

About Us

We are a group of charities set up to help older and disabled people with social care needs, and their carers and supporters. We provide care and support, information, and advice, and we campaign for change. We have collaborated together on this submission because we are very concerned that the rights of people with social care needs and their carers and supporters are not being upheld and they are struggling to access justice to hold public bodies to account and right wrongs.



Executive Summary

At some point in our lives nearly every one of us will either need social care or be involved in looking after an older relative, a sick friend or a disabled family member. Good social care can improve quality of life. Social care, through charities commissioned by LA's under their Care Act duties, also plays a critical role in supporting & providing services to people with mental



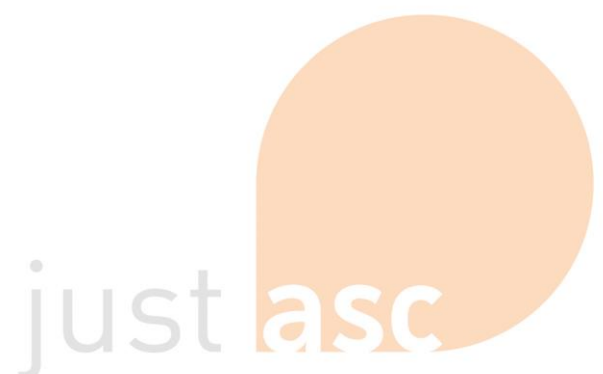
and physical health needs & their friends & family carers, in hospital, community settings & their own homes. But local authorities, who are usually responsible for arranging social care, can't meet the growing demand.

We are concerned that the mismatch between the growth in demand and the available resources to meet that demand is driving unlawful decision making as struggling councils come under increased pressure to balance their books. Every day millions of older and disabled people and their carers are suffering rather than getting the social care they need. When someone is treated unlawfully, they should have the right to hold a public body to account. Unfortunately, problems with access to justice mean that people are struggling to hold public bodies to account. These problems are particularly acute in relation to social care. We do not think judicial review strikes the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government. The costs of judicial review and the lack of legal aid funding render it very difficult to access. In practical terms, it is already too difficult for citizens to challenge what is clearly unlawful government action.

We are extremely worried that reforms to judicial review are being proposed without adequate consideration of the impact on the lives of people with social care need and their families, who need the law to protect them from poor and unlawful decision making on the part of the public bodies who should be providing them with social care.

We would like to highlight the following points:

- Demand for specialist community legal aid advice is high. Our helplines are overwhelmed with requests for advice and support from people who really need specialist legal advice. Our social care services frequently see unlawful decisions and unlawful delays in relation to the care and support packages of the people we support.
- Judicial review and the pre-action protocol is a critical tool that prevents the abuse of power by public authorities and protects citizens from unlawful decision making.
- The proposals for reform of judicial review are being made against a wider backdrop of significant problems with access to justice for people with social care needs and their families.
- In our experience the people we support struggle to find a lawyer to help them. Only 20% of local authority areas now have a community care lawyer, and there has been a 91% drop in legal help matters starts for non-family, non immigration and non-mental health cases since 2009-2010.
- Any further restriction of judicial review or legal aid will have a devastating impact on the lives of people with social care needs and their families.
- We hope that the evidence in this submission convinces Government that any future Reform of judicial review must not be rushed. It must be carefully considered to avoid further marginalisation and harm caused to people with social care needs who have already been made more vulnerable by problems with access to justice.



Increased demand and limited resources for social care means too many people are denied the social care they have a right to

Advances in health care have helped older and disabled people in England to live longer than ever before. As a result, the number of older and disabled people in England is growing significantly and this rate of growth is projected to speed up over the next 20 years. This creates a challenge for local authorities who are responsible for social care – as we get older, we tend to get long term conditions and need more health and social care.

Social care covers older people, working age disabled people and carers. Media coverage and Government attention often focuses on older people¹, but working age disabled people account for nearly 50% of local authority spend on long term care.²

- In 2016, there were 11.8 million UK residents aged 65 years and over³) In 1998, around one in six people were 65 years and over (15.9%), this increased to one in every five people in 2018 (18.3%) and is projected to reach around one in every four people (24.2%) by 2038.⁴
- 75% of 75 year olds in the UK have more than one long term condition, rising to 82% of 85 year olds⁵
- The number of people with a disability in the UK has risen the last disability prevalence estimates were carried out by the Office for Disability Issues in 2011/12 and was around 20% of the population or 11.6 million people⁶.
- In the 3 years from financial years 2015-16 to 2018-19, the numbers of working age disabled people requesting support increased 10%⁷.

Local authorities, who are usually responsible for publicly funded care are struggling to meet demand. The latest Local Government Association estimates are that the sector-wide funding gap will be £8 billion by 2024-25, with £3.1 billion in 2019-20.⁸ Reduced funding and rising

¹ See for example <https://www.dailymail.co.uk/news/article-8539119/Boris-Johnson-warned-elderly-suffering-unless-tackles-social-care-crisis.html>

² <https://digital.nhs.uk/data-and-information/publications/statistical/adult-social-care-activity-and-finance-report/2018-19/1.-activity-and-finance-overview#trends-in-expenditure>

³ <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/ageing/articles/livinglongerhowourpopulationischangingandwhyitmatters/2018-08-13>

⁴ <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/august2019>

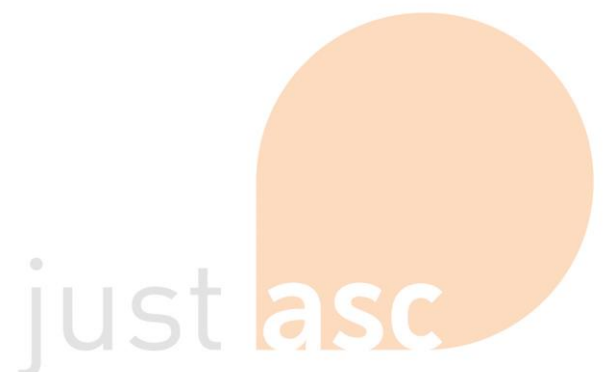
⁵ Mercer (2011) The Scottish School of Primary Care's Multimorbidity Research Programme

<https://www.slideserve.com/ryann/multimorbidity-in-scotland>

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/321594/disability-prevalence.pdf

⁷ <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/adult-social-care>

⁸ https://www.local.gov.uk/sites/default/files/documents/9.117_A_Year_In_The_LGA_v_11%20WEB.pdf



Demand for services mean that in London alone, boroughs needed to make almost £400 million of savings in 2019-20, as part of almost £2 billion planned over the four years to 2022.⁹ Boroughs plan to use a third of their earmarked reserves over that period to balance their budgets. These were the figures before the pandemic; now the Centre for Progressive Policy estimates 8 out of 10 councils do not have sufficient funds to make up for increased costs and reduced income caused by Covid-19.¹⁰

Increased demand and limited resources is putting acute pressure on services provided to some of the most vulnerable people in our society.¹¹ Local authorities are in an impossible position they have legal duties to provide care , but limited resources to do so. The Association of Directors of Adult Social Care have recognised in a survey of individual Directors that 96% of local authorities are not confident they will meet their legal duties to provide care in 2020, none in 2021¹². Too many people are being unlawfully denied access to social care by the very public authorities that are there to help them.

Demand for advice and casework support

Helplines across the country have seen a year on year increase in demand for their services with cases becoming more and more complex.

Mencap's Learning Disability Helpline received over 14,000 calls in 2019, compared to 12,464 in 2016. Age UK and Carers UK have also seen a gradual increase in community care queries in 2019-20.

⁹ Fair Funding Review: A review of local authorities' relative needs and resources Consultation response by London Councils P.2

[file:///C:/Users/KariGerstheimer\(AC\)/Downloads/FFR%20Relative%20needs%20and%20resources%20Feb%202019%20-%20London%20Councils%20response%20-%20FINAL.pdf](file:///C:/Users/KariGerstheimer(AC)/Downloads/FFR%20Relative%20needs%20and%20resources%20Feb%202019%20-%20London%20Councils%20response%20-%20FINAL.pdf)

¹⁰ <https://www.progressive-policy.net/publications/why-the-government-needs-to-pay-up-before-levelling-up>

¹¹The LGA states, "the ability of councils to fund preventative activity in relation to adult social care and children's services is being constrained by budgetary pressures"

<https://www.local.gov.uk/sites/default/files/documents/The%20impact%20of%20local%20government%20spending%20WEB.pdf>

¹² Page 6 <https://www.adass.org.uk/media/7973/no-embargo-adass-budget-survey-report.pdf>

Unlawful decisions impact upon the lives of people with social care needs and their families, making them vulnerable to sometimes extreme safeguarding issues. From unlawful delays, to denial of assessments and unlawful cuts to care packages, we see a deeply worrying picture of systematic unlawful behaviour where local authorities have failed to uphold individual rights to social care.

Case study 1

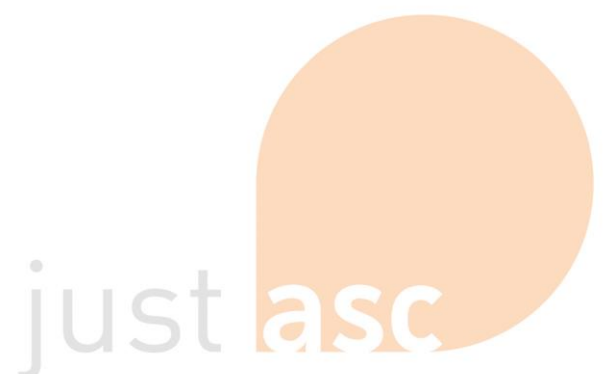
In the North of England, a social worker visited a supported living home which housed 4 people with a learning disability. The local authority needed to make savings and the social worker told us that the support packages of all 4 individuals would be cut by 50%. The needs of the individuals had not changed, and the cuts would have placed the individuals at risk. We tried to resolve this ourselves by raising our concerns with the local authority, but it wasn't until a lawyer got involved that the issue was resolved.

Case study 2

A woman called us from the South West. Her mother had been diagnosed with dementia and qualified for local authority funded care. Her mother's condition had deteriorated so much that for over a year she had been providing round the clock care. The local authority had carried out an assessment of need over 9 months ago; had agreed that support was urgently needed because the caring role was not sustainable; but still hadn't put in place the support required. The daughter had struggled to find a lawyer to help her. She developed mental health problems herself because of the strain of the caring responsibilities and had to give up her job because she couldn't manage the caring and employment responsibilities combined.

Community care cases are complex, both legally (it is a public law discipline within the context of a number of complex statutory frameworks) and factually (there will often be a long history of interaction between the client and social services authority and material of which the client is not aware). As a result, there is often a lot of paperwork to read and significant preparatory communication required to crystallise the issues. The people we support struggle to navigate this complexity themselves, and we as social care organisations do not usually have the legal expertise to help them.

Whereas previously individuals and families could have resolved problems themselves, or we as social care organisations could have resolved problems on their behalf, we are seeing that increasingly, our efforts to resolve problems by asking the local authority to act lawfully are ignored.



Case study 2

A gentleman lived in one of our care homes. He was funded by the NHS through continuing healthcare (CHC), but the NHS suddenly decided to stop payment as they decided that he no longer met the threshold for CHC support. The local authority did not agree, and they also refused to pay for the support, leaving the elderly gentleman with no support. This was clearly unlawful. Public bodies have a duty to work together to ensure people are not left without social care. We tried to resolve the problem ourselves, by writing to the local authority and the NHS Trust to urge them to pay for the support whilst they resolved the dispute. 10 months passed and the matter was still not resolved. Back pay of over £110,000 was owed. It wasn't until we got lawyers involved that the public bodies acted to meet the needs of this gentleman.

Problems with Legal Aid

Many people eligible for social care support, particularly of working age, will also be eligible for legal aid. Whilst in theory, legal aid is still available for community care cases, the reality for the people we support, is that they cannot find a lawyer to help them:

- Research by the Law Society shows that only 20% of local authorities have a legal aid community care lawyer¹³.
- The legal aid statistics are categorised into family, immigration, mental health and other non family cases, the latter of which community care cases form part. If we look at the statistics for other non-family the drop in cases is even more stark. The number of other non-family cases dropped from 488,329 in 2009-10 to 39,513 in 2019-20 – **a reduction of 92%**. The impact of this drop on public body decision making and accountability should not be underestimated.¹⁴

Urgent action is needed to ensure that people with social care needs, who qualify for legal aid, can access a specialist community care legal aid lawyer when they need one.

¹³ <https://www.lawsociety.org.uk/campaigns/legal-aid-deserts>

¹⁴ [Legal aid statistics England and Wales tables April to June 2020](https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2020)

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Judicial Review is critical to the rule of law and the prevention or correction of abuse of power by public bodies

From the perspective of Government and public bodies, judicial review can be perceived as an annoyance, a restriction on its ability to operate. In our experience, from the perspective of people with social care needs and their families, the threat of judicial review through the pre-action protocol (letter before action) is often the only way to make the state comply with its legal obligations. If additional barriers are placed on access to judicial review, it becomes a less effective tool in securing that the state complies with those legal obligations. Without access to justice there is no public body accountability. The rights and corresponding duties to provide social care might as well not exist.

Conclusion

The increase in demand and limited resources for social care means that too often people with social care needs are being denied the social care that they have a right to. This is ruining the lives of older and disabled people and carers across the country.

The older people, disabled people and carers that we support struggle to advocate for themselves. We as specialist social care organisations often do not have the specialist legal expertise to help them. Problems with access to specialist legal advice mean that it is already extremely difficult for people to hold public bodies to account when things go wrong. The already significant barriers to scrutiny in this area is having a devastating impact on the lives of people with social care needs and the people who support them.

The realistic reliance on legal aid and judicial review to challenge unlawful behaviour is already compromised, there should be no doubt that further restrictions will lead to erosion of the Rule of Law, this will be felt most keenly by those already suffering the impact of multiple disadvantages.

Any changes to judicial review and legal aid must be carefully considered so that people with social care needs are protected and can hold public bodies to account when they are treated unlawfully. In a democracy, we should all have the right to hold public bodies to account.

