

## **Response to the Joint Committee on the draft Care and Support Bill**

### **Submission by the Joseph Rowntree Foundation**

**January 2013**

The Joseph Rowntree Foundation (JRF) is pleased to submit the following response to the Law Commission's consultation on creating a simple, consistent, transparent and modern framework for adult social care law. We would be happy to supply any further information as required.

The Joseph Rowntree Foundation (JRF) is one of the largest social policy research and development charities in the UK. For over a century we have been engaged with searching out the causes of social problems, investigating solutions and seeking to influence those who can make changes. JRF's purpose is to understand the root causes of social problems, to identify ways of overcoming them, and to show how social needs can be met in practice. The Joseph Rowntree Housing Trust (JRHT) shares the aims of JRF and engages in practical housing and care work

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# 1. What is your view of Part 1 of the draft Bill (care and support)? In your view, are there omissions in this Part of the draft Bill?

JRF strongly welcomes Part 1 of the draft Bill, and in particular clauses 1 and 7. Clause 1 puts the Bill on a sound footing by introducing a duty to promote wellbeing, which is defined according to social, emotional, financial and health outcomes. JRF applauds the creating of this definition by the government, as it moves away from former narrow definitions of care need, which have often relied on types of services to define them. Focusing on the outcomes people value and want to achieve – including those aspects JRF research suggests are so vital to people’s wellbeing but which are often overlooked: meaningful relationships and personal autonomy – is a significant step forward in policy approach (Bowers, *et al.*, 2009; Katz, 2011). Nonetheless, JRF would urge the Joint Committee to re-read the Bill in light of this central outcomes-based approach. At some points, old-fashioned and narrow language creeps back in, talking about people having a ‘care and support need’ and a ‘need for services’ (Stone and Wood, 2010). ‘Need’ can and has been used in ways that compound stereotypes of passivity and dependence (Cordingley, *et al.*, 2001), which is contrary to the vision set out in the White Paper. Based on the new duty to promote wellbeing in the Bill, we ought to be talking about people ‘who need additional support to maintain or achieve wellbeing’ rather than ‘needing care’.

JRF also notes that clause 8 is titled ‘Meeting needs for care etc’ and presents a fairly prescriptive list of how local authorities might meet ‘care needs’ – covering residential and home care, information and advice, accommodation and so on. JRF feels the Bill lacks clarity regarding how this and other similar clauses – discussing care and support services meeting needs – relate to the broader outcomes-based duty to promote wellbeing. It is clear that in some areas, the range of care services on offer might well meet ‘care needs’ defined narrowly as relating to personal care, but would certainly not be capable of promoting ‘wellbeing’ as broadly defined by clause 1 of the Bill. It is important for local authorities, older and disabled people, their carers and families to understand what this duty will mean in practice and how local authorities are expected to meet it above and beyond traditional care commissioning and the integrations of health and care services.

Clause 7 places a duty on local authorities to provide or arrange the provision of services it considers will prevent or delay support needs. This is a very important and long-awaited step. Such services have been chronically under-developed and under-funded, in spite of a growing evidence base regarding their benefits and a very clear demand (Centre for Policy on Ageing, 2011; Raynes, *et al.*, 2006). JRF would like to see greater clarity, however, on provisions related to the charging for these services – would even those on the lowest income have to pay to use these valuable services? Charging risks increasing health inequalities by enabling those on higher incomes to access low-level support, and as such this ought to be clarified in legislation.

Other points JRF would like to raise related to section 1 include: regarding the provision of information and advice (clause 2) there is a need for more detail and clarity around the possible channels for this. The current wording provides a general duty which could lead to minimal information and advice provision by local authorities (for example, simply on their website). There is no consideration of supporting

access to information, for example through assistance or advocacy. Sections 4 and 6 (co-operation and integration), remain a significant omission in these clauses of the Bill (see below). As housing remains fundamental to the maintenance and support of an individual's wellbeing, JRF feels this should feature in part 1 (and throughout the Bill) far more prominently.

## **2. Has the Government made it clear what it aims to achieve in the draft Bill's provisions on care and support? In particular, will it be effective in clarifying the law on social care?**

JRF believes the draft Bill is an important step forward in clarifying the existing legislation relating to the assessment, planning and provision of care and support. It is clear the Law Commission's report on social care has been taken on board in the drafting of the Bill, which is to be strongly welcomed (see Stone, E., 2010: JRF's response to Law Commission Report on Social Care). JRF recognises, however, that some aspects of the legislative clarification will remain impossible to implement (for example portability and transparency of assessment, eligibility for support, preventative support) without a sustainable and affordable care funding regime.

## **4. Are there other ways of framing the draft Bill's underlying principle, that local authorities must promote an individual's well-being? Are there other principles that might be substituted for it?**

JRF welcomes the choice of the term 'wellbeing' and believes it is probably the best option as a term which is sufficiently flexible but also readily understandable. The flexibility of the term enables local authorities to view people holistically, having regard to social, emotional, financial and health aspects of their lives. Other more precise terms – perhaps related to need or health and care would have risks narrowing local authorities' roles to something more service orientated.

JRF's research looking at what older people with high support needs want and value (Katz, *et al.*, 2011) provides a model for exploring factors which promote wellbeing and quality of life. It is clear that the factors which improve wellbeing span a range of themes – the social, physical and psychological. As such JRF believes that the definition of wellbeing used in the Bill could be expanded to consider other factors which contribute to wellbeing such as: safety and security (broader than 'protection from abuse and neglect'); good environment (relating to housing/home) and participation in the community/community life ('broader than domestic, family and personal relationships').

## **5. Does the draft Bill make sufficient provision to achieve the Government's stated goal of greater integration within the NHS and with care and support and housing?**

JRF feels the Bill does not currently make sufficient recognition of housing and the importance of its integration with health and care. The quality and suitability of an older person's home has a significant impact on their mental and physical health and wellbeing. A suitably adapted, conveniently located home can make all the difference to an older or disabled person's sense of social inclusion and independence, and can certainly delay, if not remove altogether, the need to move into residential care settings. The reports of the Housing our Ageing Population Panel for Innovation (HAPPI) published in January 2009 (Best, 2009) and November 2012 (Best and Porteus, 2012), give a clear picture of what can be, and has been, achieved in the UK and in other countries in terms of innovative and cost-effective ways of building sustainable and inclusive homes and communities for an ageing population.

While there is a brief mention of housing in the paragraphs related to 'co-operation' in the Bill, it is entirely absent in the sections related to integration. JRF was encouraged by the White Paper's discussion of the importance of housing and its role both in improving care- and health-related outcomes and preventing the escalation of health needs. We welcomed the new duties related to co-operation with housing so clearly explained, and the new funding made available. We are therefore surprised and disappointed to see such scarce mention in the Bill, which we believe would emphasise to local authorities the vital importance housing plays in fulfilling the duty of promoting wellbeing, as well as more emphatically formalising the duties outlined in the White Paper for local authorities and health agencies to work with housing providers to promote wellbeing and delay health and care needs.

## **8. Are the provisions of the draft Bill in relation to the views of service users, carers and prospective users of services sufficient? Would you suggest any improvements to these provisions?**

The central principle upon which the Bill is founded – a duty placed on local authorities to improve wellbeing with recognition that the individual is best placed to judge their wellbeing – is very promising and JRF welcomes this in principle. It certainly had the potential to place individuals, their families and carers at the heart of the legislation. Nonetheless, we feel the legislation does not consistently uphold this approach and slips back into paternalistic language in many places. Moreover, the provisions related to assessment, care planning and entitlement do not provide sufficient opportunities for care users and their families to play a large part in the process or have their views heard.

It is important to remember that choice and control is not just about ensuring everyone has the opportunity to use a personal budget, but that the entire care pathway – from assessment to delivery – must be built around the care user and their family. While the White Paper presents this person-centred approach well, JRF feels this is not well articulated in the draft Bill. For example (and explained in further detail in other responses below), there is no mention of co-production as a standard approach, nor of the use of user-led organisations, in the assessment, care planning or care delivery process. Consultation is mentioned, and a duty to be kept informed – but these vague terms can often mean care users remain passive recipients, being 'done to' rather than influencing and taking control of the processes which affect them (Branfield and Beresford, 2006; Glynn, *et al.*, 2008; Katz, *et al.*, 2011).

To rectify this, JRF would like to see within the draft Bill a more forceful description of older and disabled people's right to be at the centre of assessment, care planning and provision. This would include a clear provision stating that assessments and care planning should be co-produced with the person being assessed wherever feasibly possible, and a duty to consult care users, carers and their families regarding their needs and priorities when local authorities carry out their duty to promote diversity and quality in the provision of local services. Furthermore, it is important not to lose sight of the strong and growing user and carer movements and the value of involving groups of users and carers and their collective voice.

## **9. What is your view of the financial and other implications for local authorities of the new care and support responsibilities set out in the draft Bill?**

JRF feels that local authorities will need to commit some additional funding to help with the facilitation and encouragement of healthy care markets, particularly the provision of preventative and low-level support which will be under-developed in some areas. Providing adequate information and advice services also clearly has financial implications.

However the majority of local spending is related to the direct payment of individuals eligible for care funding or the provision of services. Where the resources needed for this will come from remains an open issue, and decisions regarding any new care funding regime are critical to this.

## **10. What are the risks and benefits of the duty on local authorities to provide advice on adult care and support? Are they the same for the duty to provide information?**

It is important to recognise the difference between the provision of information and advice and the way in which local authorities view this distinction. Advice implies greater responsibility for the outcome of the advice being given, and therefore requires greater confidence in the quality of the advice compared with straightforward signposting. Piloting of an equity release product commissioned by JRF in 2010/11 found local authority staff were uncomfortable with the provision of advice when it came to financial issues. These concerns partly stemmed from not properly understanding the difference between regulated and unregulated financial advice, but also from a more general reluctance among local authority staff to direct people to non-statutory services. The mindset of being a direct provider of support and services can make the transition to being a 'hands off' facilitator – advising and directing, but not taking responsibility for people's decisions – challenging for some local authorities (Terry and Gibson, 2012).

Nonetheless, it is vital that local authorities are given the confidence to take more of a role in advising and guiding those in need of care and support and their carers and families; information is clearly not sufficient in such a complex and opaque system and more personalised advice is in demand (Horton, 2009; Centre for Policy on Ageing, 2011).

## **11. How can local authorities ensure that the local care market provides enough care services to meet local needs? How can they encourage a diverse range of high-quality providers?**

JRF believes the provisions relating to local authorities' duty to promote diversity and quality in the provision of local services does not include sufficient regard to the views of care users, carers and their families. Shaping local care markets must first and foremost take into account what local people want and need, responding to demand by seeking first-hand feedback and not commissioning services based on an assumption of what people need (Beresford, 2011; Williamson, 2012). JRF's research clearly demonstrates that without the service user being able to express their views and preferences (individually or collectively), they will be unable to exercise choice and control. Unless user voices are listened to by carers, professionals and commissioners, choice and control remains an empty exercise (Mauger and Deuchars, 2010; Bowers, *et al.*, 2009)

The current provision is not explicit in how a local authority should meet its duty to shape the local care market, only that it should have regard to diversity and quality. JRF believes the only way a local authority can truly define quality and diversity in a locally appropriate way is by actively including those destined to use services in shaping what it delivered.

## **13. The White Paper talks about 'approaches that promote support within communities' and calls for the adoption of 'asset-based' approaches. Is the draft Bill successful in embedding this approach, or should other preventative approaches be adopted?**

The Bill places a duty on local authorities to provide, or arrange for the provision of, services it considers will help prevent or delay the need for more intensive health or care support. JRF believes this is adequate within a legislative document, and views the White Paper as a valuable supplement to the Bill to enable local authorities to explore a range of ways in which this prevention duty might be fulfilled. Nonetheless, it is important to remember that there is a vast array of ways in which care and health needs can be prevented and delayed, including but not exclusively those outlined in the White Paper (Centre for Policy on Ageing, 2011; Raynes, *et al.*, 2006). It is important that local authorities do not feel constrained by the White Paper and understand that there are many possible approaches to choose from, many of which have been robustly evidenced and used in different parts of the country, which will be suitable for different local contexts.

## **16. Do you consider that variable local charging regimes for services are compatible with national eligibility criteria, and any future funding changes involving capping individual financial liability?**

## **17. The White Paper says that assistance with care and support needs will be subject to a reasonable charge. Do the charging provisions in the draft Bill reflect this policy intention, and is the policy intention clear?**

JRF strongly feels a national eligibility criteria and transparency regarding what the state and what the individual is liable to pay for care is vital if we want to encourage people to prepare for care costs in later life (Stone and Wood, 2010; Beresford, 2010). The current system is opaque and confusing for people in need of care and their families, and JRF is concerned that locally variable 'reasonable charges' for different services might undermine the national consistency and clarity that a national eligibility framework would otherwise achieve.

JRF feels that progress on care funding reform, with regard to the evidence and recommendations presented in the Dilnot report, is critical to decisions regarding national eligibility criteria and charging regimes. A sustainable funding settlement would establish a fair and sustainable source of funding for local services.

## **19. Do the care and support plan provisions allow adequately for input from service users and carers?**

Clause 24 of the draft Bill details the process through which those in need of care and support and their carers will prepare their care and support plans. JRF is concerned that these relevant paragraphs do not adequately and formally institute the concepts of co-production and user-led care planning. Much of the wording implies care users being passive and 'done to' rather than being active participants. For example, clause 24 part 6 states that the local authority 'may authorise' a person to prepare the care plan, and this may include the adult for whom the plan is being prepared. Section 24 part 2 states that the local authority must wherever feasible 'consult' the adult for whom the care plan is being prepared. These limited and vague statements seem a far cry from a pro-active co-production and partnership arrangement where the individual is at the centre of the planning process, as presented more forcefully in the White Paper.

JRF research demonstrates that the concept of 'consultation' can often mean little more than keeping those involved informed, rather than giving them control over the process and enabling them to set the outcomes they want and value (Branfield and Beresford, 2006; Beresford, 2011). The White Paper is more encouraging in this regard but under the current clause 24 provisions, JRF feels it unlikely that co-produced care plans and genuine user involvement will become standard practice.

Similarly, JRF is not convinced by the level of user involvement in the assessment process as outlined in clauses 9–13. The language again focuses on consultation and having regard to the wishes of the person being assessed, but co-production of assessment does not feature. The regulations 'may specify circumstances in which the person to whom the assessment relates, or a specified person or person of a specified description, may carry out the assessment jointly with the local authority',

but it is only in the detailed notes of the legislation that the term self-assessment is even used. JRF does not feel this is adequate to ensure that co-produced assessments and self-assessments become more widely used by local authorities upholding this legislation, and does not fully reflect the vision of user-centred assessment, care planning and delivery outlined in the White Paper.

## **21. The White Paper says that commissioning practices which put tight constraints on how care and support is provided – so-called ‘care by the minute’ – are unacceptable. Does the draft Bill have a part to play in addressing such practices, and if so how?**

We applaud the stand the White Paper takes against ‘time and task’ style care contracts, and believe outcomes-based commissioning of care and support services are central to a modern care system.

Consultation with service users as part of JRF’s *Shaping our Lives* project found that people express their needs and aspirations, and live their lives, in terms of self-defined outcomes rather than services. People view outcomes from a holistic perspective, thinking about housing, transport, employment, income and benefits, and broader issues around discrimination and equality without separating these into neat service areas (Turner, 2003; Glynn, *et al.*, 2008). Older people living in residential care homes identified their outcomes for ‘a good life’ in residential care (Bowers, *et al.*, 2009; Katz, *et al.*, 2011). On the other hand, service-based assessments and delivery seldom make sense to people. Service-led distinctions between (for example) social care and health do not resonate with how people live their lives, and cause confusion for users and practitioners (Beresford, 2010).

With this in mind, we believe the draft Bill does have a role in formalising an end to ‘care by the minute’ and simultaneously formalising a commitment to base the assessment, planning and delivery of care on the identification and achievement of outcomes as defined by the individual themselves. Furthermore, the outcomes-based approach should be seen as a way in which the integration of health, care and other services – including housing – can be facilitated. As these duties are set out in the Bill, JRF would very much like to see in the relevant provisions encouragement for the use of outcomes-based commissioning and the working towards joint outcomes by all of the relevant agencies.

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