Do you support the Bill?

Yes

What do you feel would be the benefits of the provisions set out in the Bill?

The main benefit is an improvement in the position of carers and in their rights in relation to support. The Bill removes limitations on which carers are entitled to assessment at present by removing the links to a community care (or child’s) assessment of the cared for person and the requirement that the care provided is substantial and provided on a regular basis. A further benefit is the conferring of a right to support, though the benefits of this will depend a great deal on the setting of eligibility criteria. Finally, the requirement to create specific eligibility criteria for carers is welcome.

How do you feel the Bill could be amended or strengthened?

There are three amendments which would strengthen the Bill:

(a) In section 4(1) ‘personal outcomes’ are defined as including ‘outcomes which would … enable carers to provide or continue to provide care for cared for persons.’ Although this is only ‘included’ in the definition of personal outcomes, it does suggest that the focus is on people who are carers being largely defined by their caring role rather than being seen as individuals in their own right. Although the focus of the Bill is carers, it is clear that the caring role has an impact on all aspects of the carer’s life. It might be beneficial to recognise this more specifically in the primary legislation definition of personal outcomes, by recognition a broader range of objectives for outcomes.

(b) Including a specific duty to offer an adult carer support plan or young carer statement. Current law (section 12AB of the Social Work (Scotland) Act 1968 and section 24A of the Children (Scotland) Act 1995) imposes such a duty in respect of adult carers. Research undertaken in connection with the preparation of a Carer’s Charter for Scotland suggested that a minority of those surveyed had been notified of their right to assessment, suggesting both that there should be a clear duty to provide this information and that information strategies need to be much more effective.

(c) Setting a time scale for the completion of the plan or statement. This issue was also discussed during discussions on the Carer’s Charter, with the proposal for setting a time scale for assessment (as it currently is) meeting some resistance. In the context of the Bill, the imposition of a specific duty owed to individual carers effectively confers on them the right to a plan or statement. Without some realistic timescale for preparation of this, the right becomes less worthwhile. At the very
minimum the primary legislation, rather than any delegated legislation, should provide that the local authority must give the carer a time scale within which the plan would be completed. More desirable would be a fixed period set out in the legislation.

It may be that the matters discussed in the following section might also be relevant in this section.

Is there anything you would add to the Bill?

One difficulty in the general area of social welfare provision by local authorities is the number of different pieces of legislation which overlap with each other and the development of inconsistencies between different pieces of legislation and lack of clarity about whether and how different legislation interacts. The most obvious solution to this would, of course, be to bring together all of the legislation in one place, so that there would be a coherent, consistent source of law for community care (complemented by mental health and adults with incapacity legislation and legislation applying to children). This clearly goes beyond simply adding to the Bill, but the issues underlying this suggestion also prompt two other possible additions, one more limited and one more extensive.

The first is that the Bill should address section 8 of the Disabled Persons (Services, Representation and Consultation) Act 1986. In brief this requires local authorities who are considering the provision of welfare services to a disabled person to have regard to the ability of a carer to continue to provide care. A carer, for these purposes, is someone who provides a substantial amount of care on a regular basis. At present, as a result of section 12AA (4) of the Social Work (Scotland) Act 1968, this requirement does not apply when a carer’s assessment has been completed for the carer (because that must then be taken into account by the local authority in providing services). Where there is no carer’s assessment section 8 might still apply (though knitting together the various pieces of legislation is complicated).

Section 12AA is repealed by the Schedule to the Bill (paragraph 2) which means that section 8 of the 1986 Act will then apply in cases involving disabled people, whether or not an adult carer support plan or young carer statement has been prepared under the Bill. It is not clear if this is the intention, but the consequence of it is that where a decision is being made in relation to provision of services to a disabled person, the local authority must:

(a) take account of the views of the carer (section 12A of the Social Work (Scotland) Act 1968 as amended by section 27 of the Bill); and

---

1 For example, in an individual case, the National Assistance Act 1948, the Social Work (Scotland) Act 1968, the Chronically Sick and Disabled Persons Act 1970, the Disabled Persons (Services, Representation and Consultation) Act 1986, the Community Care and Health (Scotland) Act 2002, the Self-Directed Support (Scotland) Act 2013, and , potentially, the Carers (Scotland) Act may all apply. All of these Acts will have been amended (sometimes on multiple occasions) and are supplemented by an array of delegated legislation and guidance.
(b) have regard to the ability of a carer who provides a substantial amount of care on a regular basis to continue to provide that care (section 8 of the Disabled Persons (Services, Representation and Consultation) Act 1986.

This is arguably rather complex and, in any case retains the idea that only carers who provide a substantial amount of care on a regular basis are entitled to consideration, which is swept away by the rest of the Bill. One solution would be to repeal section 8, on the basis that the willingness and ability to care is taken into account in the young carer statement or adult carer support plan, but it might be argued that this is then not clearly identified as a factor to be considered by the local authority in deciding on provision of community care services to the cared for person. This might then suggest that section 8 provides a potentially useful additional right for carers which should not lightly be dispensed with. Whatever view is taken the future of this provision should be clarified.

A more expansive addition would be to consider whether an attempt should be made by amendment of other legislation to avoid the development of further inconsistency and difference in different statutes. For example, under the Bill, support is to be provided to a carer when her/his needs meet the local eligibility criteria, and further information is given in the Bill about the construction of these criteria. Community care services are to be provided where ‘the needs of the person being assessed call for the provision of’ these services, and services under the Chronically sick and Disabled Persons Act 1970 are to be provided where ‘necessary in order to meet the needs’ of the assessed individual.

In both of these last two cases, of course, the reality is that decisions are based on eligibility criteria, and amending the legislation to incorporate something along the lines of what is in the Bill would make this explicit as well as providing some potential oversight of these. It would, in addition, stop these different pieces of legislation from drifting apart.

Is there anything you would remove from the Bill?

No.

Tom Guthrie, Professor of Private Law, University of Glasgow

---

2 Social Work (Scotland) Act 1968, s 12A(1).
3 Section 2.