

Consultation Analysis – Care Act 2014 Cross-border placements and Provider Failure regulations

Acknowledgments

The Scottish Government acknowledges the contribution of those organisations and individuals who made written submissions to the Scottish Government in response to the consultation document.

Executive Summary

Background

1. The Scottish Government alongside the Department of Health, Department of Health, Social Services and Public Safety of Northern Ireland and the Welsh Government launched a consultation on cross-border placements, dispute resolution and provider failure regulations in May 2014 to support the UK Care Act 2014 (“the 2014 Act”). This report presents the views expressed by respondents to the consultation proposals in Scotland.

2. The 2014 Act has created a legislative basis for cross border placements for those who require care and accommodation in a devolved administration area. Devolved administrations have worked together to agree the principles of Schedule one of the 2014 Act. Schedule one sets out certain principles governing those occasions when a local authority decides that a person’s need for care and support is best met by a placement into residential care in a different part of the UK.

3. The consultation sought views on two regulations that extend to Scotland following the introduction of the 2014 Act to achieve a consistent and equitable approach across the UK:

- Local authorities in Scotland are able to make placements outside Scotland; whereby the placing authority retains funding responsibility for the individual;
- Dispute resolution process for cross-border placement disputes;
- where a registered care home provider fails financially the local authority duty to provide alternative arrangements is prescribed.

Method

4. The consultation commenced on 9 June 2014 till 18 August 2014. It was a web based written consultation inviting individuals and organisations to submit their written responses to the consultation document on the 2014 Act regulations that extend to Scotland.

5. The consultation paper included 3 questions to which written responses were invited. A total of 9 responses were received.

Summary of responses

6. Each of the questions were embedded as part of each regulation under two headings The Care and Support (Cross-border Placements and Provider Failure: Temporary Duty) (Dispute Resolution) Regulations 2014 which includes the cross-border placements and dispute resolution process and The Care and Support (Cross-border Placements) (Business Failure [Duties])(Scotland) Regulations 2014 provider failure regulations.

7. The questions posed in the consultation document required respondents to provide a full textual response. All respondents provided full textual responses expressing their views and some provided additional views on the wider context

relating to issues beyond the scope of this consultation document. This input is invaluable as we have received responses from a range of sectors offering a greater depth to our understanding to take forward this legislation. Responses from the regulatory bodies to voluntary sectors reaffirms the complexity of the areas that this consultation seeks to address.

8. The remainder of this section provides a brief summary of key points made in response to the proposals in the consultation.

Cross-border placements

9. All respondents provided a positive response to the framework introduced by schedule 1 of the 2014 Act. However some respondents provided further information stating the difficulties that individuals experience at present without a legislative framework.

Dispute resolution process

10 The dispute resolution process forms part of the first regulation that introduces the framework. Respondents agreed with the overall principles to achieve reciprocity. However some respondents requested clarity on the sharing of information and amendments to specify a time period for Ministers/Secretary of State to make a determination upon referral.

11. Some of the respondents expressed that the dispute resolution process is adequate based on the current drafting.

12. Other respondents requested that the time period local authorities have before referring a dispute is extended from four months to six months as some cases are more complex than others.

Provider failure

13. The provider failure regulations formed the final part of the consultation document. A few responses referred to the need to consider wider causes for provider failures that lead to closures, poor performance or maladministration of corporate duties.

14. Some respondents expressed their discontentment at the timing of when the regulations are provoked and applied in the care provider failure situation.

15. Amendments were requested in relation to the use of language in the final part of the regulations, the terms used to specify those that require local authority assistance is detrimental. The phrase used refers back to the Social Work Scotland Act 1968 (“the 1968 Act”).

CHAPTER 1: INTRODUCTION

1.1 The Scottish Government launched a public consultation to inform recommendations on the legislation to support the 2014 Act that extends to Scotland. This report presents the views expressed by respondents to the consultation proposals.

Background to the consultation

1.2 The 2014 Act received Royal Assent in May 2014, this underpins the reform of care and support in England making provisions for:

- reforming the law in relation to care and support for adults;
- the law relating to support for carers;
- safeguarding adults from abuse or neglect;
- care standards;
- establish and make provision about Health Education England;
- establish and make provision about the Health Research Authority and for connected purposes to regulate assessments of the ethics of health and social care research.

1.3 At present section 12 of the 1968 Act places a duty upon Scottish local authorities to provide community care services within their area. Eligibility for such services arises both from an individual having a physical presence in the local authority area and from the individual being assessed as having a need that calls for the provision of care. An individual is not excluded from receiving community care services from a Scottish local authority by reason of being ordinarily resident outwith that local authority's area.

1.4 In addition sections 48 – 52 of the 2014 Act imposes duties on local authorities in England, Wales, and on Health and Social Care trusts in Northern Ireland, in the event of the failure of a provider of care services in a local authority area (through bankruptcy, entering administration etc), service users who are either temporarily or permanently located in another local authority area and who are using the services of a provider which fails are guaranteed to receive support in order to ensure that their service is not interrupted by said provider's failure.

1.5 It is worth reiterating that section 12 of the 1968 Act already places a duty on Scottish local authorities to provide or arrange care for any individual in their area who is requiring assistance in an emergency situation. The provisions of the 2014 Act place a similar duty on English and Welsh local authorities and Northern Irish Health and Social Care Trusts to meet the individual's needs of care and support for as long as considered necessary in relation to an individual that is ordinarily resident in Scotland. It will also allow those authorities to reclaim the costs of meeting those needs from the Scottish local authority in whose area the individual is ordinarily resident.

1.6 The Care Act provisions will come into force in April 2015. The four administrations have worked together to agree the principles in Schedule One and sections 48 – 52 of the 2014 Act.

1.7 The Department of Health launched a wider consultation on all the regulations and statutory guidance under part 1 of the 2014 Act at the end of May 2014. This

CHAPTER 1: INTRODUCTION

included the regulations on provider failure and dispute resolution regulations (covering England, Scotland, Wales and Northern Ireland), and also draft guidance relating to cross-border placements and provider failure (which will be statutory for England only). The Department of Health intends to issue the guidance in England in October this year, to give local authorities time to become familiar with it and prepare for the new provisions coming into force in April 2015.

1.8 The Scottish government recognises the need to update the current guidance document CCD3/2010 that also applies to intra Scottish placements to reflect the framework introduced by the 2014 Act.

1.9 The consultation document titled Consultation on the Draft Regulations relating to the Care Act 2014 puts forward the regulations that have been agreed to achieve reciprocity and clarity in cross-border placements. The regulations set out the detail of the framework for cross-border placements, disputes resolution and provider failure situations.

Purpose of the consultation

1.10 The purpose of the consultation was to seek people's views about the legislative framework for cross-border placements. The consultation included three questions covering three key themes: making cross-border placements; dispute resolution process and provider failure situations.

1.11 The rest of this report sets out to explore responses received to these questions. Chapter 2 describes the method used to capture views to the consultation proposals. Chapter 3 focuses on the views expressed in the written responses.

CHAPTER 2 : METHOD

Process overview

2.2 The formal consultation took place between 9 June and 18 August 2014. Individuals and organisations were invited to submit written responses to the document Consultation on the Draft Regulations relating to the Care Act 2014.

Responses

2.3 The Scottish Government promoted the consultation on its website and invited written responses to the consultation paper from all sections of society in Scotland. In particular, from those groups and organisations with a specific interest in health and social care. A copy of the consultation questionnaire can be found in Annex 1.

2.4 The consultation document and information on the consultation process were available on the Scottish Government website. This included an Easy Read version of the document. Paper copies including larger print and Braille versions of the consultation document were made available on request.

2.5 The consultation document was distributed to a wide range of stakeholders including Local Authorities, third and independent sector, professional organisation/bodies and equality groups.

2.6 The written responses were submitted directly to the Scottish Government via email. Those responding were given three options regarding confidentiality of their response (confidential; keeping their name but not response confidential; and not confidential). Those who did not fill in any option had their responses treated as confidential. A total of 9 responses were received by the Scottish Government. The respondents were categorised into organisational or group responses, with 5 categories to describe group role or interest in health and social care (see chapter 3, section 3.2, for a profile of the respondents).

Data analysis

2.7 The consultation document contained three questions seeking views on the drafted regulations. Each question asked directly whether the legislation was effective and their views on the current drafting. As such the analysis includes qualitative data derived from the views of the respondents.

Summary

2.8 This chapter has outlined the methods used in the consultation. The remainder of this report sets out the views of respondents to the consultation, with chapter 3 reporting on the views expressed in the written responses.

CHAPTER 3 : ANALYSIS OF WRITTEN RESPONSES

3.1 This chapter provides a summary and analysis of the written responses to the Consultation on the Draft Regulations relating to the Care Act 2014. The chapter begins with an overview of who responded to the public consultation and then reports on the views of respondents on each of the themes of the regulations set out in annex 1 and 2 of the consultation document.

3.2 A total of 9 written responses were received from respondents in Scotland and further details on the respondents can be found at Annex 2.

Table 3.3: Respondent profile

Type	Number of responses
Other statutory organisation	2
Third sector care provider	1
Local Authority	3
Representative organisation for professional group	2
Representative group for patients/care users	1

Overview of the written responses to the consultation

3.4 All of the questions offered respondents the opportunity to provide a full textual response. The respondents all agreed with the principles of the regulations and some offered a broader contextual view proposing additional areas for consideration.

Questions 1

1. Do the regulations provide for an effective dispute resolution procedure?

3.5 All respondents stated they supported the overall policy intent and principles of the cross-border placement framework. However some held the view that the regulations required amendments to ensure that an equitable approach is being achieved. This would allow the principle of reciprocity being fully implemented across the UK. The rationale being that the current arrangements have demonstrated a gap exists between Scottish local authorities and English local authorities creating budget pressures of a great amount.

3.6 The positive support is demonstrated further by the request that pre-existing disputes are dealt with applying the new framework introduced by the 2014 Act. As the framework achieves a significant change in that it aims to be an equitable approach across the UK.

3.7 Regulation 2(6) specifies the responsibility for determination of disputes, however the current drafting does create confusion in so far that the reader is unclear on the intended purpose.

3.8 Responses also included the views that regulation 6 is reworded to provide a greater level of control for the individual or their representative as the current wording is not definitive on information sharing.

CHAPTER 3 : ANALYSIS OF WRITTEN RESPONSES

3.9 At present the regulations do not stipulate the precise age of an adult, however a response has been received to clarify the position as to whether the relevant age is eighteen or sixteen years of age. Furthermore views have been expressed that the regulations do not clearly define when a dispute arises as the current Scottish guidance document CCD 3/2010 does contain an explanation to this effect. Also some hold the view that the sharing of information with the Secretary of State/Ministers has a negative effect to imply that the determination is a joint decision. As such the Secretary of State/Minister should not have sight of the determination until it has been released into the public domain.

3.10 The common response to this question is that the regulations prescribe a period of time within which the local authorities must resolve the dispute and failing to do so within four months make a referral to the relevant Minister/Secretary of State. However the regulations do not specify a period of time within which a determination must be made. Also responses have been received to request an extension to six months rather than four months before a referral must be seeking a determination.

Provider Failure

Question 2

1. We invite views on the approach to defining business failure by reference to insolvency situations.
2. We also invite views on the insolvency situations listed, e.g. are they appropriate and clear. Should other situations be covered?

3.11 Overall responses received in relation to Provider failure convey support of the provider failure situations as they adequately dealt with matters of insolvency in Scotland.

3.12 However some hold the view that the regulations should extend beyond the scope of financial failure to include poor performance, where a company has been dissolved and struck off the register by the Registrar of Companies for failing to lodge an annual return and/or accounts. Furthermore there is a request that the regulations include partnerships where an individual has been sequestered in an individual capacity and include Scottish Charitable Incorporated Organisations which are separate and distinct legal entities.

3.13 Other respondents expressed that the regulations were comprehensive and clear, although not covering unforeseen circumstances such as injury of Death. Although respondents acknowledged that these circumstances are already covered in other existing areas of legislation.

3.14 A number of respondents requested an amendment of the language used in regulation 5(1)(b) of The Care and Support (Cross-border Placements) (Business Failure [Duties]) (Scotland) Regulations 2014, “persons who are or appear to be in need of such accommodation by reason of infirmity, age, illness or mental disorder, dependency on drugs or alcohol or being substantially handicapped by any deformity

CHAPTER 3 : ANALYSIS OF WRITTEN RESPONSES

or disability.” The language used in the final part of the regulations is derived from legislation drafted in 1968, Social Work (Scotland) Act 1968.

3.15 Additional areas raised by a few of the respondents, local authority funding and the impact on commissioning was raised as an area for consideration. However this is beyond the scope of the consultation document and cannot be addressed.

Annex 1

Cross-border placements

People in residential care may wish to move to a different territory of the UK from that in which they reside, for example, to be near their friends and family. The Act sets out certain principles which seek to support the notion of residential care placements by ensuring that, generally, where a local authority (or equivalent in Northern Ireland) places someone in residential care cross-border within the UK, it does not result in transfer of the authority's responsibility for the individual concerned.

The draft Care and Support (Cross-border Placements and Provider Failure: Temporary Duty) (Dispute Resolution) Regulations 2014, cover:
Process for resolution of cross-border disputes that may arise between authorities about the general principles of non-transfer of responsibility;
Process for resolution of cross-border disputes that may arise between authorities in relation to temporary duties to meet needs in the provider failure context.

Questions for consultation

1. Do the regulations provide for an effective dispute resolution procedure?

Provider Failure

The Act also requires the Regulations to define the meaning of "business failure". This has been done by referencing different types of insolvency in the Regulations e.g. the appointment of an administrator. These insolvency 'situations' will act as a trigger for local authorities in England and Wales, and equivalent in Northern Ireland to temporarily meet care and support needs where insolvency causes a care provider to become unable to do so.

Questions for consultation

1. We invite views on the approach to defining business failure by reference to insolvency situations.
2. We also invite views on the insolvency situations listed, e.g. are they appropriate and clear. Should other situations be covered

Annex 2

Respondent List (non-confidential responses only)

Aberdeenshire Council
Alzheimer Scotland
Care Inspectorate
COSLA
Glasgow
People First (Scotland)
South Lanarkshire Council
The Law Society of Scotland
United Kingdom Home Care Association



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