COMMUNITY CARE – TOWARDS A WORKABLE STATUTE

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Introduction

Community care law is, beyond peradventure, in a mess. The primary statutes contradict each other, give different rights to different service users and have been so amended as to contain many quite incomprehensible provisions. The product of this mess is that service users have little idea as to their service entitlement and social services departments are generally acting outside the law. The NHS & Community Care Act 1990 deceived much of the population into believing that the principles expounded in the White Paper “Caring for People” had been enacted into law; the Act is however silent on the rights of carers, the right of individual choice, and the “seamless service” with the NHS.

The problem goes beyond the mere fact that the legislation is riddled with inconsistencies and beyond the public policy “resource issue” so prominent in the present Gloucestershire litigation. At its heart is the problem that we are dealing with a body of legislation enacted over a period of 50 years embodying differing philosophical attitudes and economic expectations. It is legislation which in large measure pre-dates the growth of public and administrative law; which was enacted at a time when the power and local democratic accountability of local government and health authorities was greater; it is legislation which contains a high proportion of statutes which originated as Private Members Bills — Acts which tend to be more “rights based” energetic and provocative.

Community care law is in danger of becoming a lawyers playground. If Parliament does not take action to implement reform, then we must assume that it would prefer endless judicial review proceedings to the very obvious political difficulties which reform would pose.

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Consolidation Versus Reform

Simple consolidation of the legislation is not possible. Such a procedure is generally only feasible where there are a number of different statutory provisions all embodying a coherent code of law; these are then repealed and re-enacted in one statute. It is self evident that community care law is not amenable to such treatment. More fundamental issues have to be tackled. A good example of this problem relates to the various statutory provisions governing domiciliary care services.

If home care assistance is assessed as being needed by

- a disabled person, the service is provided under s.2 of the Chronically Sick and Disabled Persons Act 1970. The duty under this section is one owed to a specific individual and thus enforceable as a private law right, with the concomitant possibility of damages where there is a failure to provide the service.
- an ill person the service will generally be provided under Schedule 8 of the NHS Act 1977. The duty under this provision is a “target duty”; a failure to provide the service will not therefore give rise to a claim for damages nor (without more) would it necessarily constitute a breach of the duty.\(^1\)
- an older person\(^2\) the service will generally be provided under s.45 Health Services and Public Health Act 1968, which merely gives the authority a power (but no duty) to provide such assistance. Being a matter of discretion alone, a failure to provide the service will not therefore (without more) give rise to any claim for damages.

These provisions cannot simply be “consolidated”. If, as would appear desirable, the right to home care assistance is to be based upon need, rather than membership of any particular user group, one has then to decide what kind of legal right should attach to the service obligation. If (put crudely) the obligation is rounded down to the lowest common denominator (i.e. to a mere discretion) then ill and disabled people would lose tangible legal rights; if the obligation is rounded up, then the cost implications for the Exchequer could be substantial. Such issues are fundamental and have to be addressed by a fundamental reform.

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2 i.e. a person who is not “ill” or a disabled person.