

THE FUTURE REGULATION OF HEALTH AND ADULT SOCIAL CARE: RESPONSE TO CONSULTATION DOCUMENT

The Residents & Relatives Association (R&RA)



1.0 The Relatives & Residents Association

1.1 The Relatives & Residents Association (R&RA) exists to promote the rights and well-being of care home residents/prospective residents especially by providing information, 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 a resident’s welfare once they have moved in.

1.2 It is unique, being the only national charity concentrating wholly on the specific and detailed needs of older people when considering moving into, or already living in, residential care or other forms of long-term care.

2.0 The earlier invitation from the Department of Health to comment (November 2005) on key issues in the wider regulation of health and social care

2.1 R&RA’s response, in November 2005, to an earlier invitation to comment on key issues in the wider regulation of health and social care (and appended to this document) made a number of points. In particular, it stressed the need to:

- recognise the market diversity in the provision of adult social care in contrast to health care – 90% of residential care, for example, is provided by a wide variety of providers in the independent sector – which raises issues about the need to control access to the market to ensure ‘fitness for purpose’ and the consequent need to set rigorous standards for both registration and continuing performance;
- acknowledge the vulnerability of the users of health and social care and their consequent need for protection through the regulatory process in contrast to the customers of other sorts of regulated services; and therefore
- accept that different degrees of regulation may be necessary for the health and social care sectors in contrast to business, industry and commerce;
- define ‘proportionality’ in regulation from the service users’ point of

view (because of their vulnerability) rather than the providers' perspective;

- accept that improvements to regulation should be based, in line with evidenced public expectations, on better regulation rather than less regulation.

3.0 The current consultation

3.1 R&RA welcomes the acknowledgement in the current proposals of the vulnerability of those using health and social care services and the consequent recognition of the importance of regulating those services. However, acknowledging their needs in theory is not enough; there is little evidence that the proposals provide practical protection for vulnerable groups.

3.2 The proposals mention but do not acknowledge the implications of the difference between the funding of health care on the one hand and social care on the other. Increasingly, the tariff for health care prices is being fixed nationally; providers in the social care market are free to set prices as they wish – the part played by local authority block contracting is countered by the fact that a third of residential care users, for example, are self funding individuals with little or no power to challenge the pricing policies of providers.

3.3 R&RA believes that the proposals conflate what in fact are the differing roles of the commissioner and the regulator. As described, commissioners are expected to control the market through competitive purchasing relationships. Regulation is about managing the market by setting standards and monitoring compliance irrespective of the purchasing and contractual relationship. These are different and contradictory functions. Moreover, there is a danger that over-reliance on commissioning to maintain standards and ensure safety is misplaced. R&RA has heard of many cases where commissioners' main concern is to secure the lowest price, regardless of the standards of service being purchased.

3.4 R&RA welcomes the commitment to quality and the maintenance of nationally defined standards. It is not, however, convinced that reliance on choice as one of the ways to guarantee quality can work throughout the adult social care sector. Not only are older people (in the case of residential care) very vulnerable through frailty and, often, dementia to the dangers of neglect and abuse, they are also constrained in exercising choice – which lies at the heart of the current policy for maintaining standards. The idea of self

funders (and individuals acting like self funders through the use of direct payments) acting themselves as regulators or quality controllers [themselves](#) is far-fetched.

3.5 There is an encouraging emphasis in the proposals on the importance of information and transparency in contracts in supporting choice and decision-making. R&RA has to point out, however, that recent changes to current regulatory processes have actively worked against this aspiration. People want up-to-date, high quality information about the quality of the services they are thinking of using. Currently, we can advise callers to the R&RA advice line to consult recent inspection reports of the care homes they are considering, in the knowledge that such reports are likely to be, at most, 6-12 months old (care homes [until](#) [recently](#) had to be inspected twice a year). However, as a result of the new, flexible procedure introduced in April last year, the only mandatory requirement now is that homes will be inspected once every three years. Up-to-date information will in future be hard to come by. This does not aid choice – nor, by implication, quality.

3.6 Associated with the move towards ‘risk-based’ regulation is the emphasis in the proposals on self-assessment by providers. Users of services and the families who support them in making decisions have much less confidence in evidence based on provider self-assessment than in that based on external and independent inspection. They, and the public at large, favour up-to-date and regular evidence of quality and maintenance of standards provided through increased inspection by an independent [and authoritative](#) regulator.

3.7 Finally, there is little mention of what happens from the service user’s perspective when regulation fails to secure quality. R&RA believes that a robust and effective complaints procedure is essential to protect the interests of all service users – not just those who are funded by the state or using services provided by the state. We are concerned that care home residents are increasingly expected by the current regulator to resolve complaints directly with the provider (the care home). From our considerable experience we know that many residents and their relatives are reluctant to do this, especially in the case of more serious complaints, because they fear victimisation. The case for a speedy external and independent complaints procedure is undeniable.

4.0 Conclusion

R&RA’s sole concern is to champion the interests of older people in

residential care. They constitute a sizeable but very vulnerable group of people. We are concerned that the regulatory principles outlined in the current proposals may provide insufficient guarantees of quality and safety for them.

R&RA

February 2007

APPENDIX

WIDER REVIEW OF REGULATION IN HEALTH AND SOCIAL CARE : KEY ISSUES

Submission from The Residents & Relatives Association (R&RA)



1. What role can regulation play in achieving the Government's objectives for health and social care?

The Government's main objectives for health and social care centre on the principles of fairness, effectiveness and choice. This means that all citizens should have the same right to equitably accessible and good quality services that meet their needs and preferences. As part of current policy, the health and social care system is becoming more diversified with many different suppliers entering the market. In this changing environment, it is essential that mechanisms exist for ensuring the underlying principles for health and social care are preserved. Thus, in this increasingly mixed economy of health and social care, regulation is essential in ensuring that entrants to the mixed economy are fit to practise – in a sector that is principally concerned with providing services to ill and otherwise vulnerable people. It is also essential that once permitted entry to the market, they meet accepted standards and continue to meet them.

2. What are the key issues you believe need to be addressed through the review?

We understand that the review of health and social care is part of a wider review of regulation (as foreseen by the Chancellor in his budget announcement in March 2005). We believe that it is important to make a distinction between regulation as applied to health and social care and other sorts of regulation as applied to the business, industrial and commercial sectors. The users of health and social care services (as noted in para 1) are different from the customers of other sorts of regulated services. They are characterised by their vulnerability and, in many cases, lack of capacity and so are unlikely to be able to exercise choice in the way that ordinary customers in a free market can. They are not free agents and are thus at a disadvantage in relation to service providers. It is essential that their interests are protected by a regulatory system that assures appropriate levels of market fitness and acceptable performance measured and maintained against a set of agreed standards.

3. In your view, what should be the main purposes of regulation and inspection.....

Regulation and inspection are essential mechanisms for ensuring that customers (in the broadest sense) receive services and/or goods that are fit for purpose and meet an accepted standard of quality and safety. All providers of services and goods who fall within the regulatory system should be required to meet requirements which demonstrate that providers have appropriate experience and qualifications with quality assurance mechanisms that are reliable.

The requirements for an adequate regulatory system must involve: controlling entry; maintaining standards; and having the capacity of take action where standards fall or are not

good enough. This will range from changing registration conditions to reflect the competence of the provider to cancellation where necessary or appropriate. No system should be countenanced which allows 'learning on the job'. Requirements determine the baseline for performance. In health and social care, the requirement of safeguarding the welfare of patients and service users is particularly important because of the vulnerability of the clientele.

Systems of regulation as applied to health and social care services have evolved over the last 20 years. Generally, governments of all parties and persuasions have been motivated by the protection of those most at risk from abuse and exploitation as well as poor care and poor practice. Evidence from public enquiries as a result of the deaths or ill-treatment in different sectors (local authority, health authority and independent) has reinforced the need for more consistent regulatory regimes. As a result, successive governments have made efforts to try to protect vulnerable individuals by improving systems of registration and inspection. Due to the conflicts of interest which arose when health and local authorities were respectively in charge of health and social care regulation, the National Care Standards Commission (NCSC) was created by the Care Standards Act 2000. These changes followed a long period of debate and consultation within the Department of Health from *The Review of Regulation* in 1991; *Moving Forward* in 1995, *The Burgner Report* in 1996, the *Longcare Report*, June 1998, *The Brief Case*, 1999, plus the evidence of many Registered Homes Tribunal Cases (plus local enquiries undertaken by health and local authorities over the same period). The concerns arising from the disparate practice of health and local authorities and the consequent lack of coherence and consistency in regulatory practice were extremely widespread. The creation of the NCSC was the first attempt to rationalise and reorganise the system in a more logical and acceptable manner. The Government's decision to change the system radically (again) in 2004 with the creation of the Commission for Social Care Inspection (CSCI) has not aided a smooth transition.

The requirements imposed by regulation should relate to the key, essential components of the service being regulated, be spare in their elaboration and be capable of being achieved by all registered providers. Where properly validated, the fulfilment of some requirements may stand as proxies for the fulfilment of other requirements (but validation is essential). Proportionality should be defined by taking account of service users' (rather than providers') interests. The first priority must be the safeguarding of patients/users/residents.

4. In your view, what are the strengths and weaknesses of the current systems of regulation in health and social care? Are there lessons to be learnt from

We think that the efforts to establish a regulatory system for social care that applies consistent regulations and standards across the country have been beneficial. For the first time, a level playing field between all sorts of providers has been established after a long period during which providers had complained about unfairness – related to the fact that in the past not all services (notably, local authority) were regulated under legislation existing then, that inspection systems were variable with different inspection units using different standards and with inspectors often applying subjective judgement in the assessment of services. The standards that were developed for the new system were the product of detailed and meticulous consultation and research consultation with all stakeholders, discussion and refinement. Although at the time some service providers voiced concern about the introduction of national standards, even then the majority were supportive. It seems clear that over the past five years since they were first mooted, opposition has dwindled and there is

very little opposition to them. While those subject to regulation often feel 'put upon', the care sector currently appears to be burgeoning and new entrants are not apparently deterred. We would argue that only the very poor providers still complain about them and these are just the providers who should be subject to regulation and the imposition of requirements to improve.

We believe that the inspection system could be improved. We do not think that the existing inspection methodology is working to good effect. We think that better training for inspectors would produce better inspection – especially in relation to the importance of obtaining triangulated evidence from a variety of sources to substantiate inspectors' overall assessment of a home's performance (as expected in the original vision for the new system). We would welcome more information about the methodology and training that inspectors receive being made public and we would welcome the involvement of a lay component in the inspection process.

5. What steps can the Department of Health and regulators

We do not accept that, particularly in the case of residential care (the service that as an Association we are most concerned with) the alleged burden of regulation needs to be reduced. We have seen no reliable evidence that this is the case and, if it exists, we would welcome its publication. It is in the nature of regulatory systems that those who are regulated will always argue they are over-burdened. It is also certainly the case that they have louder voices than those who are the customers of services that are regulated. We think that to reduce effective regulation would compromise the safety and well-being of service users. This is a particularly powerful argument when the increasing vulnerability of those receiving care from registered services. Older people in receipt of residential care are far older, confused and more isolated from mainstream services. Three out of four of those receiving residential care suffer from some level of dementia.

We think that before any decision to reduce any aspect of regulation is made, the question should be asked 'what impact will the withdrawal of a particular requirement have on the **service users** concerned?' As an example, what will the intention to reduce the frequency of inspections have on service users? It is argued that good homes do not need twice yearly inspections and thus a three year interval is proposed. We know that a good home can turn bad in a very short period of time. How will residents be protected? How will prospective residents be able to choose a good home when no up-to-date validated information is available if the last inspection report is three years old?

As far as national minimum standards are concerned, their purpose is to describe an acceptable baseline level of service against which a service can be assessed. Is there any standard that can justifiably be said to be unnecessary? What aspect of the service can be allowed to fall below that baseline – which would be the effect of withdrawing a standard?

6. In the light of the anticipated changes in the health and care systems., which regulatory functions need to be undertaken?

One of the central features of the anticipated changes revolves round the diversification of the health and social care market. As noted above, regulation is especially important in regulating market entry. We believe that regulation must be at the core of any move towards greater diversification. It is essential that providers are subject to external controls in a market that is

providing care for people who are in the later stages of their lives, who cannot manage for themselves, who may lack capacity, who are very old and often very frail. The need for protection (as evidenced by government's efforts to enforce POVA requirements, the implications of the Human Rights Act, disability discrimination and other prevention of abuse policies) must be paramount. The independent regulation of an independent market place, enforcing the will and expectations of Parliament, is the best means of doing this.

This does not mean that the independent market should exist independently of public accountability and flourish without taking account of public needs. We are concerned that, currently, the growth of social care provision (residential care in particular) goes largely unplanned, leading to patchy, uneven services across the country, to the detriment of older people who need services. While regulation should be independent, health and social care planning should be part of the wider public health function within in the public sector (local councils and local NHS bodies).

There is a need for a rigorous, independent, reliable system of inspection which includes out of hours and unpredictable visits (as demonstrated by the recent CSCI public consultation exercise). The public clearly wish to have an increased frequency of inspections and more unannounced inspections. The CSCI is offering neither.

6. Which organisational model

It is outside our Association's remit to have a view on most of these matters. However, we are concerned about the issue of public involvement. We firmly believe that patients, public and professionals have the right to be involved in the way services are designed, operated and regulated. We believe that in the residential care sector, there is an urgent need for lay involvement in inspection. This could be done in conjunction with official inspections, as it has done in the past, or it could be done through separate lay activities (as proposed by the R&RA, see above, para 4).

Consultation and involvement – both concepts currently in vogue – are meaningless words unless some real and serious attention is paid to putting them into practice by decision-makers. We are concerned that the drivers for this current review of regulation have come from providers pushing their own concerns. Service users need champions who will stand up for them in this review. Service users are not calling for less regulation; indeed, the general public wants more. It is pointless to adopt a rhetoric that calls for public involvement, if what the public actually wants is ignored.

November 2005