



Lords Stages of the *Care Bill*: Social care provisions

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Section Social Policy Section

The *Care Bill* was introduced into the House of Lords in May 2013. It aims to bring together existing care and support legislation and reform the social care system in several ways, including its funding. It also includes reforms to the regulation of health services and establishes Health Education England (HEE) and the Health Research Authority (HRA) as statutory non-departmental public bodies

The Bill was introduced in the House of Lords as HL Bill 1 of session 2013-14. This note provides an overview of developments during the Bill's Committee and Report Stages in the Lords relating to social care. It is not intended to be exhaustive, but rather to provide a summary of the areas discussed and the most important amendments made.

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1 The Bill

The *Care Bill* includes provision to:

- Bring together existing care and support legislation into a new, modern set of laws and build the system around people’s wellbeing, needs and goals.
- Set out new rights for carers, emphasises the need to prevent and reduce care and support needs, and introduces a national eligibility threshold for care and support.
- Introduce a cap on the costs that people will have to pay for care and sets out a universal deferred payment scheme so that people will not have to sell their home in their lifetime to pay for residential care.
- Set out Ofsted-style ratings for hospitals and care homes so that patients and the public can compare organisations or services in a fair and balanced way and make informed choices about where to go.

- Enable the new Chief Inspector of Hospitals, appointed by the [Care Quality Commission](#), to trigger a process to deal with unresolved problems with the quality of care more effectively.
- Make it a criminal offence for health and care providers to supply or publish false or misleading information.
- Establish the Health Education England (HEE) and the Health Research Authority (HRA) as statutory non-departmental public bodies.¹

2 Overview of Lords stages

The Bill was introduced into the House of Lords as HL Bill 1, and had its First Reading on 9 May 2013. The [Second Reading](#) debate was held on 21 May 2013.² The Bill was considered in Committee on 4, 10, 12 June and 3, 9, 16, 22 and 29 July; an amended version of the Bill was published on 30 July as HL Bill 45. Report Stage took place on 9, 14, 16 and 21 October. The Third Reading debate took place on 29 October.

2.1 Social care issues discussed during Committee and Report Stage

Below is set out an overview of developments relating to social care during the Bill's Committee and Report Stages in the Lords. This is not intended to be exhaustive, but rather to provide a summary of the areas discussed and most important amendments made. Unless otherwise indicated, the agreed amendments referred to were agreed without a division.

Well-being principle and related guidance

The Bill includes a new statutory principle, “designed to embed individual well-being as the driving force behind care and support.”³ During Committee Stage and Report Stage, amendments were discussed relating to what individual well-being would mean in practice, including consideration of a person’s spiritual well-being, the ability to keep pets, and the maintenance of a person’s dignity and respect.⁴ The position of adult carers of disabled children was also discussed.⁵ A new clause, subsequently withdrawn, was moved by Lord Warner to ban employment practices inconsistent with the Bill’s well-being principle.⁶

During Report Stage, a Government amendment was agreed to provide that the Secretary of State must have regard to the general duty of local authorities relating to well-being when issuing relevant guidance and making regulations.⁷

During the Third Reading debate, Lord Hamilton moved an amendment to provide that ‘spiritual needs’ be included in the definition of ‘well-being’.⁸ The House divided on the

¹ Department of Health, [Government publishes Care Bill](#), 10 May 2013

² HL Deb 21 May 2013 c746

³ Department of Health, [The Care Bill Explained](#), p11

⁴ PBC Deb 3 Jul 2013 c1258-1274 and HL Deb 9 Oct 2013 c82-88

⁵ Ibid., c1304-1311 and HL Deb 9 Oct 2013 c82-88

⁶ PBC Deb 29 Jul 2013 c1602-1605

⁷ HL Deb 16 Oct 2013 c625

⁸ HL Deb 29 Oct 2013 c1453

amendment. It was disagreed by 271 votes to 96.⁹ A Government amendment, moved by Earl Howe, to include 'feelings and beliefs' in the definition was agreed without a vote.¹⁰

Integration of Health and Social Services

A Government amendment was agreed during Report Stage that, for the purposes of the Bill's provision to promote the integration of care and support with health services, housing would be considered a health-related provision.¹¹

Promoting diversity and quality in provision

During Report Stage, Baroness Meacher tabled amendments which provided for regulations to be made about how care services are commissioned. The amendments aimed to ensure a sufficient level of quality for the individual, and also that home visits should not be normally commissioned for less than 30 minutes.¹²

Responding for the Government, Earl Howe stated:

[...] we need to move away from overly prescriptive commissioning practices that focus on price and time-slots, to consider how local authorities can deliver better outcomes and quality care. None the less, there is more that we can and will do to tackle poor commissioning practices. There is a role for regulation. We are therefore proposing an amendment that will make it clear that the CQC may, with approval from both Secretaries of State of DH and DCLG, undertake a special review of local authority commissioning of adult social services in cases of systematic failure. Subsequent to any such review, CQC could issue an improvement notice in the event of a non-substantial failing and recommend special measures to the Secretary of State in the event of substantial failings.

We also intend to issue statutory guidance specifically on local authority commissioning. This will be a valuable opportunity to influence local practice. In particular, we will include in this guidance clear examples of high-quality and poor-quality commissioning practices to support local authorities to develop and improve their own approach.¹³

Although Baroness Meacher withdrew her amendments, she reiterated the need for visits to be of an appropriate length of time.¹⁴

Also during Report Stage, two Government amendments were agreed to provide for local authorities to have regard to fostering an effective care and support workforce, and also to have regard to the importance of promoting the well-being of care recipients and carers when arranging for care provision by other persons.¹⁵

Co-operation between health and social care services: Young carers

The Bill requires that where a local authority requests co-operation from a relevant partner (for example, an NHS body) in relation to the needs of an adult or their carer, that the partner must co-operate unless to do so would be incompatible with its own duties, or have an adverse effect on its functions, and that the same duty applies when the reverse request is

⁹ Ibid., c1461

¹⁰ Ibid., c1464

¹¹ HL Deb 9 Oct 2013 c113

¹² Ibid., c149

¹³ Ibid., c161

¹⁴ Ibid., c162

¹⁵ Ibid., c163

made of the local authority. During Committee Stage, a Government amendment was agreed to extend the requirement to co-operate to include the needs of young carers.¹⁶

Assessments of need

The Bill's provisions on assessments of an adult's care needs, and on a carer's need for support, were discussed at some length during Committee Stage.¹⁷ During Report Stage the Government moved a series of amendments, subsequently agreed, to address concerns that had been raised, including:

- potential misinterpretation of the Bill's by local authorities on the levels of assistance that might be provided by friends and family rather than the local authority;
- sufficient support in the provisions for the Bill's focus on the prevention of need;
- a requirement for local authorities to consider whether any universal services available locally might benefit a person being cared for, and for similar provision to be made for carers, children, child carers and young carers.

Further Government amendments were also agreed to require sufficient expertise was used in making assessments.¹⁸

Eligibility criteria for care

The Bill proposes a single eligibility threshold for social care, which is intended to be broadly similar to the 'substantial' level of care need currently in use.¹⁹ At present, local authorities can decide to provide assistance at one of four levels of need: low, moderate, substantial or critical.²⁰ Debate during Committee Stage focused on this single eligibility threshold and those who would miss out if 'substantial' care needs were made the universal threshold. Speaking for the Government, Earl Howe indicated that this issue would be dealt with in regulations, and that a formal consultation will be run in spring 2014.²¹

Power of local authorities to charge for care

During Committee Stage, Earl Howe stated that draft regulations on the power of local authorities to charge for care would be published following the Government's consultation on social care funding reform, which ran from 18 July to 25 October 2013.²² Earl Howe further stated that guidance on charging would be statutory.²³ Two Government amendments were agreed during Report Stage, aimed at improving the flexibility of the Bill while this consultation process is still ongoing.²⁴

Steps for local authorities to take after assessment

Two Government amendments were agreed during Report Stage relating to the steps to be taken after a care assessment has been carried out. The first provided a requirement for

¹⁶ PBC Deb 9 Jul 2013 c251

¹⁷ See PBC 9 July 2013 c173-188 and 16 July c665-670

¹⁸ HL Deb 14 Oct 2013 c269-270

¹⁹ Draft regulations to provide for this change have been published. See Department of Health, *Draft national eligibility criteria for care and support*, June 2013

²⁰ A discussion of this system can be found in the Library standard note *Domiciliary Care: Eligibility Criteria*, SN/SP/6067

²¹ PBC 16 July 2013 c683

²² Ibid., c696; Department of Health, *Caring for our Future: Consultation on reforming what and how people pay for their care and support*, July 2013

²³ PBC 16 July 2013 c697

²⁴ HL Deb 14 Oct 2013 c281-282

local authorities to prepare an independent personal budget in certain circumstances, even if the authority was not going to be providing care,²⁵ and the second provided for children, as well as adults, to have their care and support plan (or support plan for a carer) combined with another person's in appropriate circumstances.²⁶

End of life care

During Report Stage, a Government amendment to the Bill was agreed to make it explicit that where an adult is terminally ill, local authorities may treat their case as urgent.²⁷

Deferred payments

The Bill makes provision for deferred payments for care, currently available at the discretion of local authorities, to be made available across England. In debate during Committee Stage, concerns were raised both about the timing of this change, intended to be implemented in April 2015, and the schemes themselves, which the Government intends would be developed by local authorities rather than rolled out nationally.²⁸

A Government amendment was agreed during Committee Stage for alternative arrangements to be made for deferred payments, if a local authority thinks it appropriate. This amendment is intended principally to allow authorities to make alternative arrangements for people who would not wish to have a deferred payment because of a religious objection to paying interest.²⁹

During Report Stage, Lord Hunt moved an amendment to provide that the Government make available to local authorities a model deferred payment scheme which all local authorities must follow unless they can show due cause not to. The House divided upon this amendment, and it was disagreed by 224 votes to 202.³⁰

Also during Report Stage, Lord Lipsey raised concerns about the operation of the proposed deferred payment scheme. Lord Lipsey tabled an amendment to instruct local authorities to direct people seeking a deferred payment to a financial adviser, and that any loan under the scheme should be sufficient to cover the costs of this advice. The amendment was withdrawn.³¹

Lord Lipsey also referred to the Government's consultation on care funding reform, which includes a proposal for the deferred payment scheme to be available to those who, alongside other eligibility criteria, have less than £23,250 in assets excluding the value of their home (i.e. in savings and other non-housing assets).³² Lord Lipsey stated that this was a:

...huge restriction that will mean that very few people will take advantage of the deferred payment scheme. It would not in any case have been 40,000, but now I think that it will be nearly nil...most people who have reasonably valuable houses, who are the people most likely to want to adopt this measure, will have far more than £23,250 worth of other assets. Most of them will not feel the least bit happy if they have to spend down until they have only £23,250 left in the bank before they can get any help

²⁵ Ibid., c298

²⁶ Ibid., c299

²⁷ HL Deb 14 Oct 2013 c298

²⁸ PBC 22 Jul 2013 c1062-1077

²⁹ Ibid., c1070 and c1077

³⁰ Ibid., c309

³¹ HL Deb 14 Oct 2013 c299

³² Department of Health, *Caring for our Future: Consultation on reforming what and how people pay for their care and support*, p44

from the deferred payment scheme. That hardly pays for a daily delivery of the *Racing Post* for the rest of their lives, their nightly gin and tonic or more important things such as the literature they want to read or all the things that make their life fuller. For those people, a deferred payment scheme is simply not available.³³

On behalf of the Government, Earl Howe responded:

The second issue raised by the noble Lord was about the deferred payment scheme and his perception that the Government have effectively emasculated it. I do not share that perception. There will be some circumstances in which local authorities must offer a deferred payment, and that is when the Bill specifies that the local authority would be under a duty to offer a deferred payment. We are consulting on the eligibility criteria for when people must be offered a deferred payment, which is where the figure of 23,250 is used. The Bill has an additional power for local authorities to offer deferred payments more widely, and we are seeking views on this through the consultation.³⁴

Lord Lipsey emphasised that this provision would mean that the Bill does not provide for a universal deferred payments scheme.³⁵

During the Third Reading debate, Lord Lipsey moved an amendment to provide that regulations on deferred payments may not specify any threshold of other assets above which a person is not eligible to receive a deferred payment loan,³⁶ prompting further discussion of a cap on eligibility for deferred payments. The amendment was subsequently withdrawn.³⁷

Portability

During Report Stage, Baroness Campbell moved an amendment to provide that the aims of a person cared for, and their carer, be included in considerations for when they move.³⁸ In response to the concerns raised about potential gaps in provision when a person moves, Earl Howe moved an amendment on behalf of the Government, which stated that the local authority the person cared for is moving out of must contact the authority they are moving to, and maintain a relationship so that they are aware of the services that the second authority is putting in place for that care recipient. The Government amendment was agreed.³⁹

Adult Safeguarding

The Bill includes provision that local authorities must undertake, or cause to be undertaken, enquiries where they suspect an adult is at risk of neglect or abuse. During Report Stage, Baroness Greengross tabled an amendment to introduce an adult safeguarding access order where an adult is suspected of being abused or neglected, and to introduce a duty to notify authorities where abuse or neglect of an adult is suspected.⁴⁰ Earl Howe responded that the Government saw no need for further provision of this kind, stating that the consequences of further powers were unclear, and that legislation already existed for professionals to access

³³ HL Deb 14 Oct 2013 c300-301

³⁴ Ibid., c305

³⁵ Ibid., c307

³⁶ HL Deb 29 Oct 2013 c1470

³⁷ Ibid., c1476

³⁸ HL Deb 14 Oct 2013 c312

³⁹ Ibid., c316

⁴⁰ Ibid., c330

those in urgent need of assistance.⁴¹ Baroness Greengross pressed the amendment to a vote; it was defeated by 143 votes to 72.⁴²

A Government amendment was subsequently agreed for adult safeguarding boards to publish annually what they have done to implement the findings of safeguarding adults reviews they have conducted, and also why they have decided not to implement any findings where they have declined to do so.⁴³

Prisoners and persons in bail accommodation

The Bill sets out the safeguarding responsibilities of local authorities relating to prisoners and those in approved premises (such as bail accommodation). During Committee Stage, Government amendments were agreed which clarified the interface between local adult safeguarding boards and prisons, and how they should work together; and to provide that safeguarding adult boards will not carry out serious case reviews in prisons or bail premises, but be available for advice.⁴⁴

During Report Stage, Lord Patel tabled an amendment to ensure that that people in prison and those residing in approved premises have equivalence of care when it comes to safeguarding inquiries by local authorities. The amendment was subsequently withdrawn.⁴⁵

During the Third Reading debate, Lord Patel tabled an amendment to state that the Secretary of State should report to Parliament on the discharge by probation trusts of their responsibilities for safeguarding adults residing in approved premises, within one year of the relevant provisions coming into force.⁴⁶ In response, Earl Howe said that guidance for prisons, probation officers, and local authorities was being developed to ensure that duties were discharged correctly.⁴⁷

Care and support as a public function under the Human Rights Act 1998

During Report Stage, Lord Low tabled a new clause to make the provision of care and support a public function under the *Human Rights Act 1998*. Lord Low stated:

The Human Rights Act 1998 applies to all public authorities and to other bodies when they are performing functions of a public nature. That means that it should apply to all providers of care, given that the provision of care is a public function. However, the matter was thrown into doubt in 2007 by the case of *YL v Birmingham City Council*, which held that care home services provided by private and third sector organisations under a contract with the local authority did not come under the definition of “public function” for the purposes of the Human Rights Act. This meant that thousands of service users had no direct remedy against their care provider for abuse, neglect or undignified treatment. Though the public body commissioning the care remained bound by the Human Rights Act, that was of little practical value to the individual on the receiving end of poor or abusive treatment, or the person given four weeks’ notice to leave because they had antagonised their provider, about whom the noble Lord, Lord Warner, told us in Committee.

⁴¹ Ibid., c339-340

⁴² Ibid., c343

⁴³ Ibid., c345

⁴⁴ PBC 29 Jul 2013 c1578-1588

⁴⁵ HL Deb 16 Oct 2013 c621-625

⁴⁶ HL Deb 29 Oct 2013 c1476

⁴⁷ Ibid., c1479-80

Accordingly, Section 145 was introduced into the Health and Social Care Act 2008 to clarify that residential care services provided or arranged by local authorities are covered by the Human Rights Act. There has been concern that this Bill would undo Section 145 by repealing Sections 21A and 26 of the National Assistance Act 1948, under which persons were placed in residential care and through which Section 145 has operated. However, the noble Baroness, Lady Northover, responding to the debate in Committee, set minds at rest on that when she provided the assurance that,

“there will be a consequential amendment to Section 145 of the Health and Social Care Act 2008 so that there will be no regression in human rights legislation”.—[*Official Report*, 22/7/13; col. 1118.]

However, there remains concern that Section 145 does not cover all care service users, or even all residential care service users. It only protects those placed in residential care under the National Assistance Act. That being so, it is anomalous not to treat residential care provided under other legislation and domiciliary care in the same way.⁴⁸

The subject was debated at length, with wide support for the amendment.⁴⁹ Responding for the Government, Earl Howe expressed his belief that the amendment would represent an unprecedented expansion of the *Human Rights Act* and did not support it:

For the first time, [the HRA] would capture purely private arrangements, such as a privately arranged social care contract between a private care home and a private individual—an arrangement in which there is no state involvement.

The European Convention on Human Rights and the Human Rights Act, which gives further effect to the convention rights in our domestic law, impose public law obligations that apply separately from, and in addition to, the duties and obligations on the private sector.

However desirable it might appear to be, it is obviously difficult to draw a crisp dividing line as to whether a function is of a public or a private nature. Ultimately, the legislation has to bear the test of time. The courts have acknowledged that there is no single test to determine whether a function is of a public nature and have pointed out that there are “serious dangers” in trying to formulate such a test.

In determining whether a function is a public function for the purposes of Section 6, our courts undertake a factor-based approach which is fact-specific in each case. Consequently, it is neither appropriate nor desirable to introduce amendments bringing specific categories of person within the Human Rights Act which do not reflect the factors that have been applied by our courts.

Difficult as it may be to do so, it is important to take a wider view of how the Human Rights Act applies outside the immediate context of social care and to see whether the amendment would have any unfortunate unintended consequences, such as calling into question whether other groups are covered.

It is clear that the amendment seeks to expand Section 6 of our own domestic Human Rights Act. However, as I have already noted, the Human Rights Act is not free-standing legislation. Its purpose is to give effect in our domestic law to the rights in the European Convention on Human Rights. Arguably, the proposed amendment would mean that, for the first time, we would be legislating for an expansion in scope of the

⁴⁸ HL Deb 16 Oct 2013 c544-545

⁴⁹ *Ibid.*, c544-562

Human Rights Act that included claims that cannot be brought before the European Court of Human Rights.⁵⁰

Lord Low pressed the amendment to a vote, stating that the legal position in this area should be put beyond doubt. The House divided on the amendment, and it was agreed by 247 votes to 218.

Duty of Candour

During Report Stage, the Government added a new clause to the Bill to introduce a statutory duty of candour. The amendment, which was agreed, provided a requirement on registered providers of health and adult social care to be open with patients and service users about failings in care.⁵¹ A related Government amendment was agreed to establish a new offence and penalties where care providers provide certain false or misleading information.⁵²

Training Standards

During Report Stage, a Government amendment was agreed to allow the Government to make regulations to specify who can set training standards for persons working in a regulated activity, including healthcare assistants and social care support workers.⁵³

Other issues discussed

The following issues were also discussed during the Lords stages, but did not result in provisions being added to the Bill:

- The adequacy of public funding for the Bill's reforms⁵⁴
- Appeals and tribunals to challenge local authority decisions⁵⁵
- An older person's commissioner⁵⁶
- Registers of sight-impaired and disabled adults⁵⁷
- A right for NHS patients to die at home⁵⁸

3 Briefings and Useful Documents

- The Bill [as brought to the Commons](#) from the Lords, with [explanatory notes](#) (Bill 123)
- The Bill [as introduced](#), with [explanatory notes](#)
- House of Lords Library briefing on the Bill as introduced, [LLN 2013/010](#)
- Pre-legislative scrutiny: [report](#) of the Joint Committee on the draft *Care and Support Bill*⁵⁹

⁵⁰ Ibid., c558-559

⁵¹ Ibid., c640

⁵² HL Deb 21 Oct 2013 c834

⁵³ Ibid., c846

⁵⁴ PBC 29 Jul 2013 c1547-1561

⁵⁵ PBC 29 Jul 2013 c1561-1568 and HL Deb 14 Oct 2013 c320-330

⁵⁶ HL Deb 16 Oct 2013 c626-635

⁵⁷ PBC 29 Jul 2013 c1589-1592

⁵⁸ PBC 29 Jul 2013 c1592-1601

⁵⁹ Joint Committee on the Draft Care and Support Bill, *Draft Care and Support Bill*, HL 143 and HC 822, 19 March 2013

- [The Care Bill Explained](#), published by the Government in May 2013. Includes the Government response to pre-legislative scrutiny⁶⁰
- The Government has also published a series of [factsheets](#) on the different areas of the Bill.

⁶⁰ Department of Health, [The Care Bill Explained](#): Including a response to consultation and pre-legislative scrutiny on the Draft Care and Support Bill, Cm 8627, May 2013