

BRIEFING NOTE ON THE HEALTH AND SOCIAL CARE BILL



THE RELATIVES & RESIDENTS ASSOCIATION

SUMMARY POINTS: THE HEALTH & SOCIAL CARE BILL

1. We, the R&RA, have concerns about the current system of regulation which allows poor standards of care to persist especially in relation to:
 - Poor standards of food and nutrition
 - Lack of appropriate activities and stimulus
 - Low levels of staffing
 - Many staff lacking appropriate skills, experience and training
 - Deficient medication practices
 - Inadequate access to health care
 - Ineffective complaints procedures
 - Infrequency of inspections.

We are concerned that the new Bill does not address these failings.

2. We are concerned that bringing together health and social care under a single regulatory system will mean that the interests of care homes residents and other users of social care services will be marginalised. We are concerned that lack of detail in the Bill means the new regulatory body, the Care Quality Commission, will be left to determine the details of the regime it will put in place and that social care will be overlooked.
3. We are concerned that the new regulatory body will be under-resourced despite its increased responsibilities.
4. We are concerned about the apparent lack of enforceable rights regarding:
 - complaints procedures
 - rights to representation
 - access to and funding for advocates
 - personal control over what happens to individuals
5. We are concerned that there is a lack of a clear statement of quality of care objectives on the Face of the Bill.

BRIEFING

1. Background

1.1 The Relatives & Residents Association (R&RA) exists to promote the well-being of care home residents/prospective residents by providing advice and support to them and their relatives at times of crisis – perhaps at the point of deciding to move into a care home or in making a complaint or airing other worries about residents' welfare once they have moved in.

1.2 It is unique, being the only national charity focusing specifically on the needs of older people considering moving into, or already living in, residential care or other forms of long-term care.

1.3 The Association, drawing on its knowledge of the actual day-to-day experiences of people living in residential care, has major concerns about the current system of regulation and is worried that these are not addressed by the new Bill. It is also concerned that the Bill throws up other potential problems.

2. Concerns about the current system of regulation

2.1 Evidence from our advice line (and other sources) illustrates the need for better regulation as a result of continuing serious concerns about:

- Poor standards of food and nutrition
- Lack of appropriate activities and stimulus
- Low levels of staffing
- Many staff lacking appropriate skills, experience and training
- Deficient medication practices
- Inadequate access to health care
- Ineffective complaints procedures
- Infrequency of inspections.

2.2. The care home population is frail and vulnerable. Around three-quarters have some form of dementia, making it hard or impossible for them to speak up for themselves or even to express their needs.

Unlike most people in hospital, care for older people in residential settings is more often than not terminal care, requiring the skills, resources and training available in good hospices. Many of those in care homes have suffered bereavement and loss. Depression and loneliness are critical needs which require skill and compassion from skilled staff. End of life care, however, in many care homes generally means that frail older people are looked after by staff with little or no training or qualifications, often supervised by just one trained worker.

Care homes rarely have access to the full range of professionals available in NHS facilities. They are also, sadly, often viewed very differently compared with mainstream health settings and are all too often regarded with little esteem and with low expectations. This is despite the fact that they care for some of the oldest and most vulnerable people in society.

Many of those now in care homes lost family members in the 1914–18 war and lived through the privations of the Second World War.

2.3 Until April 2007 all care homes were statutorily routinely inspected twice a year. Since then they are now likely to be inspected once every three years unless they are identified as “poor” or there is a serious complaint.

Our evidence shows, however, that standards in care homes can change very quickly without any “triggers” being alerted. This can occur when the manager of a service is having personal problems without the regulator being aware of major changes in both commitment and oversight. At present, the system is increasingly reliant upon self-evaluation and self-assessment.

A major survey of public opinion undertaken by the Commission for Social Care Inspection in 2004/5 showed that most people wanted care services to be inspected more frequently and without notice. A recent Unison survey showed that many CSCI inspectors themselves are not at all happy about this trend to fewer inspections and are deeply concerned about failures in the protection of vulnerable individuals.

2.4 The Association believes that any new system of regulation needs to address all these concerns.

3. The new Bill: causes for concern

3.1 We fear that, under the new Bill, social care and the interests of users of social care will be overshadowed by a dominating focus on health care. Under the Bill, it will be left to the Care Quality Commission to determine the details of the regime it will put in place.

3.2 We are concerned that the importance of good inspection of care services is overlooked in the Bill. Skilled investigative work is at the heart of good inspection. This involves observation, gathering evidence – including previous ‘history’ – and then verification via interviews and other sources. This so-called triangulation (and preservation) of evidence is crucial in helping to build a reliable picture where people may be suffering from careless, neglectful or damaging care practices.

About one-third of care home residents are self-funding and as a result, do not have access to the NHS or local authority ombudsman, nor are they covered by the Human Rights Act. No less important is the fact that about 70% of residents in care homes and nursing homes are paid for by the public purse. It is, therefore, important in terms of both social justice and accountability that the government should act on their behalf and take proper responsibility for their welfare, as well as to ensure that the Exchequer receives good value for money.

There is no indication in the Bill that this aspect of regulation is to be included in regulations, as intended by the Care Standards Act 2001.

3.3 We are concerned that the new regulator will be under-resourced, thus impeding its effectiveness. It appears that the budget for the new body, the Care Quality Commission, will be less than that received by the bodies it is replacing, despite the fact that the scope and powers of the new regulatory body will be increased in relation to NHS services. Services provided under the

NHS will now be registered for the first time. The costs of the new regulatory system need to be properly and realistically assessed and included.

3.4 There is an apparent lack of enforceable rights for service users enshrined in the Bill. People in care homes need clear rights and ones that are enforceable. They need appropriate protection and good effective complaints procedures which are used by the regulator to ensure that providers are fit and have the character and integrity to continue to be licensed to carry out their role with rigour and reliability.

From our experience, it is evident that the Government needs to recognise that it can only give sufficient protection to the service users under the new system if

- they are given effective rights to be represented
- procedures are provided to allow them to bring their own concerns to the attention of regulators
- it provides funding and personnel for advocates who can protect their interests and put forward their point of view when they are too vulnerable to do so.

This legislation provides an opportunity for the Government to give a commitment to ensuring that service users (and their representatives) will be given some control over the arrangements which are made for them.

It is important to note that there has always been a real gap in the past in the proper representation of service users. This gap now needs to be filled.

4. The Face of the Bill – follow the Scottish lead

4.1 The Regulation of Care (Scotland) Act 2001 states unequivocally that the equivalent Scottish Commission “shall have the general duty in furthering improvement in the quality of care services provided in Scotland”.

This (English) Bill does refer to the general purpose of encouraging “the improvement of activities to which its functions relate”, but only after stressing that the Commission “must have regard to the need to ensure that action by the Commission in relation to such activities is proportionate to the risks against which it would after safeguards and is targeted only where it is needed.”

4.2 The definitions of “personal care” and “personal support” are also well drafted in the Scottish act, as follows:

“ ‘personal care’ means care which relates to the day to day physical tasks and needs of the person cared for (as for example, but without prejudice to that generality, to eating and washing) and to mental processes related to those tasks and needs (as for example, but without prejudice to that generality, to remembering to eat and wash); and

‘personal support’ means counselling, or other help, provided as part of a planned programme of care.”

The current Bill is less clear and succinct on this matter when referring to “social care” i.e. “Social care” includes all forms of personal care and other practical assistance provided for individuals

who by reason of age, illness, disability, pregnancy, childbirth, dependence on alcohol or drugs, or any other similar circumstances, are in need of such care or other assistance.”

Appendix: Specific points of detail to be addressed

1. Suspension

The intentions behind Clause 14 are difficult to understand. It deals with “slow suspensions” i.e. they will not take effect pending written representations and any appeal to the Care Standards Tribunal (CST) of a decision to suspend. It is difficult to see the circumstances where this power would be invoked given that it will potentially not take effect for many months. There is a requirement to specify a time period e.g. 3 months, but what happens if an appeal to the CST takes 8 months to be heard, after the suspension decision?

If there is a risk of harm then it is likely the regulator would use the urgent route – Clause 27. Service of the Notice, which takes effect immediately. There is then an appeal to the CST. We are concerned that the threshold appears relatively low. Ofsted has the same test as under Clause 27 with regard to child minders and day care providers, in the sense of “reasonable cause to believe” that there will be an exposure to risk but the Ofsted regime is further qualified by a statutory purpose to reduce and/or eliminate risk and/or to allow for an investigation to take place. The Ofsted suspension period is limited to 6 weeks plus a further 6 weeks and then a continuing suspension if matters are beyond Ofsted's control e.g. there is an on-going police investigation.

A further additional concern is that the suspension applies to the entire registration so there is some doubt whether part of a service can be suspended. In that instance, the regulator can impose a particular condition under Clause 27, but it does beg the question in what circumstances an entire service would ever be suspended, its scope is, therefore, presumably limited to be applied to relatively small social care providers. It would be unlikely for an acute hospital in a remote location to be suspended.

2. Warning Notices

Clause 25(4) is deeply troubling. This provision refers to “warning notices” which are currently called “Statutory Requirement Notices”(often referred to as Enforcement Notices) because it goes against the Soham principle of accumulating and building up a picture of a provider’s previous conduct and attitude in relation to vulnerable individuals. Under Clause 25(4) where a provider **complies** with a Warning Notice, the regulator cannot use this breach as a ground for cancellation, suspension or variation, imposition and removal of any condition of registration. This will prejudice effective enforcement action, which is there to protect vulnerable adults, Those providers who do just enough to comply with Warning Notices will be in a stronger position to avoid regulatory action than those who are not served with such Notices, which cannot be fair.

If such a provider “rectifies” a failure in complying with a legal requirement, (ie an offence) within a specified time period, the relevant failure may not be used in contributing towards a “ground” for any subsequent cancellation or suspension of registration. Many poor providers will be the subject of “Enforcement Notices” but under the proposed clause, they may avoid more serious enforcement action given the proposed evidential limitation or restriction.

This goes against current good practice in relation to the protection of vulnerable children and adults and should be removed from the Bill. It could mean, as happened in the notorious Longcare case, and many other recent scandals involving both adult and child protection, that such information is available, or is not made available to the regulator. This can also make it difficult or impossible to obtain a full picture of the provider’s suitability to remain registered.

The regulator may serve a Warning Notice i.e. it has a power to do so. This may result in the regulator may directly proceed to prosecute for a breach of a regulation. Because of the limitation outlined above (paras 13–15), the regulator may prefer to proceed to an immediate prosecution, but this would hardly fit with a proportionate attitude to regulation and a reasonable enforcement tariff. Therefore, from all perspectives: the service user, the provider and the regulator, Clause 25(4) would appear to be counter-productive.

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