



Access Social Care's submission to the Independent Review of Administrative Law

Executive Summary

There is a growing mismatch between the acknowledged need for social care and the resources available to meet that need. This mismatch is a strong driver of unlawful decision-making which restricts the call on those resources. Where unlawful and irrational decisions are made that act to the detriment of recipients of social care or others in their household, they should be empowered to address these issues through recourse to a functioning and accessible system of judicial review. Unfortunately problems with access to justice mean that people are struggling to hold public bodies to account.

We are extremely worried that reforms to judicial review are being considered against a politically charged backdrop, 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 are also concerned that judicial review and community care law have not benefited from investment seen elsewhere in the justice system. A key 2016 Ministry of Justice position paper expressed that the central aim of the government and judiciary in reforming the legal system should be to create “a courts and tribunal system that is just, and proportionate and accessible to everyone – a system that will continue to lead and inspire the world.”¹ This response questions whether this principle was extended to judicial review and argues that the current system is neither just, equitable nor proportionate.

We would like to highlight the following points:

- Judicial review is a critical tool that prevents the abuse of power by public authorities and protects citizens from unlawful decision making.
- The vast majority of cases will never get to court. We operate in the early legal help space – up to and including the pre-action protocol letter. We have a 98% full or partial success rate with our cases because it is so clear that the public body is acting unlawfully in the majority of the cases that we take on.

¹ Ministry of Justice, Transforming Our Justice System, 2016
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf

- Having judicial review as a back stop is often the only tool that will trigger a proper reconsideration of the public authority's decision. We increasingly need to rely on the pre-action protocol letter to get the local authority to engage and/or act lawfully.
- 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.
- It is essential to understand that the cases we work on are the tip of the iceberg. Whilst there has been a drop in the number of legal help matters starts for community care law since 2010 (i.e. the number of legal help cases taken on by legal aid lawyers), evidence firmly points towards this being a problem with access to legal advice rather than a drop in demand for legal support. People 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.
- To focus on the impact of judicial review in relation to the efficiency of governmental administration risks driving the current review towards proposals which will restrict judicial review with unintended but devastating consequences. The statistics set out in this document are stark and point to growing problems with the balance of powers and the Rule of Law that have a devastating impact on the lives of people with social care needs.
- 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.

The central question posed in the IRAL call for evidence is

Does judicial review strike 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?

In our view the right balance has not been struck. The costs of judicial review and the lack of legal aid funding render it very difficult to access. In practical terms, it is too difficult for citizens to challenge what is clearly unlawful government action.

About Access Social Care

This submission has been prepared by Access Social Care, with the assistance of the Bingham Centre for the Rule of Law.

Access Social Care (ASC) is a new charity working to provide access to justice for people with social care needs. We act as a central hub for social care advice by providing second tier support to helpline organisations and advice and casework support to social care providing organisations and their beneficiaries through a membership model. The legal team at ASC have worked together to provide community care advice and casework support for over 10 years, hosted firstly within national deafblind charity, Sense, and then within the Royal Mencap Society. At ASC, we never go to court. We operate in the early legal help space, providing casework support up to and including the letter before claim.

The impact of our work on the families we support can be seen in the video embedded on our website <https://accesscharity.org.uk/>.

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

To set the context for this submission, it is important to understand the wider context of social care provision and resourcing. Advances in health care have helped people in England to live longer than ever before. As a result, the number of older people in England is growing significantly and this rate of growth is projected to speed up over the next 20 years. This is good news for all of us, but it 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 people,² but working age disabled people account for nearly 50% of local authority spend on long term care.³

- In 2016, there were 11.8 million UK residents aged 65 years and over⁴ 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 2038.⁵
- 75% of 75 year olds in the UK have more than one long term condition, rising to 82% of 85 year olds.⁶
- The number of people with a disability in the UK has risen since 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 people.⁷
- In the 3 years from financial years 2015-16 to 2018-19, the numbers of working age disabled people requesting support increased 10%.⁸

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 2019-20.⁹ This funding gap is the difference between the money needed and the funds available to meet people's social care needs. Reduced funding and rising 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

² See for example <https://www.dailymail.co.uk/news/article-8539119/Boris-Johnson-warned-elderly-suffering-unless-tackles-social-care-crisis.html>

³ <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>

⁴ <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/ageing/articles/livinglongerhowourpopulationischangingandwhyitmatters/2018-08-13>

⁵ <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/august2019>

⁶ Mercer (2011) The Scottish School of Primary Care's Multimorbidity Research Programme
<https://www.slideserve.com/ryann/multimorbidity-in-scotland>

⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/321594/disability-prevalence.pdf

⁸ <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/adult-social-care>

⁹ https://www.local.gov.uk/sites/default/files/documents/9.117_A_Year_In_The_LGA_v_11%20WEB.pdf

2022.¹⁰ 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-19.¹¹

Increased demand and limited resources is putting acute pressure on services provided to some of the most vulnerable people in our society,¹² and local authorities are struggling to meet their legal duties to provide care. 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 2021¹³. Too many people are being unlawfully denied access to social care by the very public authorities that are there to help them. And of course, there is no financial incentive to act lawfully.

Local authorities are being put in an impossible position – moral and legal obligations to look after people with complex needs, but no money to do so.

ASC evidence about demand for advice and casework support

The evidence from a number of charity run helplines and ASC indicates that there has been a steady increase in 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.

Problems with Legal Aid are leading to legal aid deserts

Poor decision making driven by a lack of resources is exacerbated by significant issues with access to legal aid for community care which effectively means that local authorities can act unlawfully with impunity because people with social care needs struggle to find a lawyer to help them.

¹⁰ 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)

¹¹ <https://www.progressive-policy.net/publications/why-the-government-needs-to-pay-up-before-levelling-up>

¹² The 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>

¹³ Page 6 <https://www.adass.org.uk/media/7973/no-embargo-adass-budget-survey-report.pdf>

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 lawyer¹⁴.

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%**.¹⁵ The impact of this drop on public body decision making and accountability should not be underestimated.

Before taking a case on, the legal team at ASC would try to place a case with a legal aid provider if we thought that the client's matter fell within scope and they were likely to pass the means assessment. Between March 2018 and March 2019 we worked on 100 cases. Of the cases we tried to refer out 53 were not taken on by legal aid provider despite being eligible, and 47 were not taken on by the legal aid provider until we had worked on the case to crystallise the issues.

We soon realised that only those cases that had progressed to the point of needing work conducted on a certificate of legal aid were being picked up. We held a number of meetings with a number of different law firms to try to unpick this issue. We were repeatedly told that it is loss making for firms to do work on a legal help basis and that the cases that were unlikely to progress beyond legal help were difficult to work on because of these financial pressures. These firms were clear with us about the types of cases that they would take on – policy challenges, group closures for urgent cases requiring interim relief, we were told “casework for individuals is becoming impossible”. To remove policy challenges from the scope of judicial review would restrict its impact even further.

We were made aware of a policy within Essex Local Authority which dictated that all family members of individuals with limited capacity must apply to the Court of Protection for deputyship in order for the person with social care needs to receive a direct payment. A direct payment allows an individual to choose and employ a care worker rather than the LA making and arranging for this. This was an unlawful policy and one that would have adversely affected thousands of people (both families and individuals with care and support needs. This policy would also have acted as a barrier to many considering direct payments which is something their right. Once we engaged in pre-action correspondence with Essex they accepted that their position was wrong and changed their policy.

A keyworker in a college setting approached us to let us know that a young man with autism and a learning disability that he was supporting at college was homeless and sleeping under a pier. He was coming into college hungry, upset and frequently covered in cuts and bruises. We established contact with the young man and determined that he was eligible for legal aid – it

¹⁴ <https://www.lawsociety.org.uk/campaigns/legal-aid-deserts>

¹⁵ [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)

<https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2020>

was an ordinary residence dispute and his situation was known to two authorities but neither wanted to assess his needs and put a package of support in place for him. We approached several law firms to try and get a specialist to support this person but we were unable to. One of lawyers we approached told us that the case was “too obviously unlawful” and it would be ‘wrapped up’ too quickly and never progress beyond legal help. They did not feel it was cost effective to work on this and were also concerned by the added cost of visiting him in person and conducting a capacity assessment”.

This is the sad reality, this gentleman had no family to support him, he could not access support alone and were it not for his college keyworker taking some initiative, he may have gone unsupported much longer. We continued working on the case, because no one else would and ensured that the right authority assessed his needs, put a package of support in place for him and provided interim emergency accommodation in the short term and something more appropriate in the longer term.

This gentleman is not alone in struggling to access legal aid. This is a regular pattern in our cases. Another of our cases was written up by Open Democracy and can be found here:

<https://www.opendemocracy.net/en/openjustice/unlawful-state/ive-been-neglected-one-man-and-the-social-care-crisis/>

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. After early legal help through specialist advice, in the vast majority of cases the local authority admits it has made an erroneous decision and will settle, so the case will never get onto a legal aid certificate. Consequently, the majority of community care cases are loss making for legal aid lawyers. Unsurprisingly, people are leaving the profession and it is really difficult to recruit into the legal aid community care field. From the perspective of the state, judicial review can be perceived as an annoyance, a restriction on its ability to operate. In our experience, from the perspective of the citizen, the threat of judicial review 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.

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

Without access to justice there is no public body accountability. The rights and corresponding duties to provide social care might as well not exist.

The ASC legal team advised on 189 cases between March 2018 – March 2020 (whilst we were still housed at Mencap) and we had a staggering 98% full or partial success rate with our cases. Success in this context means either achieving what the client hoped to achieve, for example an assessment of need (full success) or an increase in support, but perhaps not to the level they wished (partial success).

From unlawful delays, to denial of assessments and unlawful cuts to care packages, we see a deeply worrying picture of systematic unlawful behaviour focussed on balancing the books rather than upholding individual rights to social care.

Whilst it is true that local authorities have cut back on the internal teams that would previously have created checks and balances to prevent unlawful policies and practices, it is sadly also the case that too many local authorities are knowingly acting unlawfully, confident that problems with access to justice mean that they can put financial imperatives before the requirement to act lawfully. For the state to wilfully breach the law is a shocking indictment of legal culture within these authorities and an egregious contravention of the Rule of Law. On the Mencap helpline we had whistle-blowers from social services call us to tell us about unlawful policies and practices within their own councils. We are deeply concerned that any change to justiciability would remove these high level decisions on resource allocation from judicial scrutiny.

Previously we would have referred to “the letterhead effect” whereby a letter from an organisation would yield a more favourable outcome than an identically drafted letter from an individual. Over the last 10 years we have seen a gradual but marked trend of our legal caseworkers needing to rely increasingly on a greater level of intervention. More recently, we have seen a trend of our legal caseworkers needing to rely on issuing a letter before action to get the local authority to engage or to reverse a patently unlawful decision. We are now sending pre-action protocol letters in nearly 50% of our cases, whereas only 18 months ago it was less than 10%.

H’s college placement ended and the education department failed to arrange alternative education despite him being lawfully entitled to this. H’s care provider were having to subsidise the cost of H’s package of support to ensure he was adequately supported in his home during the days that he would have been at college. The local authority failed to engage with the care provider and would not respond to requests for an urgent review of this gentleman’s package of support, which is what he was legally entitled to. The care provider could not continue to subsidise this package of support and his placement was put at risk. We wrote out to the local authority on numerous occasions to remind them of their duties and to ask for an interim increase in support, but they did not respond to our letters until we sent a letter before action which was seen by their legal team.

Legal help is critical to the people we support

Unlawful decisions impact upon the lives of people with social care needs and their families, making them vulnerable to sometimes extreme safeguarding issues.

We supported Mary, John, and Ahmed. All of them had a mild learning disability and all of them received a few hours of support so that they could live independently in the community. The local authority reviewed their package of support and cut their hours, even though their needs had not changed. Very quickly, their lives spun out of control. Without support to manage his finances, John very quickly became street homeless. Without a few hours of support to manage safe sexual relationships, Mary fell prey to a sexual predator. She was trafficked to the Midlands where she was sexually abused by a group of men. Ahmed was violently abused by a drug dealer who started dealing drugs out of his flat. The families of Mary, John and Ahmed all tried to resolve the cases themselves, but the local authorities refused to step in. Our legal teams sought to resolve these matters through early correspondence which in one case was ignored and in the

other cases, the local authority shockingly claimed that the individuals with intellectual disabilities had the capacity to consent to the serious criminal harm that they were being subjected to. The pre-action protocol was essential to get the local authorities to act lawfully.

When a local authority fails to step in, it can impact upon the lives of family carers

Connor is 53 years old and requires support at home because he has a learning disability. The local authority funded 50 hours of support and in addition his mum Sally, provided over 45 hours per week to Connor. Without notice, the Local Authority suddenly decided to reduce the number of hours of care Connor would receive to 15 hours. No proper reassessment was completed and there was no justification for the cut, as Connor's needs had not changed. When Sally came to us for support, philanthropy income meant we could take the case on and we successfully reversed the decision and after further wrangling with the council, they agreed to reimburse Sally for backdated pay amounting to over £20,000, providing justice for Sally and protecting Connor's health and wellbeing.

Marianne's ageing mother, Nora, was diagnosed with dementia. Nora's health deteriorated quickly and she soon required 24/7 care. Nora had no savings and qualified for local authority support. Marianne was an effective advocate, and knew about her mother's right, but she still struggled to get the local authority to act lawfully. Despite the urgency of the situation, it took over 8 months for the local authority to step in. Marianne's sister took a sabbatical from work losing a significant amount of income. Marianne's employer was not as flexible. She lost her job, and living in an area with a high rate of unemployment, she is still unemployed.

Conclusion

In a democracy based on the Rule of Law, we should all have the right to hold public bodies to account. 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 legal right to. The impact of these failures is ruining the lives of older and disabled people across the country.

Access Social Care provides support to people with social care needs and their families. Whilst most of these cases resolve at the early legal help stage, there is an emerging trend that lawyers are increasingly needing to rely on the threat of court action through the pre-action protocol as a backstop to right wrongs. Any changes to judicial review must be considered in this context. If the realistic reliance on judicial review to challenge unlawful behaviour is compromised, there should be no doubt that the Rule of Law will be eroded, this will be felt most keenly by those already suffering the impact of multiple disadvantages. Access to judicial review should be enhanced, not restricted. In practical terms, judicial review is inaccessible, and we recommend the IRAL suggest measures to make it easier, not harder to access justice.