peers were opposed to the proposed exclusion of people over 65 and of those with learning disabilities. A "compromise" amendment would have allowed local authorities to make the decision rather than to have the categories specified in Regulations. None of the proposed amendments was successful.

Eligibility has also been a major issue among groups outside Parliament. Organisations opposed to restricting eligibility include the Royal College of Nursing (RCN), the Disability Alliance (DA), Age Concern, the British Council of Organisations of Disabled People (BCODP), and Scope whereas the Association of Metropolitan Authorities/ Association of Count Councils (AMA/ACC) welcomed the proposal to initially limit availability. DIG and the Association of Directors of Social Services (ADSS) thought that it should be up to local authorities to decide who would be eligible. Age Concern has said that it will not support the Bill until the principle of older people being included has been accepted.

- **Need for support services**: This has been another major issue. DIG lists it among its three major concerns and has just produced two reports on the subject.⁴⁵ The case has been made for support services both in order to help disabled people become good employers and in order to make direct payments operate more efficiently. The Government has now made clear that it will be issuing guidance (see above section) but there are some who feel that support services should be required by legislation. DIG distinguishes between support services which help the disabled person and "third party" schemes which simply administer the payment on the disabled persons's behalf. DIG argues that direct payments will only reach a fraction of those who could benefit if adequate support services are not available. It would prefer that a legal obligation should be placed on local authorities to ensure that support available.

⁴² The debates on the Bill in the House of Lords were on the following dates: Second Reading 7 December 1995; Committee: 15 January 1996; Report: 12 February 1996; Third Reading: 20 February 1996.

⁴³ HL Deb 12 February 1996 cc420-427(Report) and 20 February 1996 c1031(Third Reading)

⁴⁴ HL Deb 15 January 1996 c 364-80

⁴⁵ *Personal Assistance Support Schemes And The Introduction Of direct Payments*, Disablement Income Group February 1996; and *Facilitating And Supporting Independent Living: a guide to setting up a personal assistance support scheme*, Felicity Simpson with Jane Campbell, Disablement Income Group, February 1996

Others who are concerned that there should be some form of support for disabled people include the RCN, the DA, the BCODP, Scope the AMA/ACC and the ADSS although there are some differences of emphasis, for example over whether support should be provided through social services staff or independently. Some such as the ADSS and the BCODP have argued that there should be extra funding available for support purposes. The issues was raised in Committee, on Report and at Third Reading in the House of Lords.⁴⁶

- **Should local authorities be required to provide direct payments?** The argument for requiring local authorities to make direct payments where there is a demand for them and where it is reasonable has been made on grounds of equity. Some are concerned that the Bill's provision simply to give local authorities discretionary power will result in unacceptable regional variations and that direct payments will not be portable if a disabled person moves from one authority to another. This is DIG's third major concern and it is supported by several other organisations such as Scope, the RCN and the DA. The RCN argues that there are already unacceptable variations in community care services and the DA points to great inequalities in local authority charging policies at the moment. This issue was raised in the Lords in Committee and on Report.⁴⁷

- **Who can a direct payment recipient employ?** There has been some concern that the proposed exclusion of family members from being employed out of direct payment money goes too far. The BCODP, for example, argues that the rules should resemble those of the Independent Living Fund and that it should be possible to employ a family member who does not live in the same household. The issue was raised several times in the Lords.⁴⁸

- **Regulation of personal assistants/care providers:** The issue whether personal assistants and/or care agencies should be regulated in some way has also been raised in the context of this Bill. Scope, for example, is concerned about the quality of service provision and what it considers to be inadequate vetting of personal assistance staff both in the public and private sectors. The AMA/ACC argues that empowerment through choice can only be a reality if providers of services are regulated in the public interest to meet reasonable standards of quality and care. Similar the ADSS argues that registration and inspection of domiciliary care agencies should be introduced. The issue was raised in the House of Lords where the opposite view, that disabled people should be able to train their own personal assistants without interference from public authorities, was also expressed.⁴⁹

⁴⁶ L Deb 15.1.96 cc384-91 and 12.2.96 cc452-456

⁴⁷ HL Deb 15 January 1996 cc391-4; 12 February 1996 cc429-432

⁴⁸ 5 January 1996 cc406-415; 12 February 1996 cc438-445; and 20 February cc1040-1043

⁴⁹ HL Deb 15 January 1996 cc453-456; 12 February 1996 cc458-464.

Other issues raised include:

- **Adequacy of resources and/or ring-fencing for personal assistance** (eg DA, Scope, AMA/ACC, ADSS)
- **The right to use direct payment to buy local authority services** (eg AMA/ACC and ADSS; HL Deb 15.1.96 cc415-42)
- **The length of time allowed for respite care** (eg BCDOP ; HL Deb 15.1.96 cc418-20)
- **Regulations to use the affirmative rather than the negative procedure (the latter is proposed in the Bill)** (HL Deb 12.2.96 cc468-70)