

Bristol Reclaiming Independent Living



Bristol Reclaiming Independent Living (BRIL) is a community group run by and for Disabled people, neurodivergent people, people living with chronic illness, and people who experience mental distress.

Our aims are to:

- Campaign for equality and inclusion for all Disabled people.
- Promote the principle of 'Independent Living' for all.
- Provide peer support.

BRIL defines Independent Living as:

- The right to live in the community.
- Being free from segregation and isolation.
- Having choice and control over our lives, on an equal basis to other people.
- Having access to support and personal assistance that meets our needs.

BRIL welcomes the opportunity to respond to Bristol City Council's Fair & Affordable Care Policy ('the Policy') consultation.

There are two parts to this consultation. Part I has been produced by BRIL members and will address:

1. Co-production and consultation.
2. People's views.
3. Recommendations and actions.

Part II is a legal submission prepared *pro bono* on behalf of BRIL by Oliver Lewis and Alice Irving of Doughty Street Chambers.

PART I – SUBMISSION FROM BRIL MEMBERS

1. Co-production and consultation

February 2023 was the first time anyone who might be affected by the Policy had heard about it. It was clear that the Policy had been in development for some time. The announcement came in the usual email with the paperwork for the Adult Social Care Equalities Forum. Our group were concerned that no co-production or consultation had been carried out beforehand.

Every time Bristol City Council (BCC) talk about the Policy, they say it was co-produced, or 'co-developed'. However, BRIL believe this is not the case. If we look at the Think Local Act Personal (TLAP) Ladder of co-production, in no way was this co-produced:

https://www.pslhub.org/learn/patient-engagement/think-local-act-personal-ladder-of-co-production-13-january-2021-r6495/_add

Since the Policy was first announced in February 2023 there has been a national outcry, highlighted in both local and national media coverage (*Disability News Service, BBC, BBC Radio 4, ITV News, Bristol Post, LCG Plus, The Guardian*).

<https://www.disabilitynewsservice.com/fears-over-catastrophic-Policy-that-could-force-disabled-people-into-care-homes/>

<https://www.itv.com/news/westcountry/2023-12-28/disabled-people-could-be-moved-to-care-homes-to-save-council-money>

<https://www.bbc.co.uk/news/uk-england-bristol-67993985>

<https://www.bristolpost.co.uk/news/bristol-news/disabled-people-bristol-no-idea-8988590>

<https://www.lgcplus.com/services/health-and-care/social-care-cuts-serve-spreadsheets-not-communities-17-01-2024/>

<https://www.theguardian.com/commentisfree/2024/jan/25/warehouse-disabled-people-bristol-city-council>

BRIL has been contacted by Disabled people, Disabled People's Organisations, family carers, human rights campaigners, academics, lawyers and social workers. There is deep concern about the implications of this Policy.

<https://thesmallplaces.wordpress.com/2023/11/10/fair-affordable-care/>

We have had hundreds of comments on social media, with Disabled people and families concerned about the removal of the 'safety net' for anyone needing social care now or in the future.

This includes older people being discharged from hospital, working-age people with acquired impairments, young people transitioning from SEND to adult services, mental health service users/survivors, people living with chronic illness, autistic people and people with learning difficulties.

Moving on to the consultation, BRIL welcomes the extended time period, which was only extended because Disabled people challenged the time frame. However, we have major concerns over how it has been shared. It is not a meaningful consultation, as it is constructed in a way that makes responses very difficult; for example, there are no alternatives to the Policy, it is unclear, and the Easy Read version does not explain the Policy or its potential impact in full. BRIL would like to quote a few points from the document called 'Consultation Principles':

- Engagement should begin early in policy development when the policy is still under consideration and views can genuinely be taken into account.
- Policy makers should be able to demonstrate that they have considered who needs to be consulted and ensure that the consultation captures the full range of stakeholders affected. In particular, if the policy will affect hard to reach or vulnerable groups, policy makers should take the necessary actions to engage effectively with these groups. Information should be disseminated and presented in a way likely to be accessible and useful to the stakeholders with a substantial interest in the subject matter. The choice of the form of consultation will largely depend on the issues under consideration, who needs to be consulted, and the available time and resources.
- The purpose of the consultation process should be clearly stated, as should the stage of the development that the policy has reached. Also,

to avoid creating unrealistic expectations, it should be apparent what aspects of the policy being consulted on are open to change and what decisions have already been taken.

2. People's views

At an Open Meeting BRIL held on 5th January 2024, Disabled people from Bristol and from across England expressed serious concerns about the Policy BCC is proposing. Some of the comments were as follows:

- There is real fear coming from Disabled people and our families.
- Members of BRIL are very worried that putting what Bristol City Council is calling cost-effectiveness above what people actually need will have a major impact on the independence and quality of life of thousands of Disabled people.
- It will set independent living for Disabled people back 40 years.
- I am worried my care will be cut and I will end up in a care home.
- Disabled people can express ourselves and we need to be treated with respect, and our lived experiences and concerns must be listened to.
- Independent living means people are able to choose to stay in their own homes and have their care needs met.
- Forcing people into care homes takes away our right to make our own choices about where and how we live.
- BCC has gone against their own 'Better Lives' policy that included reducing the number of people in residential care. It would also mean more public funds going to the private companies that own most residential care and nursing homes.
- The Policy is against our human rights to family and private life (Article 8 ECHR).
- What BCC is calling cost-effectiveness is incompatible with the Care Act 2014. This Policy goes against Wellbeing and Prevention duties in the Act.
- I am confused as to how the Council can create its own version of eligibility criteria when the Care Act 2014 already has criteria to be met.
- Assessments are being adjusted according to resources, not actual need.
- An act in law is a legal duty to adhere to the content of the act and duties towards disabled people can be protected if breached in any way.

- Local authorities are supposed to record **all** needs, whether met or unmet.
- It is clear from the EQIA that the policy will disproportionately impact Black, Asian and other minoritised people, older people and women. In other words, the Policy will result in discrimination against people with protected characteristics under the Equality Act 2010.
- BCC's policy goes against the recommendations of Sir Stephen Bubb's report, commissioned by BCC itself. BCC has failed to make any progress towards the recommendations, and with this Policy it is putting autistic people and people with learning difficulties at more risk.
- Autistic people and people with learning difficulties, living at home and in the community, could be put at serious risk of harm and trauma by this policy. Cutting budgets for people who need high levels of careful, person-centred, autistic sensitive and trauma informed support is likely to risk destabilisation and crisis. This undermines the national agenda to prevent institutionalisation and hospitalisation, and NHS England's 'Building the Right Support' programme following the Winterbourne View scandal.
- The Policy will hit Disabled people who have been detained under the Mental Health Act. For example, Section 117 aftercare, which aims to prevent people going back into hospital, is joint funded by the Council and the NHS. If the Council bring in an arbitrary cap on social care funding for individuals this will put this preventative support at risk, and could lead to mental health crises, hospitalisation and increased human and economic costs in the long run. There will be serious implications for the local authority and the NHS.
- The EQIA makes clear that the proposal is based on practices that are already the way the Council works. The Council's usual practices are, therefore, in breach of the Care Act and fail to deliver cost-effectiveness and value for money. The result is failure to match public money to real need, leading to misuse and management of public money that we often witness as members.
- What about the role of independent advocacy? Disabled people have a right to advocacy if they don't have family or friends to support them to deal with social services. Many Disabled people need support to understand what is happening, know their rights and to navigate social care processes so they can make their own choices and express their

own views. However, advocacy services are stretched and under pressure. BCC's policy could put so much pressure on services that their right to advocacy is put at risk.

- There was a case in London (*R (SG) v London Borough of Haringey* – 2015) when a council didn't make sure a disabled asylum seeker had an advocate during a social care assessment. The council made the excuse there wasn't an advocate available. A judge told the council this was no excuse, scrapped the assessment and told the council to start again, causing more distress to the disabled person and more costs to the council.
- Disabled people may need legal advice and representation to challenge decisions made under this policy – but cuts to legal aid and the lack of specialist legal community care advice makes access to justice precarious. Disabled people's rights are under attack.
- What about the impact on personal assistants (PAs) and support workers? Disabled people who employ PAs are paying into the local economy, not private care companies. There are many skilled and knowledgeable PAs and support workers: skills and knowledge that will be lost.
- PAs and support workers could lose their jobs, meaning more financial pressure for them and their families, and in the long term on public services.
- The Policy will mean social workers, OTs and social care practitioners being pressured to practise and make decisions against their training, values and principles. The Policy is in contravention of the BASW Code of Ethics and the International Federation of Social Workers (IFSW) Statement of Ethical Principles:
 - 'Respect for human rights and a commitment to promoting social justice are at the core of social work practice throughout the world.'
 - 'Social workers are expected to bring to the attention of their employers, policy makers, politicians and the general public situations where resources are inadequate, and/or where distribution of resources, policies and practice are oppressive, discriminatory or otherwise unfair, harmful or illegal.'

3. Recommendations and actions

- a) The proposal should be withdrawn.
- b) BRIL requests BCC to publish all submissions in this consultation.
- c) BRIL and its members remain available to meet with BCC councillors and officers to discuss the Draft Policy or alternative proposals.
- d) There remains deep concern for BRIL on two grounds, even if the proposal is withdrawn. Firstly, the Council has declared it believes that a small number of people receiving care above the cheapest option is unfair on the majority. Disabled people with high needs have not chosen to have high needs; it is because of what has happened in life, but is characterised as unfairly getting more than others get, yet we are most likely to end up in institutions. This is discriminatory. Disabled people must not be pitted against each other in this way. Secondly, the EQIA makes clear that the proposal is based on practices that are already the way the Council works. The Council's usual practices are, therefore, in breach of the Care Act 2014 and fail to deliver cost-effectiveness and value for money. The result is failure to match public money to real need, leading to misuse and management of public money that we often witness as members.
- e) BRIL therefore believes there should be a fundamental review of the way the Council assesses needs and allocates resources. The review must ensure that resources are consistently matched to real, individual need as lived experience. The review should also be designed to satisfy the top rung of the TLAP co-production ladder.
- f) Only service users have the knowledge of need as lived experience upon which the new system should be built. Representatives of all user groups and carers should be involved.
- g) If the Council agrees to the review and adopts strategies that they label 'co-production', but which are clearly not, BRIL will refuse to engage and will advise other groups accordingly.
- h) 'Cost-effectiveness' and 'value for money' are misused terms. Privatisation has enabled profiteer companies to make large profits from councils' adult and children's social care spending – to the detriment of Disabled people reliant on homecare; unwaged family carers trying to make up for the drop in quality of homecare; low-paid/zero-hour contract homecare workers, mainly women, who get only a fraction of

the fees councils pay to care agencies; and children suffering in privatised 'care' placements.

- i) As regards to children's social care, BCC spends an enormous amount on children's placements outside the city, in some cases over £600,000 for one child – <https://thebristolcable.org/2021/09/more-children-in-care-place-outside-bristol-as-covid-fallout-bites/> – September 2021), which would be better spent supporting families with Disabled children/Disabled mothers and keeping families together. The open letter from disability organisations to BCC in November 2023 ([Bristol Open Letter Nov 2023.pdf](#)) highlighted that severely Disabled mothers could be separated from children under the Policy. It calls on BCC to seek increased central government funds instead.

PART II – LEGAL SUBMISSION PREPARED ON BEHALF OF BRIL

Introduction

1. In April 2023 it was reported that Bristol City Council ("BCC") had cut £4m from its £153m adult social care budget.¹ BCC published version 11 of its draft Fair and Affordable Care Policy ("the Draft Policy") on 21 June 2023, and the relevant Equality Impact Assessment was signed off on 30 June 2023.
2. This is one of two BRIL submissions in response to BCC's consultation on the Draft Policy and has been drafted by counsel instructed *pro bono*. In short, in response to questions 3-4 of the consultation survey, BRIL strongly disagrees with the Draft Policy and asks BCC to abandon efforts to adopt it.

The 'well-being principle' and meeting needs

3. BCC's overarching duty, under the [Care Act 2014](#), is to exercise its adult social care functions in relation to individuals to promote their well-being. Well-being is broadly defined to include personal dignity; control by the individual over day-to-day life (including care and support, and the way in which it is provided); participation in work, education, training or recreation; domestic, family and personal relationships; and suitability of living accommodation (s.1(1)-(2)). The [Care and Support Statutory Guidance](#) ("the Statutory Guidance") is clear that the Act "puts wellbeing at the heart of care and support" (paragraph 1.1).
4. BCC should begin from the assumption that an individual is best-placed to judge their own well-being, and should ensure decisions about the individual are made having regard to all their individual circumstances, and is not based on unjustified assumptions (s.1(3)).
5. Central to any adult social care assessment are the outcomes the individual wishes to achieve in their day-to-day life (s.9(4)). Indeed, the first paragraph of the Statutory Guidance states that, "The core purpose of adult care and support is to help people to achieve the outcomes that matter to them in their life" (paragraph 1.1).
6. These core features of the Care Act 2014 regime are part and parcel of a deliberate paradigm shift in adult social care. As explained in the Statutory

¹ BristolLive, "Disabled people 'terrified' new council policy will see them put in residential care", Tristan Cork, 5 April 2023.

Guidance, *“The Act... signifies a shift from existing duties on local authorities to provide particular services, to the concept of ‘meeting needs’... The concept of meeting needs recognises that everyone’s needs are different and personal to them. Local authorities must consider how to meet each person’s specific needs rather than simply considering what service they will fit into”* (paragraph 1.9-10).

7. Accordingly, under the Care Act 2014 there is a duty to meet an individual’s eligible needs for care and support (s.18) and a non-exhaustive list of examples of how needs might be met (s.8).
8. The Draft Policy states at paragraph 3.1 that BCC's duty is to *“try and meet all the needs that are agreed with the person”*. This is a misstatement of the law in two ways.
 - a. First, if BCC has made a determination under s.13 of the Care Act 2014 that an adult has eligible needs for care and support, then pursuant to s.18 of the Act, BCC *“must”* meet that person's needs if the person meets the criteria for ordinarily residence and if they are financially eligible (s.18(1)(a)-(c)). It is not a duty to *“try”*. A lack of resources is no defence to a failure to discharge a statutory duty.
 - b. Second, the Draft Policy is inaccurate with respect to a person in need of care and support who lacks capacity pursuant to s.3 of the Mental Capacity Act 2005 to make decisions about care. In these cases, a person may be able to express wishes and feelings, and these must be taken into consideration when making a best interests decision. However, the person need not, and may not be able to, *“agree”* that their needs be met in a particular way. BCC still has a duty to meet the person's needs.

Independent living

9. The Statutory Guidance explains (emphasis added):

“1.18 Although not mentioned specifically in the way that wellbeing is defined, the concept of ‘independent living’ is a core part of the wellbeing principle. Section 1 of the Care Act includes matters such as individual’s control of their day-to-day life, suitability of living accommodation, contribution to society - and crucially, requires local authorities to consider each person’s views, wishes, feelings and beliefs.

1.19 *The wellbeing principle is intended to cover the key components of independent living, as expressed in the UN Convention on the Rights of People with Disabilities (in particular, Article 19 of the Convention). **Supporting people to live as independently as possible, for as long as possible, is a guiding principle of the Care Act.** The language used in the Act is intended to be clearer, and focus on the outcomes that truly matter to people, rather than using the relatively abstract term 'independent living'.* [emphasis added]

10. The UN Convention on the Rights of Persons with Disabilities ("CRPD") is a treaty that is binding in international law. The UK took an active part in negotiating the CRPD, and the UK ratified it in 2010. Although it is not incorporated into English law and does not bind BCC directly, it is clear from the Statutory Guidance that local authorities must consider the CRPD when meeting a person's needs for care and support as it is part of the wellbeing principle. BCC therefore needs to take Article 19 of the CRPD into account when deciding whether to progress its Draft Policy. BRIL considers that the Draft Policy is incompatible with Article 19 of the CRPD and that it should therefore be abandoned.
11. The premise of Article 19(a) CRPD is that disabled people have equal rights to choose where and with whom to live and are "*not obliged to live in a particular living arrangement*". The central premise of the Draft Policy is that a disabled person may be forced to live in a care home or other residential setting, because funding that would enable them to continue to live in their own home has been cut. On the face of it this would be a violation of Article 19(a) of the CRPD.
12. Article 19(b) of the CRPD sets out that disabled people should have access to a range of community support services that meet their needs, and these services should be designed in such a way as "*to prevent isolation or segregation from the community*". Article 19 was drafted to combat the global phenomenon of institutionalisation of disabled people, and to spur efforts towards closing institutions. It was intended to ensure that each disabled person can choose where to live in the community and has access to the support and public services that enable them to make decisions about their life, friends, workplaces and transportation. In short, they should have opportunities to flourish on an equal basis with others. Again, the Draft Policy seeks to increase segregation from the community by placing people against their will in congregate care settings.

13. In 2012, Thomas Hammarberg, the then Commissioner for Human Rights of the Council of Europe, published a report on Article 19 of the CRPD. He explained the concept of independence as a human right:

"people with disabilities may require supports to live a full life. The notion of independence is based on a social model of disability which recognizes that people are not limited in their choices because of any inherent feature or condition of the person him or herself, but by the social and physical environment in which they live. In enabling environments, things are not done to a person, but rather people are supported, just like anyone else, to make independent and autonomous (and in some cases supported) decisions".²

14. The UN supports the social model of disability. The UN Committee on the Rights of Persons with Disabilities ("CRPD Committee") is the body that oversees the implementation of CRPD rights in the countries that have ratified the CRPD. It consists of 18 experts in disability, drawn from around the world. It provides evidence to governments about how to interpret and implement the Convention.

15. In 2017 the CRPD Committee published General Comment No. 5, which focuses on Article 19 of the CRPD. It explains that any form of institutionalisation is contrary to Article 19 of the CRPD. It clarifies that the size of a living arrangement is irrelevant, but rather what is important is if the place of living has *"defining elements of institutions or institutionalization"*. These defining elements include:

- a. obligatory sharing of assistants with others and no or limited influence over whom one has to accept assistance from;
- b. isolation and segregation from independent life within the community;
- c. lack of control over day-to-day decisions;
- d. lack of choice over whom to live with;
- e. rigidity of routine irrespective of personal will and preferences;
- f. identical activities in the same place for a group of persons under a certain authority;
- g. a paternalistic approach in service provision;
- h. supervision of living arrangements; and

² Thomas Hammarberg, "The right of people with disabilities to live independently and be included in the community", Council of Europe Publishing, Strasbourg, 2012.

- i. usually also a disproportion in the number of persons with disabilities living in the same environment.
16. If BCC were to adopt the Draft Policy, BCC would be placing itself into the invidious position of falling short of basic international human rights law. It would be a clear signal to disabled people in the Bristol area that their own Council is knowingly breaching their rights.

Meeting needs with limited resources

17. Chapter 10 of the Statutory Guidance is concerned with care and support planning. Paragraph 10.27 permits a local authority to take into consideration its own finances and budgetary position in determining how to meet a person's eligible needs. The paragraph says that a local authority "*should not set arbitrary upper limits on the costs it is willing to pay to meet needs through certain routes - doing so would not deliver an approach that is person-centred or compatible with public law principles*". It emphasises that the authority should take decisions on a case-by-case basis. While cost is a relevant factor in deciding between suitable alternative options for meeting needs, the Statutory Guidance says that this "*does not mean choosing the cheapest option; but the one which delivers **the outcomes desired** for the best value*" (emphasis added).
18. Elsewhere, the Statutory Guidance repeats that consideration of resources does not permit local authorities to elect the cheapest option. In relation to personal budgets, the Statutory Guidance states: "At all times, the wishes of the person must be considered and respected. For example, the personal budget should not assume that people are forced to accept specific care options, such as moving into care homes, against their will because this is perceived to be the cheapest option" (paragraph 11.7).
19. The Statutory Guidance maintains a focus on the outcomes an individual wishes to achieve in their day-to-day life, and on an individualised and person-centred approach to care-planning.
20. The core content of the Draft Policy at paragraphs 3.8 to 3.9 is fundamentally inconsistent with the structure and purpose of the Care Act 2014 and the Statutory Guidance. The Draft Policy states that where a care package at home would substantially exceed the affordability of residential care, BCC will move the person into residential care. Although BCC is careful to emphasise that this is not a blanket policy, the Draft Policy states that "*exceptions are likely to be rare*". Accordingly, the Draft

Policy establishes a strong presumption that a person living at home with a substantial care package will have their funding cut. The result is that if they want their care needs to be met (which in many cases means survival), they will have to live in a residential setting.

21. BCC's Draft Policy is wholly at odds with the Care Act 2014's focus on individualised care-planning and promotion of well-being, to which the Draft Policy pays only lip service. The Draft Policy takes a cookie-cutter approach and makes resource considerations determinative (with rare exceptions only). Care planning carried out in accordance with the Draft Policy will be unlawful.
22. Moreover, the Draft Policy states at paragraph 3.12 that if the person with eligible needs under the Care Act 2014 disagrees with BCC's decision to offer a care home placement, then BCC will offer the amount of that placement in a budget that the person can use to purchase home care. This appears to be an upper limit (i.e. the cost of a care home placement) that risks falling foul of the Statutory Guidance at paragraph 10.27.
23. Compliance with the Care Act 2014 regime is necessary for BCC to avoid breaching Article 8 of the European Convention on Human Rights ("ECHR"), the right to respect for private and family life, home and correspondence. Like well-being, "*private life*" is a broad concept, encompassing a person's physical and psychological integrity, the right to personal development and the notion of personal autonomy. The very essence of Article 8 of the ECHR is respect for human dignity and human freedom: [*McDonald v UK*](#)³ at paragraphs 46-7.
24. Where a public authority removes existing care or support provided to an individual, this will amount to an interference with their right to respect for their private life: see *McDonald v UK* at paragraphs 48-9. Such an interference will be a breach of Article 8 of the ECHR, unless it is justified as being "*in accordance with the law*" and "*necessary in a democratic society*" to achieve one of the aims specified in Article 8(2) of the ECHR. If adopted, BCC's Policy will result in decisions to reduce funding that are not "*in accordance with*" the Care Act 2014 for the reasons set out above. Accordingly, a removal of funding to enable a person to receive care and support in their own home will likely breach Article 8 of the ECHR, which is directly enforceable in courts in England.

³ (2015) 60 EHRR 1.

25. In 2017-18, the Equality and Human Rights Commission (“EHRC”) condemned similar policies adopted by 13 Clinical Commissioning Groups (“CCGs”) (now Integrated Care Boards). The EHRC sent legal letters challenging policies which in effect capped the amount of money available for NHS Continuing Healthcare, creating a risk that disabled people with high support needs would be moved from their homes into care homes against their wishes. The EHRC made clear that it was not sufficient for the policies to state that the cap would not apply in “*exceptional*” circumstances, because this did not “*allow the decision-maker properly to undertake... a full evaluation of the particular considerations in favour of provision... as required by [amongst other things] ... Article 8 of the ECHR, Article 19 of the UNCRPD, the [Public Sector Equality Duty under the Equality Act] ...*”. All 13 CCGs accepted the failings of their policies and agreed to revise them. The Chief Executive of the EHRC said at the time, “*Those who need help are individual human beings with individual circumstances which need to be taken into account.*”⁴
26. Similarly, in 2018, the Ombudsman found maladministration in relation to Hertfordshire County Council after that authority refused to increase a disabled adult’s care package because it would exceed the cost of a care home placement. The ombudsman held: “*While councils must always have due regard to the public purse, care provision should be based on assessed needs and where there is no evidence of appropriate assessment such remarks may be indicative of attempts to inappropriately ration limited resources.*”⁵
27. For all the above reasons, while BCC can take into account resources in care planning, the Draft Policy’s strong presumption in favour of care homes is inconsistent with BCC’s legal obligations under the Care Act 2014.
28. BRIL acknowledges the significant financial pressures experienced by BCC and other local authorities. Recent observations of the Supreme Court are relevant here. In the case of [*R \(Imam\) v Croydon London Borough Council*](#)⁶ a disabled person took their local authority (Croydon) to court for failing to secure her suitable accommodation when Croydon had a duty to do so under the Housing Act 1996. The local authority resisted the claim on the

⁴ <https://www.equalityhumanrights.com/nhs-u-turns-discriminatory-policies>

⁵ <https://webarchive.nationalarchives.gov.uk/ukgwa/20230504171644/https://www.lgo.org.uk/decisions/adult-care-services/safeguarding/16-017-084#point1>

⁶ [2023] UKSC 45; [2023] 3 WLR 1178.

basis of severe budgetary constraints. At paragraph 56, one of the Supreme Court Justices Lord Sales stated: *“A public authority which has limited resources available for use to meet its statutory duties and to fulfil functions which are merely discretionary is obliged to give priority to using them to meet its duties.”*

29. In the face of budgetary constraints, BCC is required to prioritise budgetary allocation so that it can meet its duties under the Care Act 2014.

Discrimination

30. BRIL considers that BCC has failed to comply with the Public Sector Equality Duty (PSED) under [s.149 Equality Act 2010](#) in relation to the Draft Policy. The PSED requires BCC to have due regard to the need, amongst other things, of eliminating discrimination and advancing equality of opportunity between disabled and non-disabled persons. This includes removing or minimising disadvantages faced by disabled persons.

31. Although BCC has carried out an Equality Impact Assessment (“EQIA”), it is deficient for the following reasons.

32. First, BCC states the Draft Policy was adapted from a similar policy implemented by Devon County Council, concluding on this basis that *“there is evidence of other local authorities successfully implementing an approach to ensure a more consistent and fair application of social work practice when considering how we meet the needs of individuals with eligible care and support needs”*. However, there is no publicly available evidence that Devon County Council has conducted a review of its Policy, so the basis upon which BCC asserts that Devon’s Policy has been *“successful”* is unclear. Further, BCC says that success is defined in terms of consistency and fairness. This cannot be the only metric to measure *“success”* and indeed should not be the main metric. *“Success”* must at a bare minimum include whether the relevant local authority has complied with its statutory duties, including under the Care Act 2014 to ensure that a person's eligible needs are met in accordance with the well-being principle.

33. Second, although the EQIA assumes that there may be exceptions to the approach of moving a person to a care home where this is cheaper than a package of care at home, the EQIA fails to acknowledge that the Draft Policy states in terms that any exception will be *“rare”*. The failure of the

EQIA to consider that exceptions will be “*rare*” means it does not accurately reflect the likely impact of the Draft Policy. BRIL is concerned that BCC will think it is complying with its policy if it offers one of the 162 at-risk individuals funding that is greater than a care home placement.

34. Third, the EQIA identifies that as of 17 May 2023, 162 persons were receiving a personal budget over the rate for residential care and thus would likely be impacted by the Draft Policy. However, the EQIA does not provide a demographic breakdown of this group. This is remarkable, given that BCC knows who each of those 162 people are and has completed needs assessments in relation to each of them. Demographic data is available to BCC without the risk of identifying individuals.
35. Further, it is unsafe to assume that the demographics of this cohort will map onto the demographics of all individuals receiving care and support at home, which is the basis upon which the EQIA proceeds. For example, BRIL considers it highly likely that individuals with significant physical impairments (as opposed to those who are frail) who use a team of Personal Assistants 24/7, and those with learning disabilities and/or who are autistic who require complex and specialist support, will be overrepresented in the cohort of individuals with expensive home care packages. It also seems plausible the cohort will include a higher proportion of younger individuals, on the basis that older individuals with high levels of need are more likely to have moved into residential care already.
36. BRIL is acutely concerned that autistic persons and/or those with learning disabilities who are living with support at home will be forced to move out of their homes and away from family. They will be denied the carers that they trust, who are skilled at meeting their individual needs, and placed in a care home where they know none of the residents or staff, and where their autonomy and independence will be severely curtailed. For many people, this is an absolutely terrifying prospect. There is a very real risk that a person in these circumstances forced into residential care will display behaviours that challenge. In turn, this could lead to detention under the Mental Health Act 1983 in inappropriate mental health units. While an admission to hospital would of course save BCC money (as the NHS pays for an inpatient stay), BCC should be taking steps to prevent admissions under the Mental Health Act 1983, rather than taking steps that make such admissions more likely.

37. The lack of analysis of the actual cohort affected by the Draft Policy prevents any proper understanding of its likely equality impacts. BCC has denied civil society the opportunity to respond to the consultation using the data that BCC holds but has not published.

Access to the courts

38. BRIL anticipates that none of the 162 people who the Council has identified with home care packages costing more than a care home placement will want to move into a care home. There is likely to be a dispute between the Council and each of the 162 persons who do not agree to move into a care home.

39. BRIL asks BCC to confirm that it will inform each of these at-risk persons about local charities such as Bristol Law Centre, and law firms that could provide legal advice and representation, to challenge the decision made to cut home care funding which puts them at risk of institutionalisation.

40. BRIL anticipates that many of the people at risk may need an Independent Advocate to support them with assessments, reviews and challenging decisions. Some of the people being affected by the Policy will have learning disabilities, other cognitive impairments and/or are autistic. Some may lack capacity to make decisions about their residence and/or care, pursuant to the Mental Capacity Act 2005. It is important that the Council allocates an Independent Mental Capacity Advocate ("IMCA") to each of these people, pursuant to BCC's duty under s.39 of the Mental Capacity Act 2005. BRIL asks that BCC confirms this will happen if the Draft Policy is passed. BRIL is aware that local advocacy providers are under pressure and are concerned that they may not have spare capacity to take on further IMCA clients, so BRIL asks BCC to explain how each of these people will have access to IMCAs and Independent Care Act Advocates (ICAAs).

41. BRIL would like BCC to clarify where the 162 people would go. Which care homes in Bristol that specialise in meeting the needs of working age disabled adults can accommodate 162 people between them?

42. BRIL also asks BCC to confirm in respect of each of the persons affected who lack capacity to make decisions about their residence and/or care, and that BCC will make an application to the Court of Protection to invite the court to decide where it is in the person's best interests to live and receive care. Again, BCC should ensure that each affected person has access to a solicitor specialising in welfare applications in the Court of

Protection. BRIL asks BCC to confirm that it will not move any person who lacks capacity to make a decision about residence and/or care without first making an application to the Court of Protection.

Conclusion

43. BRIL strongly disagrees with the draft Fair and Affordable Care Policy. The presumption in favour of moving disabled people to care homes rides roughshod over BCC's obligations under the Care Act 2014 including the obligation to promote well-being and to support people to live as independently as possible, for as long as possible, and Article 8 ECHR and Article 19 CRPD. Moreover, BCC has not complied with the PSED in preparation of the Draft Policy.
44. BRIL asks BCC not to adopt the Draft Policy as it is fundamentally flawed, likely unlawful, and would cause misery to many disabled people and their family and friends in Bristol. BRIL invites BCC to confirm its decision as soon as possible, given that many disabled people and their friends and families have suffered significant worry and distress since BCC published the Draft Policy.

OLIVER LEWIS
ALICE IRVING
Doughty Street Chambers

29 January 2024