



The Law Society

Draft Care and Support Bill

**Response from the
Law Society of England and Wales
October 2012**



Introduction

The Law Society welcomes the opportunity to respond to the Draft Care and Support Bill. This response has been prepared by the Society's Mental Health and Disability Committee. The Committee is made up of senior and specialist lawyers who practise in the fields of disability discrimination, mental health, mental capacity and community care, both for claimants and respondents, and members from other professions.

This Bill is a complex undertaking. It is a significant step towards simplifying what is currently both complex and largely inaccessible legislation to all but specialists. The clear priority of legislative reform must be to benefit those in need of care and those who support them in navigating the social care system.

The Bill is set against a background of far-reaching cuts in social care funding, and surrounding pressures upon public finances.

Services are being squeezed by the pressures of an ageing population and will be further squeezed in the future with the imminent 28% reduction in local council budgets by 2014/15. The Government currently spends £14.5 billion per year on adult social care, 2% of public expenditure¹, however, it is estimated that social care services are under-resourced by £2bn².

We welcome the vast majority of provisions set out by the Bill, but are concerned that local authorities will not be able to discharge their statutory duties due to resourcing difficulties. Additional funding for local authorities would allow them to properly fulfill their duties under the Bill. We support improved cooperation between local authorities and partner authorities such as trusts and CCGs. Cooperation could be improved by relaxing restrictions on shared funding, which in turn could enhance service delivery to vulnerable adults and adults with disabilities.

To adapt to funding restrictions local authorities will continue to raise the threshold at which vulnerable people become eligible for support, leaving many people with 'moderate' needs unsupported. In 2005, 50% of local authorities set their eligibility criteria at 'moderate' needs. By 2012, 84% had set their eligibility criteria at the higher level of 'substantial' needs.³ When 'moderate' needs include those who are unable to perform domestic, personal hygiene, social, educational or employment activities, this presents a problem for them, their families and for society.

We therefore support national eligibility criteria and thresholds including the implementation of the Law Commission's recommendation that there should be a single duty to assess across all areas of need for adults (clause 9). These thresholds must be sufficiently high and we call upon the government to set thresholds for care and support at the equivalent of 'The Fair Access to Care and Services' definition of 'moderate'.

¹ Using figures from HM Treasury (2011) Public Expenditure Statistical Analyses (PESA): http://www.hmtreasury.gov.uk/pespub_pesa11_natstats.htm

² Suggested by the Dilnot Commission: <http://www.dilnotcommission.dh.gov.uk/our-report/>

³ Figure 3, page 8: Care in Crisis, Age UK (2012)

Clause 1: The wellbeing principle is helpful and is a good basis for the provision of services. However, the current definition omits certain principles which we consider are essential to the development of support for people in future years. Wellbeing must include not only physical care but also quality of life. This should include allowing individuals to participate in society and preserving autonomy.

We are concerned that the definition does not include reference to dignity, equality, and the right to independent living. These principles are central to the quality of people's lives and support the principle of care in the least restrictive setting, allowing people to live independently for as long as possible.

Clause 1(3) (e) is likely to give rise to a conflict of priority between the person in need and their carers, and to dilute the duty to the person in need. We do not agree that a balance needs to be struck between the wellbeing of a person in need and their carers and are concerned to see this on the face of the Bill.

The Bill should reference Article 19 of the UN Convention of Rights for Persons with Disabilities.

Clause 2: We support enhanced provision of information both locally and nationally. It is crucial that service users, professionals and those guiding others through the system are provided with comprehensive, accessible information.

Provision of information alone is no substitute for a proper system of advice and advocacy. There needs to be independent provision of advice to assist vulnerable persons and their carers in navigating the complex system of social care, separate from the local authority.

We are aware that there are problems with information sharing between local authorities. Some hard-pressed local authorities are less than forthcoming with support or information to assist in assessing someone who has moved into or is proposing to move into their area. A requirement to provide information and advice to all, regardless of whether they live in the local authority's area, will address this.

Information must be provided in a range of accessible forms and not be the internet, which is accessible by a limited range of client groups. Advice and information should include face to face advice where this is necessary or it is easier for a person to access the information, or where it is their preference, this should be included in the Bill.

Clause 2(2)(d): this clause limits the area of concern about vulnerable adults to 'safety'. We believe this needs to be widened to include 'or wellbeing or welfare'.

Clause 3: Whilst it is important to aim for quality and diversity, 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.

A requirement of 'facilitating' rather than 'ensuring' choice would be more appropriate and achievable. We therefore propose that the Bill should, 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, 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.'

Clauses 4-6: We support increased cooperation between local authorities. These provisions will go a long way to addressing problems that occur when people move from one locality to another, will mean that when an individual relocates there will be no need for them to be reassessed by the new local authority. The current situation often leaves people without care whilst an assessment is taking place. Paragraph 5 of clause 4 should 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.

Whilst we welcome clause 5, it should 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. Our Committee has anecdotal evidence that this is currently the situation.

Clause 5(2)(b) provides a wide power for the partner or authority receiving any request to avoid responsibility for cooperating. It would be open to an organisation to argue that cooperation would have an adverse effect on the exercise of its functions on resource grounds. Indeed, this argument could be employed in almost all cases. This provision should be omitted.

Clause 6 promotes integration between health and social care services. On discharge from hospital to the community, it is particularly important that there is cooperation between health services and local authorities. We suggest that the Bill should provide that anyone who has a need for care and support has an assessment when they are ready for discharge from hospital, so that the necessary support services are provided in the community. The hospital discharge provisions in schedule 2 apply only to those adults who have been in acute care, it omits those who have been mental health patients or other patients in non acute settings who may equally require care. The need to provide these patients with care and support on discharge should be included in the Bill.

Clause 7: We support early intervention and the provision of services which will prevent or reduce an individual's need for care in the future.

It is therefore vital that assessments of need for care and support should be free of the local authority's resource considerations. It is important that an assessment of need is just that. Otherwise the local authority will be unable to plan for the future provision or commissioning of services. It is only by having an objective picture of the needs of a population and information about needs which are unmet that statutory bodies can properly plan for future provision.

Clause 8: We support a 'people centred' approach to care, tailoring services to meet needs and believe that allowing local authorities flexibility and innovation is important in the provision of care services. As we said in our response to the Law Commission's Adult Care Consultation Paper, leaving community care services

undefined in the draft Bill creates a real risk of confusion and consequent litigation over what constitutes a social care service or 'care and support'.

We believe that an element of prescription, whilst not exhaustive, remains essential. A mechanism should also be included within the Bill to enable the prescribed list to be amended by secondary legislation to anticipate future changes.

Clause 9: We welcome the implementation of the Law Commission's recommendation that there should be a single duty to assess across all areas of adult need. It is crucial that the eligibility criteria ensure that people with needs equivalent to the current moderate band and above are entitled to support.

It is important that the person carrying out the assessment has sufficient, relevant knowledge and experience. Individuals with highly complex needs are often assessed by social workers, but the level of specialist knowledge which many social workers possess is insufficient. It is important that the regulations under clause s12(1)(c) specify the circumstances in which a person with expertise in a specified matter must carry out the assessment on behalf of the local authority.

In line with clause 13 and the setting of national minimum eligibility criteria, there also needs to be a national assessment tool so that the information gathered to identify needs is the same across every local authority area. At present, local authorities are required to produce their own assessment documents and this leads to differing results across local authority areas.

Clause 10: The provisions allowing carers to access services following an assessment are a significant step forward. The legislation will make it easier for carers to receive assessments and it will remove the requirement that the carer provides 'regular and substantial care'.

We support the provision that if a carer's need for support cannot be met for any reason by providing care and support to the adult needing care then another way must be found to do this.

The Bill defines carers only as adult carers and does not include young carers. This is a significant omission which needs to be rectified to provide for an equivalent carer assessment structure and process regardless of the carer's age.

The Bill separates the needs of carers from those they care for. We support this as the role of carers is critical in the lives of cared for people. We also support greater emphasis being placed on carer's assessments and the equalisation of rights between carers and those with disabilities but the needs of the person being cared for and the needs of the carer should be assessed separately. We are concerned that in practice pressure could be placed on either party to agree to a joint assessment when separate assessments may reveal differences of views or needs. We are also concerned about the confusion which might be caused by service provision to carers as opposed to the person being cared for, which may lead to disputes about charges for services. The default position should be separate assessments which set out the respective needs on a transparent basis (see clause 12).

We are concerned that under the Bill carers are not afforded the same rights of assessment as cared for people in two ways:

- carers are not entitled to an assessment regardless of their financial resources and
- carer's assessment will not 'consider outcomes the carer wishes to achieve in day-day life and how they can be supported to help achieve these outcomes'.

Carers' assessments should both include these elements.

Clause 11: We support the requirement on a local authority to assess an adult who lacks capacity to refuse assessment where the authority is satisfied that the assessment will be in their best interests. We support the protection that this clause will give vulnerable adults who may appear to have capacity but who are at risk of abuse or neglect.

Without the assessment it may be unclear whether the presumption of capacity is rebutted. Within the assessment the assessor should therefore assess the adult's capacity to refuse the assessment. An additional and important safeguard for an adult who appears to be at risk and may lack capacity is provision of independent advocacy to that person. The Bill should include a requirement for provision of advocacy accordingly.

Clause 12: We welcome this proposal and look forward to the opportunity to comment on draft regulations regarding assessments. We expect, as a minimum, to see a requirement for multidisciplinary assessments to be undertaken in more complex cases where a person has social and healthcare and/or housing needs.

There is a problem with people knowing who is responsible for their services. We hope that the regulations will clarify which body will be placed under the proposed mandatory specialist assessment duty.

It is essential that legislation ensures that any private or voluntary provider has the same responsibilities and liabilities as a public body.

Clause 13: We support a national minimum threshold which separates 'needs' from other issues such as the authority's financial resources.

We are concerned that the term 'eligibility criteria' could lead to many authorities and the general public accepting that those within the criteria are eligible whilst those that fall outside are 'ineligible'. Our understanding of the policy behind the statutory scheme is that needs which meet the minimum threshold must be met. Our concern is that by using the term 'eligibility criteria' the outcome on the ground will be that only those needs which meet the minimum standards will be met, leaving all other needs unmet. This is not the intention behind the Bill.

A national criteria framework should be supported by guidance and assessment tools to ensure consistency in decision making nationwide. The details to be set out in the regulations will be crucial to the implementation of such a national framework.

This framework should include all needs including opportunities to engage in and contribute to society, not merely personal care, and should include independent living and care in the least restrictive setting.

If implemented correctly, a national minimum framework could provide much needed certainty for service users and their carers. It will also prevent movement of service users across local authority areas seeking eligibility for services which have been declined in their original area.

Clauses 14-15: The Bill states that regulations will set a limit above which a council will not contribute to the cost of care. It is unclear whether this may lead to full financial assessments for domiciliary care and to higher charges for such care.

The regulations should be more accessible than the current 'CRAG guidance' for both service providers and users. It is essential that anyone who is to be required to pay a charge understands how that charge has been calculated, so charging regulations need to be transparent. We are aware that currently service users may be deterred from accepting key services because of the cost. Charges place too heavy a burden on the recipient of services will undermine their ability to live independently.

Clause 16: We are aware that the level of take up of 'deferred payment agreement schemes' by councils has been disappointing. We welcome the commitment to promote such agreements.

If regulations were to allow for a uniform interest charge across councils, this could reduce the problem of people moving to other areas to access deferred payment agreements.

Under the Bill, councils will be able to charge for administrative expenses. It is unclear what an 'administrative charge' will cover and whether this will extend to legal fees.

The Bill indicates that interest during the life of the resident will be charged, rather than the current position of charging interest only after a certain period after death. This should be clarified.

Clause 17: We welcome the principle of individual entitlement to care and support for adults. This provision will simplify a number of complex and overlapping provisions including the National Assistance Act, the Chronically Sick and Disabled Persons Act and the Health Services and Public Health Act.

We repeat our comments regarding the terminology of 'eligibility criteria' at clause 13 above.

It is important that the Bill makes clear that an assessment of needs should not take into account the local authority's own resources for the reasons set out in our comments on clause 7.

Clause 18: We welcome the power enabling local authorities to meet the assessed needs of adults who do not meet the minimum threshold however our concerns about the terminology of 'eligible' and 'ineligible' needs remains. We think that local authorities will interpret this restrictively, and that it will cause major problems for persons needing care and support and their carers. This is likely to result in confusion and satellite disputes, which should be avoided.

We support the power in clause 18(3) which duplicates the power in s.47(5) NHS and Community Care Act 1990. We suggest that the power is extended to a duty where a person appears to be at immediate risk of harm or abuse.

Clause 19: We welcome the local authority's duty to meet a carer's minimum needs for support. Again this provision replaces complex and overlapping legislation, similar to clause 17.

Clause 20: Insofar as clause 20 prohibits local authorities from providing care and support of any kind, to any person subject to immigration control whose needs are deemed to arise 'solely' because of destitution, the clause seems unnecessarily restrictive. Litigation is bound to arise because of the limitations it imposes.

Otherwise, the impact of clause 20 on the division of responsibility between local authorities and the Home Office for providing accommodation plus care to persons from abroad will turn on the regulations made under clause 13. 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 21: We welcome the boundaries set out between the responsibilities of the local authorities and those of the NHS. However the Bill lacks clarity as to what exactly are the responsibilities of the local authority and what is the responsibility of the NHS. The term 'ancillary and incidental' is not defined and this will still leave the boundary between health and social care inchoate and a source of dispute and confusion.

To avoid this the Bill should contain a list of activities that should be NHS funded. We suggest that this should include rehabilitation, physiotherapy and trained nursing care. The Bill should also outline those activities that would be the responsibility of social services including personal care, meal preparation and shopping.

Clause 22: We are concerned that the repeal of National Assistance Act 1948 s21 may mean that someone who has a mental health problem that is no longer acute may nevertheless be deemed intentionally homeless.

Clause 23 & 24: We support a national unified approach to the steps taken with an individual who has been assessed as having eligible/minimum needs. The approach outlined in the Bill is outcomes focused, including consulting the individual directly and placing them at the centre of the process.

Care and support plans and support plans should focus on individual needs rather than fitting in with the existing service provision, and this is reflected in the draft Bill.

Enabling local authorities to liaise with adults with needs and their carers will require specialised training and resources.

Local authorities should be required to provide reasons as to why an individual is not assessed as requiring care and support. This is currently required through court judgments and its exclusion from clause 23 could be interpreted by local authorities as a reason not to provide any explanation.

Throughout the section local authorities are required to provide information etc to 'an adult'. There should be something added along the lines of, 'or where the adult lacks capacity, to be provided to an individual acting in the adult's best interests.

Clause 25: We welcome the introduction of a legal entitlement to a personal budget. This should strengthen the legal basis for the implementation of Personalisation. The current legal basis of using the legislation on Direct Payments has proven inadequate in practice.

The provision of a personal budget should be discretionary and take into account the fact that some people might prefer services to be arranged for them rather than by them managing a direct payment or personal budget.

We support maximising individual choice and control where appropriate; however there will be situations where this conflicts with the principles applicable to those who lack capacity as set out in the Mental Capacity Act.

Clause 26: Under ss(2)(b) we consider that it is necessary to remove "in so far as it is feasible to do so" as we consider it vital that the individual receiving care and support, their carers and any other relevant persons be involved directly in any review undertaken by a local authority.

This issue of whether a review constitutes an assessment was argued in the Supreme Court in the case of Elaine McDonald vs Royal Borough of Kensington & Chelsea [2011] UKSC 33 on appeal from: [2010] EWCA Civ 1109. The decision gives rise to reviews being no different in effect from assessments, so it is vitally important that the individuals, their carers and other relevant people are fully involved in this process. To leave the section as it stands would be to give local authorities the option of fundamentally altering a person's care package via a review without consulting the individual.

Clause 27: We support the extension of the right to choose accommodation.

We would welcome clarity as to whether the Bill is proposing that the regulations will allow the resident to pay the top up as well as the additional costs for arranging more expensive accommodation. This appears reasonable in principle, but in practice it is going to be very difficult for a busy social worker or brokerage department to work out the administrative costs. It is vital that relatives only agree to pay for additional top ups where they have made a genuine choice to use more expensive accommodation.

There is a risk of local authorities asking for top ups to fund the gap between their standard charging rate and the market cost.

Many people rely on relatives for 'top up' and this is often a great source of distress for those moving into care homes who have little negotiating power. We are particularly concerned that care home fee rates paid by councils are not being

increased to the extent required by care homes. This is creating the situation where top ups are required more often and in larger amounts.

Despite the current principle being that top ups should be paid by third parties, there are difficulties for single people who want to choose more expensive accommodation where there is no family willing to pay the extra contribution. Financial attorneys or deputies may decline to pay a top up on the basis that since they legally are stepping into the shoes of the resident, they cannot act as the third party to pay it. The law ought to be clarified to ensure that where a resident without capacity wishes to stay in accommodation, and where no one in their family is available or willing to pay a third party top up, if they have a deputy or attorney willing to pay, they should be allowed to pay the top up on their behalf.

The notes to the Bill state that clause 27 provides a power to extend the right to choose from just residential care to other forms of accommodation. This is not sufficiently clear. Clause 27 currently reads that where the local authority specifies a certain type of accommodation, the choice of the service user is restricted to that type of accommodation. 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.

Clause 28-30: We welcome the choice and flexibility offered by the provision of direct payments. Regulations must ensure that the service user is consulted on their preference for a direct payment. The regulations should also clarify the categories of people who can act as suitable persons for service users lacking capacity to enter into direct payment agreements.

The language in the regulations is unclear as it refers to both 'surrogates' and 'representatives'.

It is important to recognise that there are single service users with no family or friends, or who are estranged from family and therefore no one to act as a suitable person. In this situation it is unclear whether a council acting as financial deputy could itself act as that suitable person.

Neither the Bill nor the notes address how the regulations will manage the risk of financial abuse of direct payments. The suggested direct payment system requires a mechanism for monitoring and scrutiny. This should not be left to individual councils to design. 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.

In our response to the 2010 Adult Care Consultation Paper recommendation on direct payments for residential accommodation we said that it was premature to consider the details of the direct payment scheme while the issue of who pays for residential care was the subject of separate policy consideration. We support pilots to test the appropriateness of direct payments for residential accommodation preceding their introduction in the Bill.

It is unclear whether the government is proposing to extend DPs to those who are in receipt of CHC (continuing health care) funding. There are adults who will lose their DPs once they are in receipt of CHC. Even when someone is in receipt of a joint package between the PCT and a local authority and the local authority agree that

their 50% can be allocated as a DP, we are aware of cases where Trusts believe that it is illegal for them to contribute their 50% as the payment of the DP for the other half of the package puts the legality of their contribution at risk. It would be useful for the Bill to clearly allow DPs to be allocated not just for the local authority side of the package, but also for the health contribution.

Clause 31: We believe that this section achieves 'continuity of care'. The section as drafted allows for a 'receiving authority' to re-assess an individual and for a fresh decision on eligible needs to be made. A suggestion would be for the original care package of the 'sending authority' to remain in place and where practical to move over to the responsibility of the 'receiving authority'. The 'receiving authority' will then have to conduct an assessment. If as a result of this assessment the 'receiving authority' does not agree with the original assessment, then a joint responsibility be placed upon both authorities to come up with an agreed care package. A system whereby disputes can be resolved by the Secretary of State should be put in place if the two local authorities cannot agree on care provision. An interim duty to provide for the original care package should exist whilst this process is on-going.

Clauses 34-38: Generally, we welcome these provisions. However, we are concerned that local authorities may not be able to discharge these duties due to insufficient powers and limited resources.

Clause 38(3) provides for the circumstances in which the local authority can enter the property (38(3)(a)) and deal with the property (38(3)(b)). Clause 38 (4) then provides that the local authority may not enter the property under 38(3)(a) unless:

- the local authority has obtained the consent of the adult concerned or the person authorised under the Mental Capacity Act 2005 to give consent on the adult's behalf, or
- if the person lacks capacity to give consent and there is no one authorised to act under the 2005 Act, the local authority can act if it is 'satisfied that exercising the power would be in the adult's best interests'.

It is not clear why there is no equivalent provision in relation to 38(3)(b) (dealing with the person's property).

Clause 39: The Bill only allows a parent, child or carer to ask for an assessment. However, we are aware of cases where Children and Young Adult services ask their counterparts in Adult Care for an assessment of a looked after young person about to transition, and this is declined. Thus where the young person is about to exit care arrangements at 18 years, the only person left to advocate for such an assessment, if the parent or then carer is not prepared to ask for it, would be the after care worker or their advocate. In any event, the parent may be unsuitable to step back into the young person's life in adulthood if the young person was the victim of abuse by that parent.

Children and Young Adult Services may be unfamiliar with the Mental Capacity Act and their social workers may lack experience in conducting assessments of whether the young person has the capacity to ask for an assessment or to make key transitional decisions. They rely on their adult care social work colleagues to conduct such capacity assessments. Therefore, if Adult Care refuses to offer an assessment as the young person does not ask for it, and his parent or carer does not ask for it, then an assessment may not take place and the young person is left without the

opportunity of being supported into adulthood. Consideration should be given to extending the category of people who can make the request for an assessment to those who are advocates or after care workers for the young person.

We are concerned that the definition of 'child in need' is too restrictive as clause 39(3) defines a 'child in need' as a child for whom 'services are being provided under section 17 of the Children Act 1989'. This does not take into account the possibility that the child may be receiving services under the Chronically Sick and Disabled Person's Act 1970. It also means that the power to assess will be engaged only if children's services are providing services for the child. This seems to be unnecessarily limited, as the key objective here is to ensure effective planning for young people who will need services and support when they reach 18. A better approach would be to maintain the definition of a child in need that is set out in s17 of the Children Act 1989.

39 (6) refers to a child having capacity or being competent but there is no explanation of what these terms mean in the Bill.

39(7) The Bill does not provide for local authorities carrying out an assessment if the child has capacity/competence to decide and does not consent to it. There might be situations where an assessment without consent is necessary.

There should be a specific duty to cooperate on Adult Care Services and Young Person Services to cooperate with regard to sharing information to facilitate assessments, and also to ensure that timely capacity assessments have been conducted to clarify whether the young adult has capacity to make decisions on residence and contact with family or in refusing the offer of services or a DP.

There should be a similar section to section 11 to allow Adult Care to proceed to conduct a needs assessment on a young person without capacity even if the young person refuses, on the basis that it is in their best interests to do so, or that they are experiencing or at risk of abuse or neglect.

This is a vulnerable time for young people with disabilities transitioning into unfamiliar systems of adult social care and losing the social workers and paid carers that they had when they were still under Child and Young Person's Services.

Since the right to an assessment becomes the gateway to planning and delivery of care and support or the offer of a personal budget, if Adult Care do not proceed to conduct this in a timely manner, they may not identify in sufficient time before the person's eighteenth birthday the need to apply to the Court of Protection for orders governing that person's residence and contact with family who may have abused or neglected him previously. This increases the risk to that young person, who may feel abandoned by social services, of going back to living with family members, which may not be in their best interests.

The power should be converted to a duty on Adult Services to assess young people who lack capacity if this is likely to persist into adulthood and where the failure to assess would place them at risk of harm.

The Law Commission recommended that local authorities should retain the ability to assess without the consent of the person concerned (as they do under the Children Act and community care legislation) because there may be a small number of cases

where this is necessary; for example, where the young person is at risk of harm because there may be a gap in service provision unless they are provided with services under adult legislation.

The Law Society in particular welcomes clause 43 to ensure continuity of services at the transition of a young person into adulthood.

Clause 43 & 44: There is a clear need for the improvement of transitional arrangements for 16 and 17 year olds. Many of the problems that arise upon the age of transition appear to stem from a lack of multi-agency cooperation.

We support the proposal to have an assessment of a young person in their own right or in their role as a carer of disabled parents in advance of their 18th birthday. However, it is a concern that such an assessment can be conducted only where the young person consents or via a request mechanism used by their parents, guardian or carer.

Clause 48: We refer to our briefing and position on s.117 under the Health and Social Care Bill, attached at **Annex 1** (page 14).

Section 117 provides critical support for people at a time of high risk, when they are discharged from hospital after being detained under the treatment sections of the Mental Health Act 1983 or are subject to a community treatment order. We welcome the decision to retain the joint duty on health and social care providers, which we argued for. We also welcome the decision not to re-cast Section 117 as a gateway provision and to extend the concepts of ordinary residence and preference for accommodation to apply to S117 after-care services.

We have concerns about the definition of S117 care that is introduced in the draft Bill. At present there is a working definition of s117 after care services. They are those that help to prevent an individual's readmission' to hospital. A list of considerations for s 117 after care is set out in Chapter 27.13 of the Code of Practice to the Mental Health Act 1983. This allows for flexibility. The draft Bill provides that S117 care must 'meet a need arising from the mental disorder of the person concerned as well as preventing readmission. In practice, we consider that this terminology and these conditions will lead to disputes about which needs arise directly from an individual's mental health problem and which do not. This risks delay in the provision of services and distress for the individuals concerned.

After-care packages for patients who have been detained as a result of severe mental health problems are planned when patients are particularly vulnerable. It is important to ensure that a person who has been subject to detention by the State has in place all the support he or she needs to protect them from a further use of compulsory powers. If a service provided in a care package is deemed not to meet this new and more restrictive definition will be eligible for charging. This means that individuals may face difficult financial assessments while being discharged from hospital and that some people at risk may refuse crucial elements of their care because of concerns about charging.

Clause 51: Clause 51 of the Bill proposes to give councils the power to delegate assessment and care management to a third party though the statutory duty would remain with the council. The implementation of this has considerable legal implications with the risk of judicial review still remaining against councils who retain

the duty but who have delegated the assessment to a third party. It would be helpful for Government to consult ADASS in drawing up guidance to clarify the boundaries of the duties of the assessors and their accountability to councils, and indeed service users, when performing these functions.

Annex 1

The Law Society Parliamentary Briefing, s.117, Health and Social Care Bill January 2011.

The Law Society is the professional body for solicitors in England and Wales. The Law Society regulates and represents the solicitors' profession, and has a public interest role in working for reform of the law.

This briefing has been prepared by members of the Mental Health & Disability Committee of the Society. The Committee is made up of lawyers practising in the fields of disability discrimination, mental health, mental capacity and community care for claimants and respondents and includes members from other professions and organisations.

The Law Society is interested in the following provisions in the amended Bill:

- **Section 117 and aftercare services (Clause 39)**

The Society notes the Government's intention not to charge for s.117 Mental Health Act services now or in any future Bill. However the primary concerns of the Society and other prominent organisations in the field of mental health have not been addressed, namely that:

(1) Clause 39 of the Bill will remove the free standing and legally enforceable statutory duty placed jointly on the NHS and Local Authorities to provide aftercare services free of charge to some of the most vulnerable in our society and

(2) the Bill as drafted contains a charging provision which may be applied at some time in the future.

We note that the Government concedes that the point that section 117 would no longer be a joint statutory duty and that there are risks attached to the operation of section 117, such as the potential for premature withdrawal of services by one or other statutory party. With increasing numbers of individuals being subject to community treatment orders (to which s.117 applies) and the disproportionate representation by BME groups being detained for treatment it is more important than ever that this safeguard is retained.

The case law in relation to section 117 clearly identifies the need for a separate and enforceable statutory duty placed on the NHS and Local Authorities to provide aftercare services because without it there is no guarantee that the required services will be freely provided. It is precisely because this provision stands apart from the NHS Act 2006 and the National Assistance Act 1948, where the normal rules about commissioning responsibility for the NHS and ordinary residence for social services apply, that makes it such a powerful safeguard for what is a relatively small but vulnerable category of individuals who have been detained for treatment under the Mental Health Act. Its purpose is to ensure the appropriate services are in place and available without cost in order to prevent re-admission to hospital for treatment which is essential for the individual's recovery.

The references in the Bill requiring statutory organisations to co-operate are commendable. However this duty exists already under the current law but has not provided sufficient safeguards.

Finally, the Society has endorsed the contents of a comprehensive letter from Paul Farmer (Chief Executive, MIND) to Lord Patel in which a number of specific concerns have been raised as to the proposed amendments to the S.117 duty by way of clause 39. The Society endorses the contents of this letter in totality.