

Health and Social Care Bill 2007

November 2007

Help the Aged wants a world where older people are free from the disadvantages of poverty, neglect and isolation, so they can live with dignity as valued, respected and involved members of society

1. About Help the Aged

- 1.1. Help the Aged is a charity fighting to free disadvantaged older people in the UK and overseas from poverty, isolation and neglect. It campaigns to raise public awareness of the issues affecting older people and to bring about policy change. The Charity delivers a range of services: information and advice, home support and community living, including international development work. These are supported by its fundraising activities and paid for services. Help the Aged also funds vital research into the health issues and experiences of older people to improve the quality of later life.
- 1.2. In preparing this submission, Help the Aged has drawn on our extensive research and experience of working with and talking to older people. Through the Charity's engagement strategy, Vocal Point, Help the Aged records the issues raised by older people to feed into the work of the organisation. We also proactively seek older people's opinions on specific topics through focus groups and listening events, as well as liaising with members of Speaking Up For Our Age, a programme which facilitates and supports hundreds of local older people's forums.

2. Introduction

- 2.1. On the 15th November the Government introduced its Health & Social Care Bill to Parliament. The Bill will bring together the Healthcare Commission, The Commission for Social Care Inspection and the Mental Health Act Commission into a new regulatory body known as the Care Quality Commission (CQC).
- 2.2. Help the Aged has broadly welcomed the proposals for a new Commission as we believe it will allow for a more joined up approach to health and social care regulation, and will support the moves towards greater integration of the health and social care systems.
- 2.3. We believe the Bill includes a number of positive proposals, including:
 - The development of a wider range of enforcement actions available to the Commission – as we believe this will enable the Commission to act more swiftly and efficiently particular in the area of social care
 - The removal of the ‘liable relatives’ rules, which currently allow local authorities to require individuals to contribute to the care of their spouse.
 - The taking of powers to extend the requirement to register care workers to new groups via regulation rather than primary legislation
 - The extension of direct payments for social care to those that lack capacity
- 2.4. However we also believe there are considerable areas in which the Bill could be improved:
 - The Bill presents a key opportunity to close the current loophole in the Human Rights Act, which leaves private sector care providers outside the scope of the Act, and older people in those homes outside its protection. This Bill must protect the rights of all older people regardless of where they receive their social care services, and how they are funded.
 - CQC’s budget must be sufficient to maintain frequency and quality of inspection and to ensure that the new Commission builds on the work of existing bodies – doing more, rather than less
 - Work on social care must be given fair priority and resource allocation within the Commission’s programme
 - CQC’s complaints system must be made accessible to all. There is no detail in the Bill setting out how CQC’s own complaints procedure will operate. This should be set out on the face of the Bill so that established ways of resolving complaints are consistent and formalised.
 - The Bill presents an opportunity to create an independent body able to address complaints raised by self-funders who have exhausted the complaints procedure of their care provider.
 - CQC must have a clear and defined remit to oblige consultation with and involve patients and users in its work

- Safeguards must be put in place to protect Direct Payments users who lack capacity from financial abuse

3. Closing the Human Rights loophole

- 3.1. Currently around 90% of care homes are run by the private or voluntary sector, but residents within these homes lack the protection of the Human Rights Act. This is because the courts have ruled (first in the *Leonard Cheshire* case, and more recently in *YL* test case in the House of Lords) that these homes are not carrying out “public functions” for the purposes of the Human Rights Act, and therefore are not covered by it. Help the Aged disagrees with this view, as did the then Lord Chancellor, who intervened in *YL*. We believe that it is vital that vulnerable older people in care have their human rights protected and that to distinguish between local authority and private providers in this context is unfair and undermines the principle of the universal application of fundamental human rights.
- 3.2. The recent report by the Joint Committee on Human Rights laid bare the extent to which older people’s rights are at risk in care settings. We believe this report makes a clear case for action to close the loophole.
- 3.3. Following the decision in *YL*, primary legislation is now the only vehicle to achieve this. As Lord Neuberger, speaking for the majority in *YL* pointed out, *“it may well be thought to be desirable that residents in privately owned care homes should be given Convention rights against the proprietors.If the legislature considers such a course appropriate, then it would be right to spell it out in terms...”* This Bill presents an opportunity to do that, and in so doing to achieve the Government’s aim of promoting quality in care.
- 3.4. We believe it is logical to use this Bill as an opportunity to close the loophole which leaves older people without protection. We believe it is vital this is done through primary legislation
- 3.5. We reject the idea that the gaps in protection against Human Rights abuses could be closed via regulation. The House of Lords ruling makes clear that only primary legislation will be sufficient to tackle this issue. Furthermore regulations can do no more than empower the CQC, we believe it is vital that potential victims of human right abuses and their representatives themselves have an effective remedy against providers who violate fundamental rights.

4. Budget of the new regulator

- 4.1. Help the Aged is concerned that the primary driver behind the plans to merge the Health and Social Care Commissions has been to achieve efficiencies. Whilst we do not deny that it may be possible to create efficiencies through the process of bringing together Commissions, we are concerned that under current proposals CQC will have a substantially smaller budget than the current commissions combined, particularly as the new regulator will be responsible for the regulation and inspection of more providers than the three organisations it replaced. We fear that this may lead

to the loss of key work areas which are vital to ensuring the quality of services to older people.

- 4.2. We are also confused by the fact that Regulatory Impact Assessment for this Bill sets out that the cost benefit of having one regulator rather than three depends on the scope and responsibilities of CQC, which will be set out in secondary legislation. This would seem to suggest that it is, as yet, impossible to tell whether the new Commission will be cheaper.
- 4.3. We are seeking assurances from Government that CQC's budget will be adequate to maintain the quality and frequency of inspections and to build on and develop the work of the previous organisations, rather than reducing its programmes.
- 4.4. We are also anxious to ensure there will be no regression from the current powers or programmes of the existing bodies

5. The importance of social care

- 5.1. Since proposals for merger of the inspection commissions were first brought forward, concerns have been expressed about whether social care issues would become marginalised within the new Commission's work. Help the Aged believes these concerns are legitimate.
- 5.2. The imbalance of funding allocations to health as compared to social care, and the corresponding imbalances in political and public interest in these areas mean that there is real danger that social care issues become sidelined when budgetary and other resources allocations are made within CQC's programme. This must not be allowed to happen. We are seeking strong assurances from Government that social care will remain a key area of work for the new Commission.
- 5.3. In particular we would like assurances that some of the pioneering work developed by CSCI in recent years should be carried forward and continued by the new Commission - key examples would include the *Experts by Experience* programme (through which Help the Aged has supported CSCI to recruit a panel of older people to join care inspection teams) and more generally the Commission's strong work in the area of user involvement.
- 5.4. Attention must also be paid to ensuring that a joined-up approach does not become a one-size fits all approach. This could be damaging, for example in the area of registration where a large hospital is a very different organisation to a small domiciliary care agency.

6. Complaints procedures for care

- 6.1. Help the Aged is concerned that Bill does not set out how individual service users will be able to make complaints about CQC and its work. We believe it is important that individuals can influence the work of the Commission and that it remains accountable to individual patients, service users and their families. Help the Aged

believes these procedures are vitally important and should be laid out on the face of the Bill.

6.2. Help the Aged is also very concerned that the complaints procedures available to people receiving care are inadequate to ensure redress at an individual level when problems occurs. At present users of care services which are provided by the local authority itself are able to access the full range of local authority complaints mechanisms in relation to their care. However self funded users of care services are excluded from these complaints mechanisms in some significant circumstances. Where a complaint relates to a Local Authority function, such as the Safeguarding Vulnerable Adults responsibilities, a self-funder can access the statutory complaints procedure. However, if a complaint relates to another function of the care service, for example mail being interfered with, or a complaint about meal times, this would neither be dealt with under the Local Authority complaints procedure (as it would be deemed not to be related to the local authority responsibility which is simply to provide care, but rather would be seen as a function of the individual service) nor would it be the responsibility of the regulator to investigate. We believe this is unacceptable, as it means that if a self-funding individual is unhappy with the service they receive, their only recourse for action is the internal complaints procedure of that service provider. The reality is that this means that most older people feel unable to make complaints about inadequate services as they fear that it might compromise their care and make things worse. The Bill represents a good opportunity to change this, so that all users of care services have access to an independent complaints procedure.

6.3. A third issue with the current way complaints are handled concerns people who are both self-placed, and self-funded, so that they have not had a Local Authority assessment of need and are not known to social services. Again, where there are issues with the quality of care services provided, the resident can only access an internal complaints procedure.

7. Patient and user involvement within the new regulator

7.1. Patient and user involvement will be vital to the success of the new Commission. However Help the Aged is concerned that at present the Bill does not make clear how and to what extent the CQC will be required to consult with patients and users. Clause 2 requires CQC to have regard to the view of the public – however we believe specific mention here should be made to the need to also consult with users and patients. We would also like to see explicit reference to user involvement in Clause 2, and also in Schedule 1 which sets out the requirements for CQC's advisory committee.

7.2. It is also vital that members of the public, users and potential users have good access to information about the services they use (or may use). The Bill sets out that information about inspections and about enforcement actions should be published. This information should be made available to patients, users and other members of the public.

8. Extending access to direct payments

- 8.1. Help the Aged has welcomed the introduction of Direct Payments for social care – through which older people are given cash, instead of a care package arranged by the local authority, to enable them to have greater choice and flexibility in meeting their care needs.
- 8.2. The Bill proposes extending this scheme to those who lack capacity – by allowing an agent to collect and administer a direct payment on behalf of an individual who lacks capacity. This is to be welcomed. However it is vital that proper checks and safeguards are put in place to ensure that older people who lack capacity are not placed at risk of financial abuse as a result of this scheme.
- 8.3. Help the Aged believes the Bill also provides an opportunity to look again at Direct Payments users who later become eligible for NHS Continuing Care. At present people in this situation tend to lose out on the ability to keep up existing care arrangements, once the NHS becomes responsible for providing their care, because NHS services are provided on a block purchased and more standardised basis.

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