

Care Bill

House of Lord Second Reading – 21 May 2013

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law

Key points

- This briefing has been drafted by the Society's Mental Health and Disability Committee. The Committee is made up of senior specialist lawyers and members from other professions who practise in the fields of disability discrimination, mental health, mental capacity and community care, representing individuals, organisations, commissioners and providers of health and social care.
- The Society welcomes the proposed reform of adult social care law. The Society broadly supported the Law Commission's recommendations and commented on the draft Care and Support Bill. The Society wishes to acknowledge the thorough and helpful assessment made by the Joint Committee within a restricted timeframe. This legislation will have far reaching consequences for many, including the most vulnerable in our society. The Society agrees with the Joint Committee that:
 - The implications of these reforms require thorough financial assessment in order that local authorities are able to deliver Parliament's intentions.
 - A major national campaign to raise awareness of the new legal framework and associated rights for individuals will be crucial to proper implementation.
 - In order to avoid litigation, a tailored dispute resolution system and complaints procedure providing proper redress should be established.
 - Regulations and guidance will be central to how this Bill will be implemented and these will require full consultation.

Clause 1 – Promoting Individual Well-Being

1. The Society supports the use of the well-being principle but reiterates its view that the current definition omits essential principles. Wellbeing must include not only physical care but also quality of life, allowing individuals to participate in society and preserve their autonomy. Therefore, the failure to reference the right to independent living as central to the provision prevents the necessary approach to the individual and their specific needs.

Clause 4 – Providing information and advice

2. The Society maintains that information must be comprehensive and accessible and that this is no substitute for an *independent* system of advocacy and advice for service users to navigate what will be a complex system. Information must be provided in a range of accessible formats and not primarily located on the internet (e.g. the suggested 'NHS Choices' website), which is only accessible by a limited range of client groups. Whilst an

individual's need for information and advice might be met in a number of ways these need to be reasonably prescribed in order to ensure needs are in fact met. This prescription may be best placed in statutory guidance and regulations which must be protective of service users, for example FSA regulated financial advice.

3. The society notes the provision in clause 2(3) that Local Authorities may be permitted to make a charge for this service and this will be set out in Regulations. Whilst the Society acknowledges that a charge may be appropriate in certain cases it will be important that disabled or vulnerable groups are not disadvantaged by a charging provision that acts as a barrier to seeking information and advice.

Clause 5 – Promoting diversity and quality in the provision of services

4. A statutory obligation to 'ensure' a 'variety' of high quality services will be hard for authorities to achieve given the background of funding cuts. This is particularly important as the assessment of what is, or is not, 'high quality' will be subject to interpretation. It is worth reiterating the Joint Committee's suggestion that the market shaping duty be explicitly linked to both essential standards of quality and safety and to NICE quality standards.
5. The Society suggests that a requirement of 'facilitating' rather than 'ensuring' choice would be more appropriate and realistic. The Bill should, therefore, require local authorities 'to promote the efficient and effective operation in its area of a market in services for meeting care and support needs', with a view to facilitating the following, for any person who wishes to access services in the market:
 - (a) choice between a variety of providers;
 - (b) choice between a variety of high quality services;
 - (c) access to sufficient information to make an informed decision about how to meet the needs in question.'

Clause 6 – Co-operating generally

6. This re-drafted clause is to be commended save for the failure to acknowledge that 'partners that have been commissioned by either the NHS Commissioning Board or by a Clinical Commissioning Group' will at some stage include private or third sector service providers who should be included in the list.
7. The clause should also be widened to include a request for cooperation by the patient or the patient's carer. Otherwise, if the relevant local authority does not make the request, the duty would be obsolete. Anecdotal evidence from our members indicates that this is currently the situation.

Clause 7 – Co-operating in specific cases

8. The provision of a wide power enabling a relevant partner or local authority to relinquish responsibility for co-operation is highly disconcerting. It is likely that an organisation would, or could, argue that co-operation would have an adverse effect on the exercise of its functions on resource grounds which would be unacceptable. This provision should be omitted.

Clause 8 – How to meet needs

9. The Society remains concerned that ‘care and support’ is still undefined. An element of prescription, whilst not exhaustive, is essential to aid clear interpretation and avoid costly and burdensome litigation. A mechanism should also be included within the Bill to enable amendment by secondary legislation.

Clause 9 – Assessment of an adult’s needs for care and support

10. The single duty to assess across all areas of an adult’s need is welcome, but the Society maintains that it is crucial that the eligibility criteria recognise the current position that those whose needs fall into the moderate band are provided with and are entitled to support.
11. This clause remains silent on the issue of the expertise of those who may carry out assessments. Regulations which specify the circumstances in which persons with expertise are required to carry out the assessment are extremely important in ensuring that appropriate quality services are delivered. The Society also notes the absence of a national assessment tool or scale to compliment the setting of national minimum eligibility criteria, and expresses a hope that such a tool or scale is now in development in order to ensure a smooth and nationally consistent transition to the new framework.

Clause 10 – Assessment of a carer’s needs for support

12. The Bill continues to define carers as only adult carers. This is a significant omission which must be addressed by a duty that is not dependent on the age of the carer. The Society does not accept that child carers’ needs cannot be met under this Bill and is concerned that the matter is left in limbo with the assertion simply that this Bill is not the correct place to set out duties owed to child carers.
13. Regulations on the assessment of carers will also need to address the suitability of joint or separate assessments for carers and those being cared for. In order to prevent confusion and possible disputes as to charges for services the default position should be that of separate assessments for the carer and person cared for.

Clause 13 – The eligibility criteria

14. The Society welcomes the indication on the face of the Bill that regulations will set the national minimum ‘eligibility’ threshold. However, we are concerned that the use of the term ‘eligibility’ will lead to ineligible but justifiable needs being disregarded which is not the purpose of the Bill. Regulations must separate ‘needs’ from other issues such as the local authority’s financial resources and must create a national criteria framework supported by guidance and assessment tools to ensure nationwide consistency in decision making and the provision of services
15. As it stands this clause does not protect those individuals who currently enjoy this important protection under s.21(1)(a) National Assistance Act 1948. The Law Commission recommended that this duty was retained on the face of primary legislation as a residual “long stop legal duty”. The Government’s explanation that this duty is not set out on the face of the Bill because of the difficulty in drafting an appropriate provision is not tenable. The

Society would request this is reviewed and an appropriate provision included in the Bill. This is a serious matter and not one which should be left to Regulation as the Government intends.

Clause 20 – Duty to meet carer’s needs for care and support

16. This clause is wholly welcomed and supported.

Clause 21 –Exceptions for persons subject to immigration control

17. The impact of clause 20 on the division of responsibility between local authorities and the Home Office will turn on the regulations made pursuant to it. Providing that those regulations accurately replicate the existing regime, there are unlikely to be problems. We do not think it appropriate for care and support services provided by local authorities to be considered an immigration issue as opposed to a question of need. The immigration status of the person should be separated from the local authority’s obligation to provide care and support, leaving the question of enforcement of immigration control to the Home Office and not local government.

Clause 22 – Exception for provision of health services

18. The Society notes, and supports, the Government’s intended aim of clarifying the boundary between health and social care. This boundary is an area of increasing dispute both between statutory bodies and between individuals and the State. It is a matter of concern that the key proposals are to be left to Regulation and that they will largely maintain the status quo. Solicitors’ experience is that the National Framework for Continuing Healthcare is not working effectively. This is evidenced by the significant number of claims for CHC retrospective review which have been received in response to recent Government deadlines which reflect the lack of clarity and consensus as to where the boundary lies between free NHS services and social care means-tested services which the individual can expect from the State. Defining this boundary more clearly in primary legislation would benefit from further consideration.

19. It follows that there is likely to be an increase in disputes. The current cost of dispute resolution is not quantified but the Society believes that a clear national dispute resolution procedure for disputes between organisations and between individuals and organisations should be promulgated as recommended by the Law Commission.

Clause 25 – Care and support plan

20. The Society welcomes the duty to provide written reasons for decisions on care and support provision as well as the concentration on individual needs within support plans

21. However, there is no recognition in Clause 24 of those who may rely on others for their best interest decision making. The Bill should specifically state that where the adult lacks capacity, information be provided to an individual authorised to act in the adult’s best interests.

Clause 30 - Cases where adult expresses preference for particular accommodation

22. The Society supports the extension of the right to choose accommodation and the clarification that the 'additional' costs will include the cost of arranging the provision of the requested accommodation. However, it remains a concern that top-ups should only be paid where a genuine choice has been made to use more expensive accommodation as there is a real risk of local authorities asking for top-ups to fund the gap between their standard charging rates and the market cost. The practical ability of local authorities to work out administrative costs for arranging new accommodation is also questionable.
23. Further clarity is also required for those who lack third party involvement in order to pay top-up charges. There ought to be specific acknowledgment that individuals such as deputies be able to pay such charges on behalf of clients who lack capacity.
24. More flexibility as to the 'type' of accommodation requested by a service user is also necessary. For example, if the local authority stated that the needs could be met in a residential care home, then the service user presumably could not choose a supported living placement. This should be clarified to ensure a reasonable level of flexibility in meeting an individual's needs or wishes.

Clauses 31 & 32 – Direct payments

25. The clarification that direct payments may be spent in any way that facilitates achieving the agreed outcomes as well as the clarification of who may receive direct payments on behalf of service users who lack capacity is welcome.
26. The Society notes that the Bill and any associated discussion of relevant regulations remains silent on how the regulations will manage the risk of financial abuse in the case of direct payments. The suggested direct payment system requires a mechanism for monitoring and scrutiny. Guidance is required as to how councils can stop direct payments where there is no alternative suitable person to manage the direct payment or when the existing suitable person has been removed because of financial abuse.

Clause 55 – Assessment of child's need for care and support

27. Whilst this clause will ensure smoother transition to adult care as well as protecting young people who will continue to have needs, the categories of individual who may request an assessment should be extended. Important groups who should be afforded the opportunity to request an assessment are staff in Children and Young Persons services or advocates.
28. It is crucial that the Bill should help achieve timely decision making on behalf of young people transitioning to adult services. This is especially so where the young person lacks capacity; failure to assess such young persons may well lead to a risk of harm. There should also be a mechanism for allowing assessment where the young person has capacity but refuses to consent to the assessment as originally recommended by the Law Commission.

Clause 67 – Discharge of hospital patients with care and support needs

29. This is a missed opportunity to include discharges from mental health and community settings where there are considerable delays in discharge. The failure to provide parity with the acute sector denies this group of patients from being prioritised for timely discharge and is in our view discriminatory.

Clause 68- Aftercare under the Mental Health Act 1983

30. The Society notes the changes proposed and that there will be a facility for "top-up" to enable the exercise of choice of accommodation. Whilst this is to be supported, any attempt to erode the current provision of free s.117 aftercare by taking the accommodation element out of the provision would be a matter for concern. There is a danger this may arise, and therefore assurances may need to be sought to the effect that there is no intention by government to erode the current free standing duty to provide free aftercare under s.117 to some of the most vulnerable individuals in society. See also comments on clause 30.

Clause 71- Guidance

31. The Society does not agree that this legislation would not benefit from a statutory Code of Practice and would request this is re-considered. The Codes to the MHA 1983 and the MCA 2005 have shown that they are very effective in supporting primary and secondary legislation. Given the complexity of some elements of the system proposed in the Bill the Society's view is that a statutory Code would be of benefit to all.

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