



Consultation on Carers Legislation

COSLA Response

Introduction

1. COSLA believes that unpaid carers are equal partners in care, acting within the context of a partnership between the individual and the state, which forms the bedrock of our system of health and social care. Without the contributions made by unpaid carers, that system would be unsustainable now and in the future.
2. Over the past few years, there have been advances in support to carers, with improved outcomes across many partnerships. Through the implementation of the Carers and Young Carers Strategies, the Scottish Government and COSLA have introduced a range of measures to help identify and support carers. Other measures, such as the Older People's Change Fund, have also helped to create opportunities to redesign support arrangements.
3. That said, it is clear that there is significant room for improvement and we should be investing more as a society in supporting carers. Councils and their partners recognise the importance of this community and the need to invest more heavily in prevention over time. To do this, councils and their partners need to be able to support carers flexibly, developing the principles established by the Christie Commission by focusing on coproduction, building community capacity and targeting support to ensure that carers are well supported in their role.
4. Against this backdrop, the new power to support carers which has been introduced through the (Social Care) Self-Directed Support (Scotland) Act 2013, will further enable councils to act flexibly in supporting carers to continue in their caring role and have a life alongside caring.
5. Any move to introduce legislation which places further duties on councils, especially where doing so could restrict their ability to act flexibly, must be underpinned by clear evidence that those specific legislative proposals are required to achieve the desired outcomes.

The case for moving to legislation

6. COSLA does not believe that a sufficient case for moving to legislation has been made. Indeed, many of the arguments that are offered in support of legislation are not persuasive.
7. For example, the dispersal of carers' rights across different acts is presented as an argument for a single piece of legislation; however, the reality is that most areas of social care provision are covered by a range of statutory provisions. Hence, we do

not think that a new bill which is primarily intended to assimilate pre-existing legislation is a good use of parliamentary time.

8. What is more, many of the proposals relate to areas where it is unclear that additional legislation is required to deliver the outcome. For example, information and advice is already available, and while we should always give thought to how this could be improved, legislation is unnecessary to achieve this.
9. Finally, the Public Bodies (Joint Working) (Scotland) Act 2014 places new duties on local authorities and health boards in respect of involving relevant groups in the planning and design of services, and it is expected that supporting regulations or guidance will name carers specifically. So parts of the bill will merely duplicate what is already provided for in existing legislation.
10. We are also concerned that many of the specific proposals may be impractical and risk making it more difficult to support carers flexibly into the future. These are set out below.

Assessment Process

Replacement of *Carer's Assessments* with *Carer's Support Plan*

11. It is recognised that the term 'assessment' can be seen as referring to an assessment of a carer's ability to care, and that some carers say they feel this can be seen as threatening or judgemental. While we understand this issue, we think it is primarily a practice and culture issue rather than a semantic issue. The solution lies in empowering carers to become equal partners in care rather than simply altering the description of the process. As councils and their partners move forward with further implementing self-directed support (SDS), there is an increasing move away from assessment of need, towards engagement and an outcomes-focused dialogue about what the carer wants to achieve. This is described in different ways as councils develop and consult on local approaches to SDS, and it is questionable whether there is a need to legislate to establish one particular term over another.
12. Furthermore, the proposal to issue guidance on Carer's Support Plans cuts across local activity in relation to self-directed support, where assessment systems and processes are being developed as part of a move towards outcomes-based approaches. To issue statutory guidance on how support planning should be approached for one particular group within this context is overly-prescriptive and risks a one-size-fits all approach to carers. This will inevitably result in inflexibility and a poor fit between support planning for carers, and the range of approaches developed locally under SDS.
13. Those points aside, there are risks associated with a legislative requirement to adopt the term 'Carer's Support Plan'. There is an important conceptual distinction to be made between 'assessment' and 'plan'. Whereas an 'assessment' gives consideration to need, a 'plan' assumes it. The initial process that is to be undertaken is the identification of eligible need; *even if* a new duty to support carers is introduced, it will still be within the context of an eligibility framework and therefore not all assessments will identify need that calls for the provision of a formal support plan. The term 'Carer's Support Plan' can raise expectations in this respect and does not allow for sufficient separation between the concepts of assessment and care and support planning. It is questionable whether it is a justifiable use of

resources to develop a support plan for all carers, irrespective of the burden of care that they take on or the level of their own need.

Extension of duties on assessment

14. The consultation proposals effectively extend the duties on assessment to cover all carers and move away from the 'regular and substantial' test. Councils recognise that there is a need to invest in prevention if we are to manage future demand, and that a key part of this is improving support to carers. However, the proposal to mandate that a formal assessment is undertaken for all carers, irrespective of the level of need, runs counter to the requirement to effectively target resources towards need. This carries the risk that councils are forced to invest scarce resources inappropriately and may result in carers having unrealistic expectations about the level and type of support that can be provided. It is recognised that this measure is being proposed as a way to address low uptake of carer's assessments and that some carers report having to wait significant amounts of time for their assessment. However, difficulties in responding to requests quickly due to lack of resources is a separate issue from low uptake of carers' assessments in the first place.
15. Currently local authorities have a duty to conduct carers' assessments upon request from those carrying out regular and substantial care. In practice, the assessment process for the cared-for includes consideration of the carer's input and needs, and presents an opportunity to agree whether a further stand-alone carer's assessment is required. Many carers report that the assessment process and support provided to the cared-for is sufficient to also meet their needs as a carer, and either do not request, or actively decline, a separate carer's assessment.
16. Councils recognise that they need to improve their recording of discussions that do not result a request for an assessment (or result in an offer being declined) and that there is a need to raise awareness among both staff and carers in terms of carers' assessments. This is already being undertaken through the measures described above, and the imminent agreement of a Carer's Rights Charter will deliver further improvements. Introducing further duties on assessment under these circumstances would do little to improve uptake and nothing to shorten the time taken to conduct assessments. In fact it could be argued that an extended duty could worsen the situation by adding a layer of bureaucracy around issuing formal offer of assessments, which actually diverts resources away from the business of conducting the assessments themselves.
17. We further understand that the consultation proposes extending the existing duties on assessment to situations where the cared-for person is not eligible for community care services – i.e. where their needs are mainly in relation to health or other factors. While we would support this broader interpretation of need, we would question whether a new duty is appropriate. As we understand it, there is currently no legal impediment to providing carers' assessments in these circumstances and therefore we think it may be a matter of guidance rather than law.

Removal of reference to 'ability'

18. The proposal to remove the term 'ability' from the statute on carers' assessments is welcome. The term 'ability' does not accurately reflect local practice. Engagement and dialogue about the desired outcomes for both the carer and cared-for are the focus of processes locally. This takes account of not just ability to care, but also present and future capacity and the carer's wellbeing, including the outcomes they aim to achieve.

Length of time to complete assessments

19. The consultation proposes placing a new duty on councils to inform carers of the estimated time to receive a carer's assessment, and, if this time is not met, to inform the carer of the reasons for this. It is recognised that informing carers of the length of time it is likely to take to receive a carer's assessment is desirable in terms of good communication and transparency; indeed, it is already local practice in many areas. However, councils' ability to do this accurately is impacted by constantly shifting (and increasing) patterns of demand and the need to apply risk-based prioritisation to the targeting of resources, including those that are used to conduct carer's assessments.
20. This makes it difficult to accurately estimate timelines and introducing a duty in this area risks leading to the codification of standard timescales and the emergence of bureaucratic scheduling, monitoring and re-scheduling mechanisms, similar to those already shown to present challenges in terms of appointments for NHS services. This would do little to secure genuine transparency and would divert scarce resources away from the business of conducting the assessments themselves.

Cross-boundary issues

21. The extent to which portability of assessment moving between local authority areas is a significant issue varies across Scotland, and many service-users report they are satisfied with the current arrangements. However, it is also recognised that there are those for whom this is a significant issue. At present, local authorities providing support to people who are ordinarily resident in another local authority area can recover expenditure from that other local authority under section 86 of the 1968 Social Work Act. However, this is subject to agreement between the local authorities on who will carry out the assessment and what level of support will be provided, the key principle being that one local authority cannot make independent decisions about another's expenditure. That is not to say, however, that improvements in both those processes and the information available to service-users cannot be made. This is being progressed through joint work between the Scottish Government, COSLA and disabled person's organisations, which is well under-way and includes a focus on non-residential social care services and associated guidance.
22. However, the legislative measures and associated arrangements described above apply to people who the council has a statutory duty to support, and so do not apply to carers. Currently, where a carer moves between areas, or the cared-for and the carer reside in different local authority areas, councils reach local agreement on the services to be provided and which council should pay for them. In the case of the carer and cared-for residing in different areas, the total amount of support provided in each area is often a determining factor. Again, the key principle here is that one local authority cannot make independent decisions about another's expenditure.
23. The proposal to use legislation to stipulate which local authority the proposed duties to formulate a carer's support plan and provide support would fall on, runs counter to this principle and to councils' local democratic accountability for the use of resources. Moreover, it risks hindering councils' ability to agree arrangements that best-suit an individual's circumstances. There will be cases where this makes most sense for the cared-for person's council to be the lead authority - for example because the support to the carer is to help them in tasks carried out at the cared-for person's home or neighbourhood, and/or because that local authority has the best understanding of the

cared-for and carer's circumstances. On the other hand, there will be occasions where it makes most sense for the carer's council to be the lead authority, for example because the support to the carer is largely delivered in the carer's home.

24. Irrespective of whether it is the carer or cared-for person's authority that is designated as lead, the act of introducing legislation that makes a stipulation not only runs counter to democratic accountability, it adopts a 'one-size-fits-all' approach and risks preventing councils from being able to deliver a sufficiently flexible approach.

Support to Carers

New duty to support carers and young carers

25. The consultation document proposes a new duty to support carers 'in accordance with an eligibility framework' which would be set out in regulations or guidance. It is not clear whether the Scottish Government proposes to introduce a national eligibility framework that includes nationally-set eligibility thresholds, or simply a duty to support carers with decisions about what constitutes eligible need being taken locally. In any case, there are concerns that *either* approach could have a negative impact on the support that carers receive.
26. Councils already operate eligibility frameworks, consisting of eligibility criteria and locally-set eligibility thresholds. The distinction between frameworks and thresholds is an important one, insofar as frameworks establish the criteria used to assess and categorise need, and thresholds define at what point those needs will be considered eligible for the provision of support. Both are important for transparency, but the ability to set thresholds locally is vital to ensure councils are able to manage demand, *which is increasing and varies from council to council*, within the context of finite resources. Any proposal to establish a national eligibility *threshold* would not only give carers a level of national entitlement that could exceed that of the cared-for, it would prevent councils from being able to adjust eligibility thresholds as a means to apportion finite resources according to shifting priority need in a transparent manner. A national eligibility threshold would therefore interfere with the management of shifting local need, and it would cut across local authorities' democratic accountability for local decisions about the use of resources.
27. Alternatively, a statutory duty to support carers with eligibility thresholds being set locally also carries significant risk. While this is arguably more in line with local democratic accountability and the management of varied local demand patterns, it would risk polarising how resources are used, irrespective of where councils chose to set the 'bar' for eligibility. We could either find resources gravitate towards those with the most acute support needs – and risk those services that are designed to prevent the escalation of need – or vice versa. Thus, on balance, the retention of existing powers to support carers and young carers may be the preferred option.
28. Notwithstanding the issues with each of the options outlined above, any move to introduce a new duty to support carers would place a significant financial burden on councils at a time when resources have reduced and demand continues to increase. Should the Scottish Government decide to introduce a duty to support carers, despite the concerns outlined above, those proposals should be fully and accurately costed and all costs to councils met in full by the Scottish Government.

Short breaks

29. We recognise that short breaks from caring are an essential part of the overall support that families and carers need to help them care for a family member, partner or friend. However, a duty to provide short breaks carries similar risks in terms of resource polarisation and ability to reflect local need. Moreover, stipulating that one type of support should be available as a matter of statute runs counter to the ethos of self-directed support and councils' associated duties to ensure flexibility and choice. Short breaks do not suit all carers and many chose alternative forms of support. A duty to provide short breaks carries the risk that resources which would have been available for carers to use flexibly via SDS are tied up in sustaining short breaks provision at below optimum efficiency, due to the costs of maintaining a viable core service simply to meet the legislative duty irrespective of local demand.

Information and Advice

New duty to establish and maintain information and advice services

30. It is vital that carers are able to access information and advice which can support them in their caring role; however we do not agree that a legislative route is required to deliver this outcome. The SDS act already places a duty on local authorities to ensure the provision of independent information and advice in relation to self-directed support. More general information and advice is also already available, including that commissioned specifically for carers and, while we should always give thought to how this could be improved, further legislation is arguably unnecessary to achieve this.

Carer Information Strategies

31. The proposal to repeal section 12 of the Community Care and Health Act, which would remove the requirement for strategies to be approved by Ministers, seems sensible within the context of health and social care integration, should a decision be taken to proceed with legislation. Given that the Public Bodies (Joint Working) Act will establish new integrated health and social care arrangements which will be both locally and nationally accountable, it would seem sensible to repeal the requirement for Ministerial approval. Partnerships will develop local approaches to carer information, which should be customised to fit local need and reflect the range of services and supports available locally. The continuation of funding for carer information strategies (subject to spending review decisions) is welcome and it will be important to ensure that a) funding is maintained at current levels at a minimum, to ensure that partnerships are able to maintain or improve the quality of carer information; and b) it is clear that, irrespective of which partner funding is disbursed to, decisions on its use will be made by the new integration authorities.

Carer Involvement and Planning & Delivery

32. The consultation document contains several proposals for introducing various duties in relation to involving carers in the planning and delivery of services. It is not clear that further legislation is required in this area as local authorities already have duties in relation to involving individuals and communities, including communities of interest, in the planning and delivery of services. This is enshrined within existing equalities legislation and is an explicit facet of councils' duties in relation to best value and community planning. Moreover, when the Public Bodies (Joint Working) (Scotland) Act comes in to force next year it will place further duties on local

authorities in respect of involving relevant groups in the planning and design of services, including through locality planning. It is also expected that supporting regulations or guidance will specify carers amongst these groups.

33. Against this backdrop, it is difficult to perceive a clear case for additional legislation which would overlap, and in some cases duplicate, that which already exists. That is not to say that councils and their partners should not focus on improving community engagement across all communities. The principles established by the Christie Commission call for genuine co-production, which requires genuine subsidiarity – ensuring that decisions are taken as locally as possible, by the communities they will affect. COSLA’s vision for local government includes working with carers co-productively, building community capacity and devolving decision-making. Layering further legislation on top of these pre-existing duties and new policy developments would add little and risks reverting to the tokenism that has characterised previous decades.

Conclusion

34. Councils and their partners need to be able to act flexibly in supporting carers now and in to the future, and Scotland’s legislative framework must function to support that. This means that recourse to legislation should be reserved for problems that cannot be fixed by other means, and that specific legislative proposals must protect public bodies’ ability to respond flexibly to local need. This is accompanied by an associated requirement to ensure that public bodies are adequately resourced to meet their statutory duties and councils are able to provide sustainable social care into the future. In relation to the specific proposals for carer’s legislation, this means that should the Scottish Government nonetheless decide to proceed with legislation under these circumstances, it must meet the resulting costs to councils in full.

COSLA
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