

The regulation of social care:
Improving the treatment of
workers through regulatory
law about care provision.

Professor LJB Hayes, Kent Law School



Prior research undertaken

- Equal pay. Problem of identifying legal harm of sex-based low pay in care work
- Electronic monitoring of working time. Homecare / minimum wage law.
- 'Institutionalized Humiliation' affect of inadequacy of employment protection on working lives in homecare. *Stories of Care: A Labour of Law. Gender and class at work*
- Sectoral collective bargaining in social care
- Labour exploitation in low waged work in Wales.
- Professionalisation at work in social care, Engl., Scot. Wales.
- Framing of 'care worker offence' of ill-treatment and willful neglect (Crim. J & Courts Act 2015).
- Conditions of work and conditions of gender-based violence in highly gendered work (ILO C.190).
- The physicality of worthlessness, harms of exclusion from labour protection (*Mencap v Tomlinson-Blake*).
- Devolution and the potential for regulatory innovation in employment protection.

The legal and social life of care standards regulation

- Funded by Wellcome.
- Socio-legal research – ie law is more than 'text', law is created by action, law made 'real' by human actors.
- Proof of concept: Care workers' employment is a constituent output of the regulation of care.
- Guiding question 1: Does legal regulation shape job content and terms and conditions of employment sector-specific ways?
- Guiding question 2: How are social care standards regulations interpreted in practice by inspectors, employers, workers?



Why does this matter? – what's the point? – how might this make a contribution to change?

- Good quality care depends on ability to attract/retain most suitable people.
- Good terms and conditions are hard to achieve – funding pressure, increased demand
- Improvements: cost efficient + secure meaningful improvement in care quality/effectiveness.
- c/f high 'job satisfaction' (work) 'unattractive jobs' (employment).
- Matters of employment in social care need sector-specific attention ... but where to start?

A pilot study

- Innovative
- Small scale and adaptive, (began in Jan 2020 ... covid!)
- Purpose: to begin to investigate the capacity for care standards regulation to influence the quality of care workers' jobs
- Central contributions
R.As, Dr Alison Tarrant
and Dr Hannah Walters.

Thanks to the organisations and people who worked with us:

Social Care Wales,
Care Inspectorate Wales,
Scottish Social Services Council,
Scottish Care Inspectorate,
Care Quality Commission,
UK Homecare Association,
Care England,
UNISON and UNISON Scotland,
UNISON North West,
GMB and GMB Wales,
Care Workers' for Change,
Care Workers' Charity.

Poor terms and conditions of work in social care means

- Increased health and safety risks.
- High labour turnover (30-40%).
- Huge vacancies.
- Chronic lack of workforce training.
- Circa 2 million workers UK, 85% women, high proportion of BAME workers (50% in London)
- Reliance on minimum wage rights that are hard to enforce
- Erosion of Minimum Wage entitlements (*Mencap v Tomlinson-Blake* [2021] UKSC 8)
- Bore the brunt of the 1st and 2nd wave tragedy of covid in the UK

Why connect the regulation of care provision to the regulation of care workers' employment?

- Care safety/quality and the quality of care workers' jobs are empirically inseparable.
- Formally and in law, matters are organised completely separately.
- Political and industry consensus care workers' jobs / terms of work, not fit for purpose.
- Widespread frustration at inadequate care provision, fears about future.
- Devolution = innovation / diversity of approach / regulatory infrastructure re: care provision
- Policy concern for job quality in social care – aka 'recognition' 'badges' 'valuing' 'professionalisation'.

Data drawn from:

- Legal analysis and review of policy / literature
- Analysis of online survey about care safety with UNISON Northwest (England): 2,600+ care worker respondents, March-April 2020.
- Analysis of online survey about regulation, 343 care worker respondents, August-Oct 2020.
- Analysis of online survey about regulation, 27 registered managers of residential homes, July-August 2020.
- 27 semi-structured interviews:
 - Care standards inspectors (7).
 - Registered managers of care homes with large scale provider operating throughout UK (5).
 - Care workers (15).

Key findings

- Regulatory law governing care provision contains job quality indicators: 'sector specific employment standards'.
- Our data adds to evidence of the inseparability of care quality / safety and job quality.
- Data points to job quality indicators overlooked in practice by inspectors / managers.
- Suggested constituent groups had different 'relationships' with regulations (situatedness, yet all actors within a socio-legal system).
- Better understanding of potential of regulatory law could help employers' and workers' organisations improve terms and conditions through a lens of care quality improvement.

Regulation of Care Provision: How does it relate to terms and conditions of employment?

Staffing levels

Health and Safety

Fit & Proper Persons (selection/suitability of workers)

Training and supervision

Insecurity and low pay

Safeguarding

Sufficient Staffing levels = Manageable workload

Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

A registered service provider is required at regulation 18 (staffing levels) to ensure 'sufficient numbers of suitably qualified, competent, skilled and experienced persons [are] deployed in order to meet all the requirements of [the fundamental care standards].' This means that staffing levels and workload issues underpin compliance with all fourteen of the fundamental care standards.

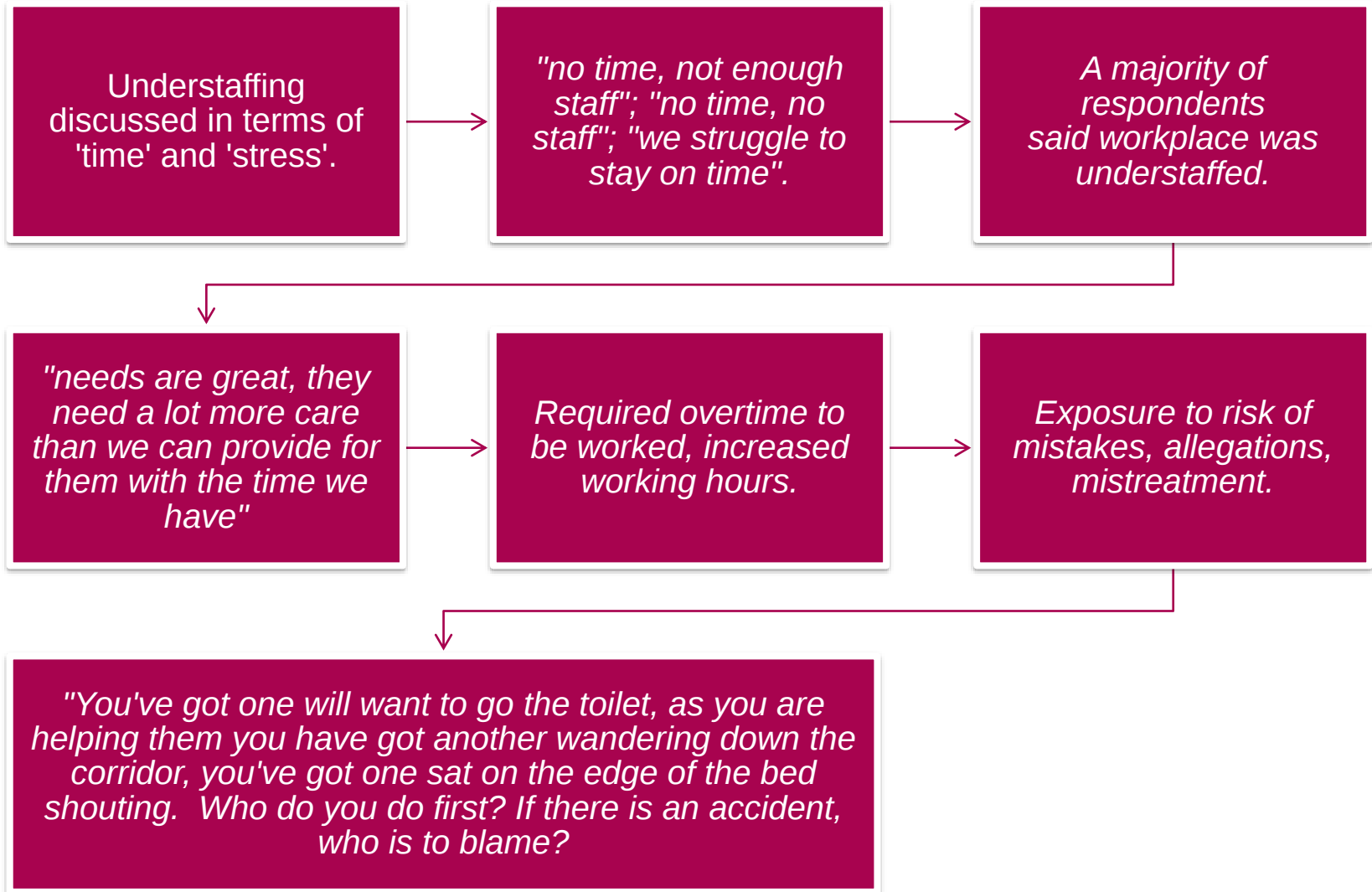
Regulated Services (Service Providers and Responsible Individuals) (Wales) 2017.

Regulation 34 (staffing) requires that service providers 'must ensure that at all times a sufficient number of suitably qualified, trained, skilled, competent and experienced staff are deployed to work at the service'.

Setting staffing issue in service delivery / policy context

- In England, 122,000 vacancies prior to pandemic (10%)
- Personalisation: individual, personal preference, dignity, autonomy choice
- Dementia Care: know the person, the 'human being' approach. Continuity, relationships and stability are key.
- Aging population. Skills for Care, England 650,000 – 950,000 extra jobs needed in social care within ten to fifteen years.

Relationship of care workers to requirements sufficient staffing



Relationship of registered managers to sufficient staffing requirements

- Mechanised, based on using specific calculation tools made available by corporations
- To calculate 'dependency level' of collective and map against staff mix (care workers, seniors, nurses)
- Discussed sufficient staffing requirements in terms of: "safety", "mitigating risk", calculating "exactly what is a safe staffing level", "ensuring basic needs are met, avoiding complaints, and preventing falls or choking."
- Business awareness: "ensuring business is sustainable", "fall below the standard carries serious implications, embargoes, large scale investigations, reputational damage in the marketplace and impacts staff morale".

Relationship of registered managers to sufficient staffing requirements

- Cf Some resistance to the staffing calculator approach: 'is not about the numbers game' it is about 'the emotions and dynamics of the staff and the stress and the pressure for the relatives'.
- 67% of survey respondents said that they had enough staff on duty every day of the pandemic. Only 14% they needed to inform head office / the relevant inspectorate about low staffing levels.
- Cf what makes a good care worker? - 'will find time', 'will happily give more time', 'focused on getting things done'

Relationship of inspectors to sufficient staffing requirements

- Inspectors found compliance difficult to discern.
- *"if staff were too busy or short for enrichment activities, it could be made up another day".*
- *"difficult to evidence, regulations don't stipulate set numbers"*
- *"people are under a misapprehension that we can tell if it's this many people and that many staff, and that we can tell providers how many staff they should have – and that's not the case at all".*
- *"It's a very, very grey area and difficult to evidence breaches or enforcement."*
- *"Most providers will try, but a big problem is keeping staff, if there is high turnover will make up with agency staff."*

How does requirement for suitable staffing create a sector specific employment standard?

Staffing levels are fundamental to individual working conditions. Regulatory standards can be seen to require that the workload of care workers is manageable.

Regulations in England, Scotland and Wales impose a duty on care providers to ensure sufficient staffing. The corollary, regulations give rise to a reasonable expectation that care workers will be employed under conditions in which staffing is sufficient.

- Protection of workers from exposure to risk
- Mitigate sources of stress
- Enable the building of relationships, provision of social contact and companionship that are key to job satisfaction / retention
- Situates issues of financial instability and low pay within a defined regulatory context focused on care safety.

Health and Safety = A safe working environment

Health and Social Care Act 2008 (as amended by Health and Social Care (Safety and Quality) Act 2015).

*s.1(1) The Secretary of State must by regulations impose requirements that the Secretary of State considers necessary to secure that services provided in the carrying on of regulated activities **cause no avoidable harm to the persons for whom the services are provided.***

*s.1(3) Cause means **cause or contribute** to, whether **directly or indirectly.***

Avoidable harm means harm is avoidable, in relation to a service, unless the person providing the service **cannot reasonably avoid it** (whether because it is an inherent part or risk of a regulated activity or for another reason).

Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

*Regulation 12 provides for 'safe care and treatment'. It states that care and treatment **must** be provided in a safe way and that providers **must demonstrate** that they have done **everything reasonably practicable** to provide safe care and treatment (my emphasis).*

The Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011)

Regulation 15 requires service providers must ensure that 'at all times suitably qualified and competent persons are working in the care service in such numbers as are appropriate for the health, welfare and safety of service users'. The Regulation therefore contains an emphasis on both the numbers of staff and their competence.

Health and Safety. Data from Care Workers

First report, acquired by House of Commons Library.

Working with UNISON (largest UK trade union). Looking at providers as *employers* during first wave pandemic.

Gathered data from over 2,600 care workers employed in over 1,000 different care settings England and Scotland (over 90% women).

Key issues: Personal Protective Equipment, Pay problems, Health and Safety Concerns.

- ' I feel pressured to attend work because of income worries'
- 'Staff are at work while ill as they fear losing pay, putting other staff and clients in danger'.
- 'I had to take my annual leave for self-isolating because I could not have survived on statutory sick pay'
- We have no policies in place. [There are] more people in the building than normal. So we cant follow the social distancing advice. Been told we still have to come to work even if family members are showing symptoms. We have to come even if we have colds or coughs. Also, the people in the high risk categories that have been told not to work, have to work. [These are] people with asthma and COPD.
- Occupational sick pay is central to the ability for care workers and providers to provide safe care.

A large majority of respondents say too little is being done by employers to keep staff safe from the risks Covid (69% of learning disability support workers, 60% of home care workers, 52% of residential care workers).

A large majority of respondents say too little is being done by employers to keep service users safe (58% of learning disability support workers, 56% of homecare workers, 43% of residential care workers).

8 in 10 care workers reported that they would not be paid their wages as normal if they had to self-isolate. (79% of homecare workers, 83% of residential care workers, and 67% of learning disability support workers). Indeed, 61% of homecare workers, 72% of residential care workers and 57% of learning disability, notwithstanding their high occupational exposure to the risk of infection.

Government guidance assumes PPE availability, but care workers state PPE is often unavailable or unsuitable. Evidence from care workers shows how lack of PPE is a safeguarding issue and there are also reports that basic hygiene cannot always be followed, highlighting concerns about availability of soap and hand sanitiser.

Official guidance has said no PPE is needed in certain situations, but evidence from care workers suggests this has created confusion and they believe lack of PPE is putting them, and others, at risk. Official guidance is not addressing the specifics of potential virus transmission in residential and homecare settings.

Care workers who are ill with COVID-19 are not all self-isolating. It appears that poverty, and fear of poverty, may be exacerbating the risk of transmission of covid in social care circles.

Care workers believe that lack of attention to minimising risk of infection in care and support settings has directly contributed to outbreaks of covid in social care-settings

Recommendations

- Put care workers into problem-solving roles, expertise in deployment of resources / PPE.
- Government action to ensure care workers receive normal wages when self-isolating.
- Delivered: Infection Control Fund – to ensure no care worker was penalised for taking infection control precautions, via local authority.

Recognition – but not as a matter of employment

- Test and trace support payment (England); Self-isolation Support Scheme (Wales); Self-isolation Support Grant (Scotland). All via local authorities.
- Social Care Staff Support Fund (Scotland)
- The Health Secretary said: “While some employers offer employment contracts closer to the Scottish Government’s fair work principles, it is clear that others do not. In recognition of the current exceptional circumstances ... my focus now is on fairness for the care workers affected.
- Covid Statutory Sick Pay Enhancement Scheme (Wales)
"removes the financial disadvantage to social care workers of staying away from work ... to protect our most vulnerable"

Regulation of Care Provision: Sector-specific employment standards for care workers.

1. Staffing levels = **Manageable workload**
2. Health and safety = **A safe work environment**
3. Insecurity and low pay = **Pay that is fair and adequate**
4. Training/supervision = **Continuous training & supervision**
5. Fit and proper persons / safeguarding = **Recognition of professional status**

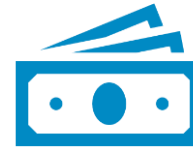
Sector-specific employment standards for care workers, these are key for care safety and care quality because they have a basis in law, there is an infrastructure, they attend directly and specifically to the particular needs of the sector because conditions of employment are conditions of care.



**Manageable
workload**



**A safe work
environment**



**Pay that is fair and
adequate**



**Continuous
training
& supervision**



**Recognition of
professional status**

Employment standards in a devolved context is an ongoing and developing agenda

- Fair work Wales: Social Care Fair Work Forum
- Having arrangements in place for employee voice and collective representation is of itself a substantive characteristic of fair work. It also provides a process which helps ensure fairness in the other areas.
- Tripartite. Social Care Fair Work Forum is the first of its kind and could provide a unique model of collective bargaining for the independent sector. Its early priority, to determine how this model of collective bargaining could operate in conjunction with existing bargaining arrangements and how it will make, implement and communicate its recommendations.
- Independent Review of Adult Social Care in Scotland (pandemic) incorporated recommendations of Fair Work Convention Inquiry into Social Care 2019. National Care Service Scotland.

Health and Care (Staffing) Scotland Act 2019

s.1) The guiding principles for health and care staffing are—

(a) that the main purposes of staffing for health care and care services are—

(i) to provide safe and high-quality services, and

(ii) to ensure the best health care or (as the case may be) care outcomes for service users,

(b) that, in so far as consistent with those main purposes, staffing for health care and care services is to be arranged while—

(i) improving standards and outcomes for service users,

(ii) taking account of the particular needs, abilities, characteristics and circumstances of different service users,

(iii) respecting the dignity and rights of service users,

(iv) taking account of the views of staff and service users,

(v) ensuring the wellbeing of staff,

(vi) being open with staff and service users about decisions on staffing,

(vii) allocating staff efficiently and effectively, and

(viii) promoting multi-disciplinary services as appropriate.

EMPLOYMENT RIGHTS GREEN PAPER

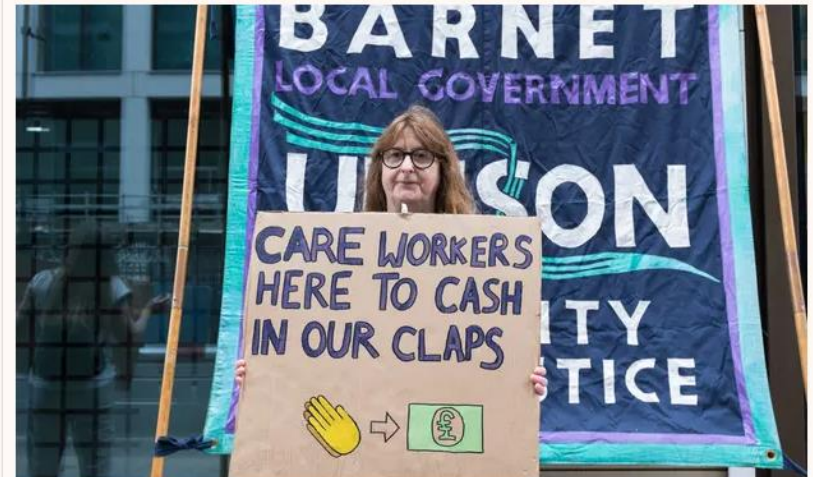
A new deal for working people

We can't fix the social care sector without fixing the way we treat its workers

Angela Rayner

Before I was elected to parliament I was a home care worker. I know how broken the system is

- Angela Rayner is Labour deputy leader and shadow secretary for the future of work



📍 Campaigners and social care workers demonstrate outside the Department of Health and Social Care in London, 4 September. Photograph: Wiktor Szymanowicz/NurPhoto/Rex/Shutterstock

The scourge of poverty wages and insecure work doesn't just blight the lives of millions of working people, it holds back our economy too. Nowhere is this more clearly the case than in our social care sector.

I know at first hand the terrible impact that our fragmented social care sector

Sector specific employment standards : a springboard?

- Seeing regulation as cultural and multi-layered, with many differently situated actors within the regulatory system, including workers.
- How can existing regulations be used as tools within the wider system to promote safe, high-quality care by promoting good quality jobs for care workers?
- Sectoral collective bargaining – sector wide agreements – social care centralised
- Existing regulatory infrastructure, asking questions, looking for evidence, re-framing the problems of poor quality employment
- Wider agenda of public health value of employment protection