

# STATES OF JERSEY



## **DRAFT REGULATION OF CARE (JERSEY) LAW 201- (P.95/2014): COMMENTS (P.95/2014 Com.) – RESPONSE OF THE MINISTER FOR HEALTH AND SOCIAL SERVICES**

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**Presented to the States on 3rd July 2014  
by the Minister for Health and Social Services**

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**STATES GREFFE**

## **COMMENTS**

### **INTRODUCTION**

First and foremost, the Draft Regulation of Care (Jersey) Law is about ensuring the safety and well-being of vulnerable people in Jersey. Those who, when being cared for, either in their own homes, or while in Health and Social Services residential or long term nursing care, are not currently protected by regulation.

Some of these people, particularly those being cared for at home, are at the highest risk of abuse, ill-treatment and exploitation, yet our existing Laws, designed to protect them, are over 30 years out of date.

People are often surprised to learn that most of the care provided in Jersey is not regulated, and there is a public expectation, or rather a demand, that we must do something about it.

Current legislation is unsatisfactory. In some areas, it is effectively non-existent. This new legislation is essential if we are to maintain public confidence in care services in Jersey.

It is also important to note that, while care homes and domiciliary care will be the first Regulated Activities, under the new legislation, cosmetic procedures, acute hospital services, social services and primary care will all follow in due course.

### **RESPONDING TO THE SCRUTINY PANEL RECOMMENDATIONS**

I am grateful to the Panel and their adviser for their comments about the Draft Regulation of Care Law 201-

I agree with many of the recommendations in the Scrutiny Panel Report. Indeed, the draft Law, the policy on which the Law is based, States report R42/2013 and the outcome of the recent stakeholder consultation, all address the very issues the Adviser has raised.

I cannot agree, however, with the adviser's first recommendation to "*suspend signing off the Regulation of Care Law 201- until the Care Act 2014 consultation on market oversight – monitoring financial sustainability guidance is completed which could then be used as a base for inclusion due to be implemented by April 2015*".

The consequences of a decision to delay approving this Law, on the basis of waiting to see what happens next in the UK, could be serious and significant. Jersey has been down that route with other legislative projects in the past.

If we take the view that we should wait, because the UK is considering changes, the reality is that Jersey legislation may never get completed and that is an unacceptable risk for the States to take.

The panel adviser accepts the Law is 'fit for purpose' and makes no suggestions for any amendments to the Primary Law.

She states that *“Overall, the draft law provides a sound framework for regulating health and social care services, which reflects the key aspects of the requirements particularly identified in the England regulatory standards at present.”*

The draft Law is not just 'cut and pasted' from UK legislation.

It was carefully formulated, taking into consideration local experience of regulating care services, as well as the deficiencies of the UK regulatory framework. The draft Law is designed to ensure that Jersey does not replicate the defects of the UK system, the consequences of which have been tragic.

I, and my Department, concur with most of what the Panel is suggesting.

Indeed, there is very little that we haven't already considered and incorporated, either in the draft Law or in the legislation policy

However we do not agree with the recommendation to suspend the Law until the UK brings in legislation relating to market oversight and providers' financial stability.

The reason they have given is misguided, in that much of the proposed UK law is irrelevant in Jersey, and the section about CQC's role in requiring providers to give the regulator financial information is already provided for in the draft Jersey Law.

Most of the questions about the appointment of the Commission are already set out in Schedule 2 of the draft Law, while questions about the recruitment process itself are answered in the Jersey Appointment Commission's Code of Practice on appointments to autonomous public bodies.

Of the other recommendations in the Adviser's Report:

- We have already given an undertaking to consult with stakeholders about Regulations; we do not need to update the Law as it already contains the necessary provisions.
- The commission will be created independently using a transparent process, in that it will follow the requirements set out in the legislation and the JAC code of practice
- Provision will be made for the Law to be reviewed following implementation, in accordance with good legislation practice. However, we would argue that 12 months is unrealistic and too short a period to gauge how effectively a new Law is working
- It is anticipated the Commission will set a strategy. However, as an independent autonomous public body, it will decide about producing a strategy and its timeframe
- The Commission will be responsible for the implementation of the Law and Regulations once enacted. There will, however, be a project lead and a project plan, together with a legislation team for the drafting of the Regulations and Standards who will ensure stakeholder engagement.
- An undertaking to consult with stakeholders in development of the Regulations has already been given.
- The Commission will also be responsible for developing the Standards.
- However, it is likely these will be service specific - as is the case in Scotland, Northern Ireland and Wales.
- The CQC model of having the same standards for high tech, acute hospital services and small group homes for people with Learning Disabilities is not sensible, nor is it sufficiently responsive to the varying, and often complex, needs of different services
- Once established, the Independent Commission will be responsible for providing information and developing the framework to *support all providers in understanding their responsibilities, interpreting standards, implementing outcomes, registering for the first time etc.*
- It is anticipated that the Commission will have an infrastructure to support its regulatory activities.
- In terms of reviewing and maintain standards, the Commission is to review any standards under Article 15 of the draft Law

In preparing the Draft Regulation of Care (Jersey) Law 201 - lessons have been learned. The deficiencies and failures in the UK are well understood and have been taken into account when drafting the Jersey legislation to avoid the same thing happening here.

In terms of Financial and Manpower Implications, the business case in the proposition refers only to the operational costs of the Commission.

It does not include compliance costs for providers. The Panel's Report, however, ignores the section which acknowledges that most providers are already compliant with the expected requirements and will have little additional costs.

Where there are significant failures in meeting standards, this is likely to be symptomatic of unacceptably low levels of care and, as such, detrimental to the health, safety and welfare of individuals using that service.

The Panel is seeking a detailed cost analysis of all financial implications that will be incurred within specific regulations, but this is not feasible. Any future Regulations brought before the States will, however, include a statement on financial and manpower implications.

Finally, we wholly concur with the Panel's conclusion. Indeed, we have many times, given an undertaking to ensure that a thorough consultation period is held for each Regulation to allow adequate time for any concerns to be addressed before lodging.

This legislation is of utmost importance and I am happy to agree with the Panel, that future Regulations should be fit for purpose and able to meet the needs of the Island”

## **SUMMARY**

This legislation is about securing the safety and well-being of vulnerable people in Jersey. We know people are at risk, and delaying progress towards legislation that will protect them, when we know the risk that such lack of regulation in this area continues to present, is not a decision that I would want to be a part of.

That the UK has yet to finalise its care legislation, to put right the deficiencies of their existing regulation, is not good reason to delay putting our own house in order, and I would urge Members to support the Proposition, allowing the next steps towards regulation to be progressed with the utmost priority.



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**MINISTER FOR HEALTH AND SOCIAL SERVICES – RESPONSE TO REPORT  
FROM HEALTH, SOCIAL SECURITY AND HOUSING PANEL**

**1. Introduction**

The Minister for H&SS is grateful to the Panel and their adviser for their comments about the Draft Regulation of Care Law 201- and agrees with many of the recommendations in the report. Indeed, the draft Law, the policy on which the Law is based, States report R42/3013 and the outcome of the recent stakeholder consultation address the very issues the Adviser has raised.

**2. Delaying the Draft Law**

The Minister cannot agree however with the adviser's first recommendation to *"suspend signing off the Regulation of Care Law 201- until the Care Act 2014 consultation on market oversight – monitoring financial sustainability guidance is completed which could then be used as a base for inclusion due to be implemented by April 2015"*. It is a thoroughly bad idea to delay approving this Law on the basis of waiting to see what happens next in the UK. Jersey has been down that route with other legislative projects in the past. If we take the view that we should wait, because the UK is considering changes, the reality is that Jersey legislation may never get completed; there are a number of precedents where this has been the case. We have an immediate problem to fix, in the form of regulation of domiciliary care. It is essential therefore to have a primary Law in place that will enable Regulations to be written to address that problem, rather than nothing at all. Going ahead now does not preclude a thorough review, in a few years' time, of how the Regulation of Care Law is working which is something we would be undertaking as a matter of course.

The Scrutiny Panel's report gives as its reason for delaying the Law that the UK are due to bring in a new Care Act. This is misconceived; the Market Oversight and Provider Failure provisions in the UK Care Act are to address the situation where a care provider, who provides services in a number of UK local authorities, each of which has statutory duties to provide care, fails. In Jersey we do not have the same underlying statutory duties or diffuse responsibilities for delivering them. There might be some useful lessons that come out of the consultation from the perspective of what information the CQC may require from providers to assess their financial stability. However, the Draft Regulation of Care Law already contains sufficient powers to enable the Commission to assess the financial stability of providers and protect against difficulties arising. For example:

- Article 10 provides that Regulations can specify the criteria to be applied and the requirements to be complied with when determining whether a provider is 'fit' to be registered,
- Article 14 enables Regulations to specify requirements with which providers must comply, and

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- Article 28 which requires registered care providers to produce such documents, information and records the Commission considers necessary or expedient for the discharge of its functions under the Law

The report recognises that “*Overall, the draft law provides a sound framework for regulating health and social care services, which reflects the key aspects of the requirements particularly identified in the England regulatory standards at present*”. This is certainly the case; however the draft Law is not just ‘a cut and paste’ from UK legislation; it was carefully formulated taking into consideration local experience of regulating care services as well as the deficiencies of the UK regulatory framework. The draft Law is designed to ensure that Jersey does replicate the failures, particularly in the English system, that they now have to address in new legislation, despite their equivalent Law, the Health and Social Care Act 2008, being only six years old.

It is for these reasons that the draft Jersey Law is principally enabling legislation which is broad in scope with numerous Regulation making powers. This Law therefore provides a sound legislative basis that can be responsive to future demands or any regulatory problems that may arise.

### **3. Panel’s “Issues for Consideration”**

The panel sets out a number of issues it suggests should be considered in appointing the Health and Social Care Commission, most of which are already addressed in Schedule 2 to the Law.

- Will the Chief Minister be responsible for leading the recruitment in partnership with JAC to appoint the Chair of the commission?
- What criteria will be used to ensure that the appointee has the relevant knowledge, skills and leadership qualities required?
- What marketing and communication strategy will be used to support the recruitment process?

#### ***Response***

***As set out in Schedule 2, the Chief Minister is responsible for the appointment, of the Chairman and therefore will be responsible for leading the selection process. The selection will be overseen by the Jersey Appointments Commission which has a Code of Practice on appointments to autonomous public bodies, so the process will need to comply with that code***

- Can an employee of Jersey Council of Ministers apply for the Chair of the commission or commissioner?

#### ***Response***

***There is no such thing as “an employee of the Jersey Council of Ministers”, the disqualifications are set out in paragraph 4 of the Schedule***



***and will be applied. These are to meet the requirements for the Commission to be independent and free from any undue political or stakeholder conflict of interest which is a fundamental principle of good regulatory practice.***

- Will the Chair of the commission (once appointed) lead on the recruitment of the commissioners?

***Response***

***Yes this is explicitly set out in paragraph 3 of Schedule 2***

- Will the appointment be on a fixed term contract including a probationary period?

***Response***

***The Chief Minister determines the term of appointment as set out in paragraph 5(a) of Schedule 2. It will be for a fixed term subject to renewal, but it won't include a probationary period as the Law limits the circumstances in which the appointment may come to an end to safeguard the independence of the Commission. A person can be discharged however for the reasons set out in paragraph 7 of the Schedule.***

- Will the recruitment process be values based?
- Will service users be part of the recruitment process, if so how will this be achieved?

***Response***

***The recruitment process will comply with the JACs Code of Practice on appointments to autonomous public bodies, which provides for a representative of 'the public body or other interested group'. The selection panel and how this will be constituted will be determined by the Chief Minister under the oversight of the JAC.***

- Who will the Chair of the commission be directly accountable to?

***Response***

***The Commission will be an Independent Public Body, however the Chief Minister appoints the Commissioners and under paragraph 7 of the Schedule can terminate the appointments if a Commissioner does not discharge his or her functions.***

- What performance management methods will be used to ensure that the employees of the commission are current, working effectively and developing their knowledge and skills?

**Response**

***These will be part of the Health and Social Care Commission's internal Human Resources policies and which undoubtedly will follow good practice guidance.***

**4. Adviser's "Recommendations and Conclusions"**

The Report makes a number of Recommendations and Conclusions, to which the Minister makes the following responses:

- Suspend signing off the Draft Regulation of Care (Jersey) Law 201- until the Care Act 2014 consultation on market oversight – monitoring financial sustainability guidance is completed which then could be used as a base for inclusion (this is due to be implemented by April 2015).

*Market oversight is the monitoring of financial sustainability guidance. It is being undertaken in the UK due to the financial collapse of the former residential care provider Southern Cross Healthcare, which put at risk the provision of residential care to thousands of vulnerable citizens across the UK. Southern Cross fell into financial difficulties in 2011 and were the largest residential care provider in the UK, caring for 31,000 people.*

- Consult with key stakeholders on the inclusion of market oversight

**Response**

***The Minister will not be suspending bringing forward the Draft Regulation of Care (Jersey) Law for the reasons set out before.***

***The Minister has already given an undertaking to consult with Stakeholders in the development of the Regulations and Standards, and not only those relating to 'market oversight'.***

- Update the Draft Regulation of Care (Jersey) Law 201-

**Response**

***It will not be necessary, to 'update the Draft Regulation of Care Law 201-' as the issues raised in the Panel's Report are already provided for within the existing draft Law, and can be achieved by the drafting of appropriate and relevant Regulations.***

- Ensure that the commission is created independently using a transparent process, ensuring that there are service user representatives

**Response**

***As previously stated, the Commission will be established through the procedures set out in Schedule 2 and will follow the Jersey Appointments Commission's Code of Practice on appointments to autonomous public bodies***

- Identify a review date of the commission and undertake an independent qualitative and quantitative evaluation of the processes implemented (suggest twelve months)

**Response**

***A review of the legislation will be undertaken, however the suggested time frame of 12 months following implementation, is unrealistic and too short a period to gauge how effectively a new Law is working.***

- The commission to produce a three year strategy

**Response**

***It is for the Commission as an independent autonomous public body to decide about producing a strategy and its timeframe, however it is expected that there will be a strategy.***

- A project manager to be identified who can lead on the implementation of the regulatory law and map out the process for designing the standards with the commission
- To run in parallel - a communication plan which ensures that all the key stakeholders are kept up to date with developments
- An implementation plan, identifying key elements of the project

**Response**

***It will be the Commission who will be responsible for implementing the Law and Regulations once enacted, however there will be a project manager and legislation team leading on the drafting of the Regulations and once the Commission is established, the Standards who will ensure Stakeholder engagement. A project plan will be developed setting out the process.***

***It is a requirement of the draft Law, under Article 15(2) that "the Commission must before publishing a standard for compliance or an amendment of a standard....or before revoking a standard....consult with such persons or bodies as appear to the Commission to be a representative of persons who would be affected by the proposals"***

- Decide if the standards will be service specific or standards that cross over services as the CQC essential standards in England

**Response**

***The Commission will be responsible for developing the Standards; however the likelihood is that these will be service specific (as is the case in Scotland, Northern Ireland and Wales). The CQC model of essential services clearly does not work; having the same standards for high tech, acute hospital services and small group homes for people with Learning Disabilities is not sensible or sufficiently responsive to the varying and often complex needs of different service provision.***

- Commission to provide tools that will support all providers to understand responsibilities, interpretation of standards, implementation of outcomes, registering for the first time etc.
- Create a web link for providers with useful information, documents, case studies

**Response**

***This will be the responsibility of the Independent Commission once established however it is anticipated that it will have an infrastructure to support its regulatory activities.***

- Ensure the standards are reviewed in a timely manner ensuring they reflect the changing delivery of support and care

**Response**

***The Commission are obliged to review any standards under Article 15 of the draft Law***

**5. “Implications of implementing the regulations that will underpin the draft law for service providers in private, states and others in the delivery of care”**

This section of the Report sets out of a combination of statements and questions relating primarily to the details of requirements that might be provided for in future Regulations and Standards.

As has been mentioned several times before, the development of the Regulations and Standards will include Stakeholder consultation and it is somewhat difficult to answer questions, on what are at present, unwritten statutory requirements. Therefore the responses in this section come with this proviso and are based on what the Report’s author has anticipated will be in the Regulations.

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- **Premises - providers need to:** Be mindful of equipment that needs maintaining and updating and the associated cost.

Ensure that the premises are suitable for the regulated activity. If changing service focus would this involve structural changes? How will this be funded?

### **Response**

***If a provider chooses to change service focus, the premises will need to be appropriate to that particular service and if this means structural alteration, it will be the responsibility of the provider to pay for this. This is standard regulatory practice.***

- Ensure that Health and Safety is maintained and fulfils the legislation. There could be some requirement placed on providers that they could have difficulty in implementing, for example, new fire systems.

### **Response**

***The responsibility for ensuring Health and Safety Legislation is complied with lies with the Health and Safety inspectorate and in the case of fire safety legislation, with the States of Jersey Fire Service. However it is self evident that if a provider is putting the health, safety and welfare of the people using the service at risk, appropriate regulatory action would need to be taken – that is the purpose of regulation.***

- **Resources - providers need to:** Ensure that the staffing level reflects service need. If this is a directive from the commission, providers may not have the funds or resources available to achieve/ maintain this requirement.

### **Response**

***Once again if a provider chooses to operate a service, then there will be an obligation to employ sufficient, suitably qualified and competent staff to meet the needs of the people using the service. A failure to provide adequate staff puts the health safety and welfare of services users at risk. This again is the purpose of regulation.***

Ensure that recording systems are adequate and meet data protection and confidentiality requirements. Providers need to ascertain if current IT applications are fit for purpose - this may require investment.

### **Response**

***Providers are already required to meet data protection legislation, this is not new.***

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- **Legislation - providers need to:** Review policies, procedures and guidelines to ensure they reflect legislation and are fit for purpose for example, safeguarding, Health and Safety etc. There could be inconsistency across providers because of lack of knowledge in some areas.

Understand the inspection process otherwise it could result in a breach of the Regulatory Law.

Be aware if the registered services provided are not clearly stated there will be consequences and could possibly be a fine.

Understand the standards for registration. Will providers be legally bound to ensure the outcomes are achieved as described?

### **Response**

***In accordance with normal regulatory practice, the onus is on the person registered to be aware of their statutory responsibilities, and yes it will be the registered person who will be legally accountable for complying with the requirements of the Law. This is no different from any other regulatory regimes and is already the situation in Jersey and other jurisdictions.***

- **Staffing - providers need to:** Clarify if employees need to be registered with a professional body and if there are fees attached, who pays? The provider or the individual?

### **Response**

***It is not for the Regulator to determine who pays for professional registration, however as is the case in the UK, professional staff such as nurses, social workers, physiotherapists, doctors etc are required under Jersey Law to be registered, irrespective of their employer. The accountability for professional registration lies with the registrant not the employer and the penalty for working without being registered can be severe and includes a custodial sentence.***

Ensure staff demonstrate compliance which is robust and transparent. Identify relevant evidence requirements for each outcome and ensure staff follow the service procedures.

Be aware if there is a minimum hourly rate and understand the retention and recruitment issues.

Plan for unforeseen circumstances e.g. high sickness levels, job vacancies, suspension of registered manager. This may need a possible contingency fund.

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- **Training - providers need to:** Consider how staff will be trained, the associated costs (releasing staff, funding qualifications, updating refresher training etc.). What will be mandatory training?

Explain the inspection process; ensuring staff are fully aware of their responsibilities.

### **Response**

***What will constitute mandatory training has not been determined, this will be addressed in the Standards***

- **Funding - providers need to:** Understand how the fees for registration are calculated? How will this be funded and by who?

Ensure what the policy of the organisation is regarding payment for Disclosure and Barring Services (DBS) - is it the provider or the individual?

### **Response**

***The fee structure will be set out in Regulations and the fees themselves will be determined by the Chief Minister by Order.***

***DBS checks will be a requirement, but again it is not for the Regulator to determine who pays for this.***

- **Please note –** The ultimate challenge for a service provider and the commission would be managing provider failure.

### **Response**

***Managing provider failure is the core work of any regulator and whilst this can be challenging it is a standard feature of day to day regulatory activity.***

## **6. “Lessons to be Learnt”**

The report goes into some detail about lessons to be learned from the UK experience. Just to reiterate, in drafting the Jersey Regulation of Care Law, avoiding the deficiencies and failures in the UK was paramount. The draft Law was written to take into account the recommendations of the Francis Report, the Cavendish Review, the Winterbourne View investigations as well as numerous Parliamentary Select Committee reports and transcripts relating to the failures of CQC as a regulator.

The following statement in the report: *“It is important to recognise the role of providers has changed and continues to change due to the landscape of health and social care becoming more complex and challenging. The increased levels of responsibility make it even more important to set clear, consistent standards to hold employers accountable.”* is well understood by the Minister and is one of the

reasons why she is bringing the Regulation of Care Law before the States for approval.

The recommendation from the Panel that “each Regulation should be drafted with the above lessons learnt in mind” is already acknowledged.

## **7. Financial and Manpower Implications**

The Panel state that they have “concern around the ongoing cost the implementation of the new Regulations will incur” and with respect to the business case set out in the proposition “It is not clear if this will cover all other areas requiring funding especially within the areas recommended from the advisor regarding premises and resources”. The business case in the proposition is for the funding of the part time Commission and executive function for the first phase of implementation and does not cover additional compliance costs for providers. However the proposition also includes the following statement about compliance costs that was not mentioned in the report: **“to meet the requirements of the proposed legislation, the majority of existing providers are likely to meet the expected standards and therefore will have little or no extra costs. Some are meeting most of the standards and may have some but not significant extra costs. A small number may fail on a number of standards and would face significant costs. However, significant failure to meet standards is likely to be symptomatic of unacceptably low levels of care and detrimental to individuals using the service. In the currently regulated independent sector, much progress has been made towards improving quality and most providers are either already compliant or have a development programme in place to upgrade their services and facilities. It is also anticipated that should the Law and Regulations come into force there will be a reasonable timescale for providers to meet any new requirements.”**

The Panel includes the following statement: “It is imperative that alongside any draft regulations, a detailed costs analysis is provided showing all financial implications that will be incurred within that specific regulation.”

It is not practicable to provide “a detailed cost analysis.....showing all financial implications”, however any future Regulations brought before the States, will include a statement on financial and manpower implications.

## **8. The Health, Social Security and Housing Panel’s Conclusions**

The Panel states the following conclusion: “The Panel is aware that the finer detail for this important piece of legislation will come with each of the Regulations that will underpin this law. Due time needs to be given for all key stakeholders to have the opportunity to be actively involved in the development of the Draft Regulations and the Panel recommend that a detailed, thorough consultation period is held for each Regulation allowing adequate time for any concerns to be addressed before lodging. The Panel believe that it is of utmost importance that



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*future Regulations should be fit for purpose and able to meet the needs of the Island”*

**The Minister agrees with this conclusion and as stated several times above, has already given such an undertaking.**