



Legal Literacy in Adult Social Care

The forces driving deprofessionalisation in social work

A Discussion Paper from the Centre for Welfare Reform

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Introduction

I have written this paper in response to the Parliamentary Inquiry into Adult Social Care currently underway. I have worked for 20 years in the field of adults' social work, as a lawyer, commentator and trainer of frontline and management in both the public and private sectors. I want to share my views about what's gone wrong, within and around the sector, and hope that it will be useful material for reformers.

I will be concentrating on matters relevant to the workforce and the culture within adult social care and looking at what drives the various levels of professional to behave in the way that they now tend to do. The paper begins by examining seven worrying trends which combine to create on-going de-professionalisation in the social work role. I then end by looking at the potential benefits of legal literacy in the social work sector.

The material is inevitably anecdotal - based on what people have told me, or asked me about, during my career. Where detail is lacking it is because I do not wish to be sued for breach of confidentiality or defamation – although neither of those outcomes would surprise me, because criticism is not welcome in today's culture, even if it is objective. That's one of the problems in itself, of course.

I. Coarsening Culture

There seems to be a coarsening of the culture within local authorities at the level of Members, the legal department and social services management, in relation to the role that law should play, and the status it should have in the workplace, on a day-to-day basis. This coarsening has made it ‘normal service’, deliberately to take legal risks, in the discharge of public sector duties, even if the advice received is that it’s unlawful – unless or until a legal threat is made. That’s not a traditional or respectable public sector ethos, in any recognisable form.

For example, I know of a council faced with a threat of legal action from a group of mental health service users who all wanted a Direct Payment, and who had all been denied one, purely because of their ‘status’ as mentally unwell. After much to-ing and fro-ing, and pressure from solicitors, the council gave a direct payment only to those within the group who qualified for legal aid, the rest being left to the authority’s capriciousness, because of want of the means to do anything further about it.

Elsewhere, an expensive 18 month long piece of litigation about a fair price for residential care was approaching its conclusion. The parties had voluntarily used mediation, after an interim (and public) judgment in favour of the providers (about the consequences of having left the service users in the beds, after the contract had expired). At mediation, the parties agreed that the finance officers, ASC commissioners and the care home owners should work on a joint ‘Cost of Care review’, together, and make a joint presentation to Members. When BOTH their own staff and the providers had agreed that the shortfall in the rates being paid by the council was £30 a week, the Members’ response was this: “You can have £10 a week, and not a penny more.”

Havering and Tower Hamlets Councils were publicly castigated in court recently, as behaving ‘shamefully’ in their avoidance strategies, regarding liability for a needy family placed by one council in the other’s area - and for the passing from pillar to post, of a child in need, without regard to the duty to co-operate and the housing, homelessness and children’s legal frameworks.

Tameside Council recently refused to accept the LGO’s findings that its approach to fees and top-ups was maladministrative; the statutory Monitoring Officer cited a QC’s reasoning as sufficient to justify its position, even though it had gaping holes in it, to the informed eye. The council’s stance was so plainly not lawful, as to make it both fair and in the public interest in my view, to say that defending it must have required positive commitment to economy with the truth – the only other explanation being

abject managerial ignorance or collective delusion. I don't even think that the LGO went far enough, in highlighting what else was unlawful about what Tameside had done.

Its motive was to force up standards, which of course is a good intention. It had terminated the old framework contract with providers, presumably lawfully. The law is that if a Council only needs 'x' beds for its throughput of residential care clients, and 'x' beds can be secured for the same fee but with a better quality service from a fewer number of care homes than before, then a council does not have to keep more expensive homes on its framework. However, that is a different question of what it needs to do, then, for people already owed a duty, and still in those beds, and legally unable to pay a top-up, in order to exercise choice to stay; that is a matter of public law, and the law of assessment within both old and new community care provisions, conspicuously absent in Tameside's justification.

These examples show a positive disrespect for the notion of the rule of law – welfare law – in the discharge of public functions, to my mind.

2. Muddled Co-production

There is often a muddled approach which amounts to ‘Let’s just cross our fingers, because it will all be ok if it’s been co-produced or has emerged from a multi-disciplinary team’s approach – whatever their level of knowledge.’ One recent example being the attitude taken to the inadequate matching up of the new statute law, regulations and the guidance that ordinary people and workers might need to understand in order to enforce their rights.

Care Act Regulations

The Care Act guidance was produced for comments, before the Regulations were publicly available even in draft. Some bits of the finalised Guidance were clearly well written by people who took account of advice as to the public law principles, established by the old legal framework and judicial review proceedings. The rest was a mish-mash of different contributors’ styles and agendas, in my view. The commissioning chapter was strong; the safeguarding chapter was weak. There was hardly any reference to notions of legality or legal principle or ambiguity that would need to be resolved by some or other means once the Act was in force.

Take, for example, the guidance on personal budgets: although there’s no mention of sufficiency in the actual Act or Regulations with regard to defining a personal budget, there is a focus on it in the Guidance - because a reasonable stab at, and an evidence basis for, ‘sufficiency’, is what public law invariably requires of social work staff. It’s an objective view of sufficiency that matters, because this is public law we’re talking about, whereby judges leave freedom for manoeuvre to public bodies, subject to intervention and quashing of only truly indefensible or legally ill-informed stances.

However, all the talk in the guidance of councils taking account of ‘reasonable preferences’ hopelessly mixes up the strand of public law which is about the possibility of a council making exceptions to policies about expenditure, for good reasons, in individual cases, with the everyday situation where a decision that is unpopular with the client can still be perfectly legal, because it was fairly arrived at and objectively defensible in light of public law principles as not ‘unreasonable’ in the special sense within that body of law.

The Guidance seems to have been written to mislead people into thinking that their own reasonable preferences can be enforced, which is not what

the Care Act ever set out to enable. Maybe this came about because of the agendas of passionate proponents of personalisation – or because of governmental interests at the centre, pleased with what they thought they'd legislated for – I have no idea. But the point is that it serves no needy person to have been misled as to their legal rights, and only confused the staff who need to deliver the less pleasant aspects of the Act.

Lack of updating

There is still an intellectual cavern in the authorship and updating of the Guidance, or perhaps a lack of awareness as to what it is that needs to be said. Once the Cornwall case had come out, for instance, on ordinary residence principles applicable for those moving between the Children Act and adults' services coverage, no further substantive guidance on what it actually means to apply the principles in that case, was given.

The re-issue of the Advocacy guidance says that it's acceptable in relation to independence, to have those who have become formal delegates of the council's job of doing carers' assessments, also acting as independent funded advocates, if there's a Chinese Wall within the organisation - despite the regulation that says no-one who is 'otherwise working' for the council can be seen as independent – without any attempt to explain how these two notions can possibly sit together.

Although there are no safeguarding regulations with which the Guidance could have been seen to be inconsistent, the fact that the Safeguarding Chapter had to be extensively re-written, is another example of hoping for the best, I feel. A civil servant threw out a casual remark that every member of the Safeguarding Adults Board should have a Designated Adults' Safeguarding Manager, without any idea of the impact that statement would have, in economic terms, and when there is no reference anywhere in the Care Act OR the regulations, to any such a role; that position has now had to be withdrawn, much to everyone's relief.

Ordinary residence confusion

Most seriously, from my perspective, the wording in the guidance on continuing ordinary residence and Choice of Accommodation did not and still does not match that of the relevant Regulations. It is actively misleading, in the context of both responsibility for a person's care commissioning, and in relation to top-ups, in my view. I have highlighted the inconsistency with the regulations on Choice, here, in bold:

*Shared lives schemes: accommodation which is provided together with care and support for an adult by a shared lives carer, approved by the scheme, in the shared lives carer's home **under the terms of an agreement between the adult, the carer and any local authority responsible** for making the arrangement. The shared lives carer will normally be providing personal care but they will not need to provide it in every case.*

The Guidance: Para 19.28

Whereas if one looks at the Regulations, one finds this (my emphasis again, in bold):

Shared lives scheme accommodation

4. For the purposes of these Regulations “shared lives scheme accommodation” means accommodation which is provided for an adult by a shared lives carer, and for this purpose—

“shared lives carer” means an individual who, **under the terms of a shared lives agreement**, provides, or intends to provide, personal care for adults together with, where necessary, accommodation in the individual's home;

“shared lives agreement” means **an agreement entered into between a person carrying on a shared lives scheme and an individual for the provision, by that individual, of personal care to an adult together with, where necessary, accommodation in the individual's home;**

This makes it clear that for the purposes of continuing ordinary residence, the type of Shared Lives agreement in contemplation as capable of constituting ‘specified accommodation’ is only ever the kind of agreement that is made between the formal Scheme and the individual shared lives carer - NOT one where there's an agreement between the user and the carer.

This really matters to people with learning disabilities because of the application of continuing ordinary residence rules (or not) for the most common form of Shared Lives living these days – the one based on a licence or a tenancy, i.e an agreement between the service user occupier, and the shared lives carer, which is facilitated by formal Schemes and payment of the rent, through Housing Benefit - rather than the much rarer old-fashioned form, based on an integrated placement with care, and contracted for as a whole, by the Scheme, directly with the house owner and Shared Lives Carer, and nothing to do with the service user at all.

To my mind, given this ‘Guidance’, the Shared Lives world would reasonably think that continuing ordinary residence rules now apply, to the Shared Lives clients who have ended up out of area.

But that would only be the case in the far rarer form of arrangement. The ‘supported living’ definition of ‘specified accommodation’ might be the better way to contend for continuing ordinary residence for a Shared Lives tenant or licensee, moving out of area, but nothing is said about that in the Guidance.

The same sort of fudge has clogged up understanding of the Choice of Accommodation rules (appertaining to top-ups – of primary relevance to older people). The Guidance envisages that the crucial price comparison for the determination of the need to find a lawful top-up in order to access preferred accommodation, is the difference between the cost of care, and the person’s allocated personal budget, making it **look** as if the Choice of Accommodation rules apply equally to people moving into supported living, out of area, even as tenants; whereas the regulations make it clear that it is the cost of the accommodation - and only actual accommodation that is the subject of a contract between the responsible council and the provider of that accommodation (not a tenancy) - thereby necessarily limiting top-ups and ‘Choice’ to those service users placed in registered residential care homes or in formally integrated placements in unregistered settings.

The other problem related to continuing ordinary residence is that its existence turns on the original care planning authority acknowledging on the person’s care **plan**, not in the assessment, that the person’s can only be met by a certain type of accommodation in which personal care is available if required. There is no standard template for a care plan, and thus many councils have no space on the form for such a statement, and then rely on its absence, for contending that they are not the continuing responsible authority!

I know of at least one current case where the responsible council under continuing ordinary residence rules offered a care package of approximately £700 a week, for a man going into supported living with a new provider, through a tenancy, out of area, and suggested that the difference between that and the provider’s fee for **care** of £1,000 a week should be seen as a top-up – (i.e for wants, not needs). This would be a worrying trend in itself, but one can see its connection with the misguided wording in the Guidance, set out above.

The gentleman, who was already on his original council’s books for receipt of care, had been scooped up by his relatives and taken to live temporarily in each of their homes in the county where they thought that he would best be housed, now his very elderly relative and home provider, could no longer care for him.

Supported Housing with care was found by the family and assessment by the old council commenced. The council’s budget offer was made without any explanation of how its arbitrary cap of £700 even conceivably related

to the assessed eligible needs of the gentleman in question, let alone how it could meet those needs, either by making the man able to achieve in the relevant domains/outcomes, or by reducing the significance of the impact of his ongoing inability.

As positions became entrenched, the council's own lawyer suddenly thought it was a good idea to contend that the man was not the original council's responsibility any longer – because his relatives had moved him in which each of them for what was now some weeks – despite the council already having all of their consistent evidence that they had only ever rescued him temporarily when his aunt had been hospitalised!

The Court of Protection became seized of the case, (instead of the Administrative Court, where a judicial review about the adequacy of a package would normally be commenced) because the gentleman needed to be deprived of his liberty, to be properly cared for; and hence the Court of Protection's approval needed to be sought. The poor judge was puzzled as to why the case was running as contested at all, since everyone agreed on the deprivation of liberty point.

The council 'gave in' at the door of the court and upped the budget on offer. But not before the man had a stroke, public money had been spent on legal aid, and a family of 4 siblings had been run ragged trying to cope with their brother's needs, in the meantime.

Here is the detail about the inaccurate wording, for those who are interested:

The Guidance - Annex A (Choice of accommodation)

5) Where a local authority is responsible for meeting a person's care and support needs and their needs have been assessed as requiring a particular type of accommodation in order to ensure that they are met, the person must have the right to choose between different providers of that type of accommodation provided that:

- the accommodation is suitable in relation to the person's assessed needs*
- to do so would not cost the local authority more than the amount specified in the adult's personal budget for accommodation of that type*
- the accommodation is available*
- the provider of the accommodation is willing to enter into a contract with the local authority to provide the care at the rate identified in the person's personal budget on the local authority's terms and conditions*

Whereas the Regulations say this, with regard to the conditions for the preferred accommodation to be honoured:

R.3(1)(e) Where the preferred accommodation is not provided by the local authority, the provider of the accommodation agrees to provide the accommodation to the adult on the local authority's terms.

R.3(2) If the cost to the local authority of providing or arranging for the provision of the preferred accommodation is greater than the amount specified in the adult's personal budget that relates to the provision of accommodation of that type, the additional cost condition in regulation 5 must also be met.

In so far as a 'first impressions' read-through of the material set out above, actually supports the thrust of what was allowed to stand as the Care Act policy overviews that were put out in 'Fact' sheets, before the actual coming into force of the new framework, I am not 100% sure that what I've characterised as mistakes **were** even mistakes! Readers will recall that much capital was made of the idea that people with disabilities would be able to go anywhere they wanted to live, as if the Choice rules applied even to those moving as tenants.

What I do know is that both of these assumed mistakes have been pointed out in writing to the Department of Health, and yet nothing happens, although the material is regularly updated now.

So, my perception is that there's a dispiriting amateurishness about all of this, that happens to chime with the new administration's decision to downgrade the responsibility for social services to a person with the status of a mere MP, as opposed to a Minister. All this suggests to me that there is a policy, somewhere, that social work be allowed to wither on the vine, until it becomes a mere irrelevance, and the money is 'benefitised', simply because that's cheaper to administer, nationally.

3. Consultancy Confusion

There is a tendency, at all levels, to spend money on the great and good – i.e external, or merely interim consultants, paid thousands, and forever doing reviews, inquiries and reports, most of which are then shelved – rather than an organisation’s management actually self-critically reflecting on what is currently happening, let alone on what is going actively wrong – i.e short term reaction instead of pro-active self-scrutiny.

- In 2014, a CCG and a local authority spent £20K on an 8 week review of its continuing NHS health care culture practice (at the end of a financial year) – at least three senior staff involved in its parameters and objectives had been moved out of post, before it was even finished – one on the basis, inevitably, of long term sickness leave, as his face and personality, no longer fitted. The only senior interest in its conclusions came ultimately from the NHS risk manager in the CCG who asked “Are we actually doing anything that could see us land up in court?”
- The 2016 Social Care Institute of Excellence’s review into allegations that Norfolk council was not complying with the Care Act (triggered by the complaints of service users via Equal Lives, a user led group) has now been published. The report comprises 53 pages of material without a single finding of fact (let alone law) about any of the original allegations that triggered the review, and hence no analysis of that central question of illegality - but it does include a ream of recommendations, from which it could be inferred that Norfolk was in a mess, and making some of its citizenry, very miserable indeed.

The review makes no further mention of Equal Lives’ members’ complaints, nor does it probe the specific complaints raised by wider participants Norfolk’s own press release conveys an impression that the review found an authority doing its best in difficult circumstances.

It is impossible to evaluate the reviewer’s professional credentials for analysis about legal compliance or otherwise, because the authorship is actually anonymous.

A proper review would (in my view, as a legal expert) have needed to probe both the complainants side of the story and the council’s, asking, for instance, did the Panel give reasons for rejecting the view of the professional staff who’d actually done the assessment?

If the answers about assessment were weak, or infected by an error of law about the meaning of the eligibility criteria, then that was a potential breach of the Care Act.

In a case where the complaint was about whether a person's needs should be met by her partner and 13 year old daughter, a proper review would have clarified whether the relatives were asked if they were willing. Without that crucial fact being explored during the assessment, the existence of adequate informal support was not a stance that any well-trained budget decision-maker or care planner could lawfully take.

A proper review for a complainant faced with a massive cut would have flagged up that she should have been given reasons for why the final offer was the final offer, and why it was regarded as being rationally related to the cost of meeting her assessed eligible needs, after asset and strengths-based planning had been explored. It also would have identified that there was probably more than unreasonable delay in signing off the funding. These were all arguable breaches of the Care Act and Guidance in themselves.

The users' original examples of savage cuts had been presented online, without Norfolk's own perspective, and thus without any legally defensible reasons having been mentioned. If the complaints are still unresolved by the SCIE review process, then whether the cuts would have withstood legal scrutiny, as justifiable, would have been for a judge to decide, and that would have depended on the council's recording, or evidence of its thinking.

The Care Act Guidance requires transparency about sufficiency, and recommends that reasons 'should' be 'stated' as part of any disputed package process. There's no conceivably good enough legal reason for a council not to follow that part of the Guidance. What, if any good the SCIE review has done for educating other councils or improving practice, remains to be seen, of course.

4. Domination and Dominion

There is an overt and unembarrassed public sector use of ‘dominion’, through the use of purchasing, as a means to exercise control and resist criticism, despite any failure. Today councils have gained the power to compel apparent approval, support and loyalty, from other stakeholders in the sector, regardless of the facts, or any other duties in play, simply because they are now the sector’s most powerful purchasers.

This has in turn diluted the spirit, amongst the commercial and charitable sector’s providers, for standing up for what is right, regarding standards and package content, because they are now even more dependent on grants and remuneration. And there may not be any intellectual or professional awareness of how **wrong** that is, because all the senior people in the organisation will have been made redundant.

For example, an advocate mentioned to me in 2016 that her organisation had been phoned by the commissioner from the council to ask management of the advocacy organisation whether it could see its way to being a little less robust, if it wanted its contract renewed. The advocate (an advocate, remember) was nowhere near seeing that as a whistle-blowing matter.

A senior manager from the Department of Health involved in the work on the Dilnot-related parts of the Care Act said quite warmly to me that even though it would be useful, they couldn’t pay me for a webinar that could be provided to all local authorities’ management because they “didn’t know what I’d say.” I am often told that the independence of my training is its strength, though, in this particular day and age; I feel I am able to be frank because no-one is ever going to pay me not to be.

Providers know that if they sign up to a contract that pays them less than it costs them to meet need and stay viable, then they will suffer; but many prefer it to the redundancy hit that they’d have to bear if they were to close, and many believe that it is in some way still possibly worth it to them in terms of holding on to the public sector’s market share and good will.

The result is inevitable: smaller providers go to the wall, diversity and humanity within the sector is squeezed out, and only the big organisations can function through internal cross-subsidy.

Charities law says that a charity must not subsidise the public sector’s own duties by taking less than full cost recovery. But Trustees everywhere fail to stand up to councils and say ‘We do this from choice, and we provide x, y and z for free, as our charitable offering. But we are not legally obliged to discharge your duties for you and if you want to buy services from us, in order to do that, you need to pay us properly.’ Instead, they are more likely

to cower at the thought of the local press giving their organisation a hard time for giving the council notice, in respect of a vulnerable adult, and hide behind an unfocused notion of what Best Interests ‘forces’ them to do.

The SCIE review of Norfolk’s Care Act compliance was ultimately commissioned to obviate the scope for a CQC probe, under a little known provision of the Care Act allowing for scrutiny of councils, not providers.

It was supposed to be an independent report - and SCIE is an independent charity, albeit funded by government and one that has played a large and financially supported part in the implementation of the Act.

The identity of the review’s commissioner was not even clear, however; Community Care had trailed the story that the LGA was going to pay, but the report, in the end, indicated that at least the reviewer thought that the commissioner was only Norfolk, i.e the council actually being audited.

I believe that any ordinary person reading this background to the review would say (just as with the system for funded advocacy) “How can it be independent, if the council is paying?”

The conclusion of the review, that its findings constituted an ‘opportunity’ rather than any sort of indictment of the council’s management, perhaps highlights an endemic problem with the power of the purchasing pound in the modern world – that is, that the customer who’s paying the fee tends to be afforded ultimate control over presentation and tone (even if not over the content) of such audits.

The deliberate dismantling of a proper team of knowledgeable social services aware professionals in the Department of Health over the last few years has been directly contributing to the need to spend money for thinking, but at the same time, to the development of the use of this kind of dominion, in my view.

5. The Decline of Decision Making Competence

There is a failure, from the Department of Health downwards, right through to councils' workforce units, to train staff appropriately to justify decisions that require human judgement. Instead there seems to be an almost unstoppable preference for systems that seem to do the thinking for professionals (through mechanisms like a resource allocation system, pathways or a flow-charts for what should happen next) which empty the job of its intellectual and personal satisfaction.

In relation to training, there's now an assumption that a full day's training can be delivered just as well but more quickly, in a half day; and a faith in videos about person-centredness being all that's needed in order to count, in some way, as effective training. These positions are coupled with the loss of any culture of staff reading anything, in their own personal time, or taking responsibility for their own continuing professional development.

In the training world, there are people working in workforce development who have no idea what to even call the courses that they should now be commissioning, to keep staff's knowledge of the Care Act up to date. They have no Principal Social Worker to liaise with – just a necessity to justify the use of the training budget so as to enable the ticking of as many boxes as possible.

Out of 40 authorities who purchased Care Act training from my business, only 2 wanted to be given any test questions to see what the staff had actually learned.

The 'bums on seats' approach to passive learning, now that courses have to be squeezed into half days, and don't allow time for case studies, difficult scenarios and debate, has inevitably 'dumbed down' the outcomes that can feasibly be delivered, in my view.

There are massive training lessons to be learned from SCIE's review of Norfolk. The review has now come and gone from the social care sector's news, having been overtaken by the untimely death of Harold Bodmer, its director, and president of ADASS, shortly after publication.

But in the review, there was no examination of the quality or the content of Norfolk's Care Act training, no doubt because of the cost implications of suggesting that it be done any differently, in future or elsewhere.

The review highlighted, however:

“Many members of staff feel anxious about having difficult conversations with individuals, about meeting needs amid budget cuts... Time pressures and the need to take up what was said to be three new cases each week, on top of what is perceived as an already big caseload, do not help [in] maintaining or improving social care practice.”

And this:

“Many managers report that staff need greater skills to ‘present to panel’. They stated that workers need to have the ‘ability to reflect on the story, not just to repeat it’... “This is particularly the case, it was reported, with competency-based staff, who themselves also were finding the pressures especially challenging.”

6. Casualties of Austerity

There is a persistent presentation of the financial situation as unavoidable, so that staff and service users who put their heads up above the parapet to complain, are made to feel that they are an unfortunate fringe element, with a sadly misguided perception of the whole customer experience – because dissent must be quelled or ‘finessed’ at all costs – through a macho, bullying culture in management that is unashamed of the stance that the vast majority of the vulnerable do not tend to bite the hand that feeds them (and that staff needing to believe in their job security in order to survive, won’t even nibble...!).

Ironically, this machismo leads to a culture of ‘he who shouts the loudest’ ultimately getting the most by way of services or a budget, in turn leading to a further loss of morale on the part of the frontline staff. Management of this nature and calibre is uninterested in principled exception-making and sometimes just opts for settlement when the going gets embarrassing, rather than set a precedent in public.

Norfolk’s staff appeared to have been saying that ‘It’s the cuts and that there’s nothing that can be done about it’. This suggests that that’s what they’d been told - and told to say - by management, which would not be lawful – because a duty is a duty, regardless of available resources: a council’s reserves do have to be spent if a duty has been triggered.

The knack required of staff is being legally literate about what that duty is, precisely, and exactly what triggers it! That is what training in ‘Difficult Conversations’ is - and it can’t be done without understanding how law works!

Perhaps most worryingly, however, the reviewer referred regularly to the financial situation management finds itself in, without any critical examination of the actual law regarding the relevance of resources to the existence of a statutory duty, its enforceability, and the human rights and public law limits to the discretion accorded to public bodies, in the manner of discharging the duty.

For instance:

“Senior managers are understood to have the responsibility to make the necessary savings”

And:

“The need to make savings is a key priority for senior managers in order to ensure sustainability of the department.”

Some staff at least, knew better: in the original Equal Lives Complaint a member of Norfolk's own staff (anonymously) had said:

"The responsibility for shortcomings... does rest at least in part with senior managers who should be strongly resisting such drastic cuts and making it publicly, honestly and transparently clear to, and via, our politicians that we are no longer able to do the job we are asked to do without proper funding or investment."

A recent further example of the cost of believing that nothing can be done about the situation, no doubt driven by the same obsession with budget management at all costs – is a successful action against West Berkshire's using judicial review (2016) for failing to consider use of the General Reserve Fund to avoid making cuts to the budget for disabled children's short breaks.

The legal and financial advice apparently overlooked the council's own constitution providing for such expenditure, exceptionally, for management of legal risk.

Astonishment at the tone taken by the reviewer and the management in Norfolk and what must have been said by lawyers to West Berkshire has made me go and check whether under s6(6) of the Local Authority Social Services Act 1970, there is **still** – not repealed by the Care Act - a mandatory duty on councils to furnish the director with sufficient staff.

To my own surprise, it is still in force. That is a democratic mandate for justifying protection of social services budgets, so that the social work safety net is actually sustainable.

Section 6(6) "A local authority which have appointed, or concurred in the appointment of, a director of social services, shall secure the provision of adequate staff for assisting him in the exercise of his functions."

But if SCIE doesn't feel able to point this out, given its mission to educate and improve practice, heaven knows how a social worker is ever going to grow into the right kind of Director to have this debate out with the Members.

7. Personalisation Spin

There is an interminable ‘spin’ about the benefits of the Care Act, and of the mixed public and private sector divide in commissioning and the provision of care services; and of the synergy between housing, benefits and social care income streams, etc. But there is no accountability or sometimes even public comment about dreadful eventualities that have arisen, out of mismanagement or ignorance.

By way of example, there is still constant reference to the benefits of independent living, funded through housing benefit, instead of social services commissioning, without any honest attention paid to the reality behind the arrangements usually constituting de facto integration of the care and accommodation elements into one cohesive package.

Councils make these arrangements not only for normalising the lives of people who would in earlier days have remained institutionalised, but to make savings from shared care and more affordable staff ratios. This leads providers into manoeuvring clients into doing the same thing at the same time, whether or not they like it. Outcomes based commissioning cuts across the service user’s rights to enforce the delivery of the actual inputs which would have been specified in a proper person-centred package. Independent living is not an unmixed blessing.

The integration of care and accommodation arrangements renders the setting into being criminally unregistered residential care, but CQC takes no steps because it is DH policy that this is how it should be done.

Ironically, in such settings, there would be no Deprivation of Liberty issue arising out of the safe and benign supervision and control of the residents, if only the premises were still registered as a care home... DoL Safeguards would be able to operate.

I am not for a moment propounding the benefits of institutional care, but making the point that sector wide economy with the truth, and fudging of the legal realities, along with wrangling between government departments in charge of differing income streams, is what has in fact made supported housing into such an insecure industry.

In the famous McDonald ‘incontinence pads’ case, a senior social worker was prepared to say that the council’s stance was that Elaine McDonald’s privacy and safety would actually be enhanced because the council’s decision to withdraw the night time assistance and leave the NHS to provide her with pads, meant that she would not be able to go to the toilet in the night, and would thus not be disturbed or at risk of falling over. One surely needs the hide of a rhinoceros to make such a statement in Court.

TLAP and SCIE inevitably put out a constant feed of good news stories about the benefits of the Care Act and Making Safeguarding Personal, when what has been done with the legal framework has either been the consolidation of the old law, not its root and branch reform, or the translation of principles emerging from case law, not some new practice guidance or new statute.

Putting this another way, virtually everything that is good about practice, now, would always have been lawful, under the previous system!

In the meantime, there was no ADASS comment about Community Care's revelation that advocacy was not being arranged in even a fifth of the anticipated situations as provided for under the Act. And the statistics were only based on the figures for service users' assessments, not for safeguarding or revision of care or support plans.

Neither was there any widespread publicity eg from ADASS, the LGA or the National Brokerage Network about Nottinghamshire Council's urgent decision to withdraw its approval from a direct payment support organisation whose services were being funded by way of payments into service users' budgets, when it was under police investigation, on very strong evidence, for fraud and misuse.

It is only social media, and occasional use of the courts, I feel, that makes any difference to the culture these days: eg in highlighting that providers **are** now beginning to withdraw from the local authority market rather than take rates that force them to pay less than the minimum wage, whilst abiding by duties to shareholders, or the charitable nature of their organisation. Elsewhere, it is legal action that is highlighting that it is providers who ultimately set the rate, and not in fact, councils, whose mandatory duties to meet need, are ongoing, unless they can find some willing provider, to purchase from!

8. The Benefits of Legal Literacy

Since the Care Act came in, I've been pondering how practitioners tolerate the stresses of a career in social work, without knowing how law actually works. Social workers often have to say no to people's requests for services or an amount within a personal budget – my thinking is that surely they'd want to know how?

There's no appeal system against adult social care offers – only judicial review litigation, and then only successful proceedings for really eyebrow-raising, illegal or unfair decisions. But knowing the rules about this would surely sustain professional sanity, and integrity, particularly during austerity?

UK law requires neither perfect nor even 'pleasing' responses from social workers - merely defensible attitudes and practice. The principles of what's known as public law offer really generous room to public bodies' decision-makers, as long as practitioners have made the judgements required of them by statute, in the correct manner - the judges being in ultimate control of what's 'correct' in this sense. But they don't make it up as they go along: the judges need evidence from credible, trustworthy, independently-minded and well-educated social work staff in order to form a view about what is required in a civilised society, and what is tolerable, and what is beyond the pale.

It is the law, after all, that makes councils into the final decision-makers about an appropriate response to needs, including when there's less money around than previously – and even when clients' needs haven't actually changed.

Those calling for straightforward 'benefitisation' of the money, as part of root and branch reform of how care is funded, need, to my mind, to focus on the fact that the cost of meeting of different but similarly scored people's needs inevitably varies in different areas of the country, for perfectly rational reasons.

Those aiming for welfare reform need, to my mind, to explain to the public how their ideas for equitable public expenditure could actually offer more equity than the notion of a professional making a judgement after person-centred assessment and care planning.

I find that it actually empowers practitioners in coping with clients' and management's expectations, by emphasising both the limitations to councils' obligations, and where the clients' enforceable rights to the social care 'safety net', reside.

Legal literacy can give practitioners real confidence, when:

- continuing to monitor someone's well-being after they've explicitly refused an assessment, but where the practitioner nevertheless believes that they're experiencing some obvious abuse or neglect from someone else;
- explaining why an offer of significantly reduced funding after a review, is still rational, lawful and sufficient, albeit the person's eligible unmet needs haven't changed;
- suggesting to management that even if the prospective service user isn't technically eligible, there's a statutory power to meet needs, and why exercising it would be 'best value' practice, this time round;
- asserting that should the senior management's 'risk enablement' panel override a social work professional's view of what the best interests of the incapacitated client compel, it could be prudent for that Panel's actual members to visit the client in person, for recording their own cogent position, in readiness for a judge's probing!

HCPC registration rules and ongoing competencies require social workers to practise lawfully. Practitioners shouldn't ever be told to act unlawfully by management, and 'whistleblowing' is protected. But if kept ignorant by the sector's culture (or perhaps by the priorities of interim management staff, on short-term consultancy contracts on performance-related pay), public sector staff may well be leaned on, to make whatever savings possible. Knee-jerk responses, fear of making exceptions, disregard of human rights etc, can then ensue, causing staff burn-out and negativity, and mayhem, for vulnerable clients. And even though the Care Act now compels the funding of independent advocates for unsupported people with substantial difficulty engaging in the processes that social services departments are responsible for, councils aren't even currently obliged to ensure that independent advocates have any particular qualification, when they first start, let alone any 'Care Act Aware' certificate... despite advocates' duty to challenge any apparent failure by a council to discharge its statutory functions.

I believe legal literacy is the missing element in strategic leadership, in terms of training and reward for innovation. It's what makes all the following time and effort-saving management strategies, into legitimate options under the Care Act:

- harnessing well-informed volunteers for informal support to involve people who consent, but whose cognitive difficulties would otherwise trigger funding of an Independent Advocate;
- allowing payment of someone in one's own household, for essential care, at night, rather than paying a premium for anti-social hours of work to regulated agency staff;
- splitting packages of care with the NHS, when someone narrowly misses qualifying for NHS free continuing health care, but still has ill-health related needs – whereby everybody saves at least some money;
- regularly using agreed 'conduct' protocols, for firmly but respectfully handling a client's entrenched family members' differing positions, where some of them may be perceived to pose a risk to a vulnerable person - thus preserving relationships and dignity, but avoiding invasive safeguarding or litigation;
- limiting the amount of funding for sustaining a carer, once a given figure has been exceeded - necessarily and lawfully - because supporting the carer without regard to cost, might result in spending much more public money overall, than funding the cared for person's care, in an alternative not inappropriate setting... even though it would prevent the carer from continuing to be a carer, and would thus impact on an aspect of their well-being;
- (one that I'm not keen on, but which is happening in real life, right now) actually paying external providers less than the wages bill that the providers have to shoulder for their staff, whilst apparently 'commissioning for outcomes-based customer satisfaction', and calling it market management, under the Care Act's commissioning duties, even if 'superfluous' businesses then fail and are 'assisted' out of the market.

Unpalatable though the last one or two examples may be, powerful social work management can't operate without knowing about the legal framework that makes them lawfully acceptable.

What is driving the sector's consciousness gap?

In my experience, social work academics in universities might have insufficient confidence in their own legal acumen to teach the law, other than superficially (i.e. "Today's lecture is about the Mental Capacity Act, but we don't have time to look at the case law that's arisen from it..."; or "Today's lecture is about care planning under the Care Act but we won't know the

answer to the question of how much budget is enough to be lawful, until there's a case on it..."). The qualifying curriculum under-emphasises case law knowledge, referring to principles and Acts, only. The Croisdale-Appleby review of social work education did not even mention the significance of the legal framework for a proper curriculum.

Higher Education providers claim to deliver practice-ready professionals, but has somehow conveyed to generations of social work students that there's always a duty of care in negligence, within statutory care functions – fuelling fear of claims for compensation for foreseeable harm, and anxious practice. Yet decades of caselaw have actually established that this isn't the law, in adults' social services - for what the judges have described as 'obvious' public policy reasons. The Courts have said (eg in cases such as Sandford, [2008] EWHC 110 and Hounslow, [2009] EWCA Civ 286) that since:

- social services councils don't voluntarily assume risk in relation to individuals (being compelled to discharge social work functions, pursuant to statutory duties for the good of society as a whole)
- they aren't funded, through public money, to be able to prevent harm, even when it is foreseeable
- they work with people who may well be targeted by third parties beyond the control of the council
- the structure of welfare law is such as **not** to make judicial imposition of a parallel duty of care in negligence law, as well as a duty **to** care, in public law terms, conceivably useful for society

There is therefore no reason to extend the current parameters of a duty of care into adults' social work functions. (It can be different in the law relating to children's social work, but I know of no academic course in which that distinction is explained to students.)

This sort of sector-wide misunderstanding often leads to budget-driven or defensive practice, back-watching, and belief that looming safeguarding 'risks' automatically justify invasive interventions into people's lives, regardless of mental capacity. The Administrative Court and Court of Protection consequently remain busy; and the sector makes noise about learning lessons - whilst failing, expensively, to enforce legal literacy, as a core competency. Using interim management consultancy in the public sector can't help either: project management qualifications aren't enough. There's an economic impact too: councils tell providers (particularly in the

third sector) that surviving austerity requires ‘partnership’, but then they demand acceptance of ever lower and lower fees. Most care sector owners are too dependent and afraid of unprincipled competition, to retort, as they might, if only they were legally literate:

“We get that central government’s made massive cuts, but surely the councillors grasp that if all us businesses say NO to your meagre shilling for a contract to meet people’s needs this meanly, the council will still bear the statutory duty? That is, do your elected Members and staff actually want to take the clients home with them, in order to meet their needs? – or maybe even re-open all those council-owned care homes that you closed over the last few years?”

Society then wakes up to the antithesis of social welfare values:- care packages watered down to an uncivilised less than minimally acceptable standard; the ‘He Who Shouts Loudest’ culture, rewarding aggression, instead of informed discussion; a passive, demoralised (largely female) workforce - and ever more upbeat spin, about the impact of the bloomin’ Care Act.

9. Conclusion

Clearly, what is really wrong in the social services sector is a lack of money, ‘second rate agency’ status compared to the NHS, and a lack of informed political or journalistic interest in it, unless one’s own mother is being badly treated in a care home.

But that is the context in which we work, and I am not deluded enough to think that it is going to change, any time soon.

My point is that developing public and professional legal literacy about the Care Act, rather than calls for further root and branch reform, is the right way forward.

I think it could be done cost-effectively through bite-sized online materials about the legal framework.

But that will only be wanted, and therefore developed, if the sector admits that it would have made a difference, in all sorts of ways, and has long been allowed to be missing.

The sector would also have to foster individual professional commitment to remaining up-to-date and convey a message, somehow, that it’s a positively good thing for a frontline member of staff to flag up divergence from the law, by their employing organisation, rather than a disciplinary offence!

So this is all in my dreams for now. But I hope I live long enough to see the trends explored in this essay forced into retreat, or even heading back in the other direction, over the next few years.

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