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Community care law for psychiatrists

SUMMARY

Although psychiatrists are well-acquainted with the Mental Health Act 1983, most are unlikely to know much about community care law, despite the fact that its provisions have the potential to significantly improve the level of service for the users. This paper explains the meaning of community care law, looks at how it applies to National Health Service trusts and what are the psychiatrists' responsibilities. It examines how community care law works and discusses the significance of 'fair access to care services' policy, the meaning of 'need', the benefits of direct payments, the significance of housing provision and the role of carers.

What is community care law?

Community care law potentially applies to all psychiatric patients but rather than consisting of one act it is a hotchpotch of conflicting statutes (Box 1; Clements, 2004, para. 1.30). It co-exists with the care programme approach (CPA), but unlike the CPA it has the force of law, entitling people to services.

The community care law acts are 'activated' by Section 29 of the National Assistance Act 1948 which is made mandatory for people with a disability (including mentally ill people) by Section 2(1) of the Chronically Sick and Disabled Persons Act 1970.

The gateway to all the provisions is Section 47 of the National Health Service and Community Care Act 1990, commonly known as a 'needs assessment' which, when properly performed, opens the door to all the statutory service users' rights.

How does the community care law apply to NHS trusts?

Most trusts share the responsibility to carry out needs assessments with social services. Often the assessments are integrated into the CPA. However, services recommended by the CPA do not constitute a statutory right,

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whereas those recommended by a Section 47 assessment have to be provided (subject to means testing, apart from Section 117 Mental Health Act 1983 aftercare).

The *ad hoc* approach to needs assessments means that opportunities are often missed for really finding out about peoples' needs and addressing them in individually tailored ways. As well as individual assessments, a series of similar assessments can be used as a management tool to guide the design of new services to meet the needs of groups of service users.

What responsibilities do psychiatrists have?

For patients detained under the Mental Health Act 1983, the responsible medical officer has a duty to ensure, in consultation with the other professionals concerned, that the patient's needs for health and social care are fully assessed and that the care plan addresses them (Department of Health & Welsh Office, 1999). Assessing social care needs is governed by Section 47 of the National Health Service and Community Care Act 1990 needs assessments. Therefore, psychiatrists have a duty under the Code of Practice to ensure that social needs assessment is carried out for detained patients by the appropriate professionals in their organisation. They should also make every effort to ensure that the same assessments are made available to patients who have not been detained under the Mental Health Act 1983.

How does needs assessment work?

Section 47 needs assessments are the responsibility of local authorities (social services). Although technically these may not be delegated to someone who is not a social worker, this is what often happens in practice. Local authorities are not obliged to assess frivolous requests for assessments, but any request by a psychiatrist or mental health worker for their patient to be assessed would have to be taken seriously. Case law (*R v. Sutton LBC* [1998]) suggests that failing to make a service provision decision or a proper care plan is not acceptable.

Once a needs assessment has decided what is required, this should be provided, although the time this will take will depend on the circumstances. Unfortunately, often the assessment is not carried out properly or not carried out at all.

The system fits neatly with the CPA – the results of the assessment should be set out as a care plan (Department of Health, 1989) and so in some trusts the two have been formally combined.

Box 1. Acts which comprise community care law

- Part III of the National Assistance Act 1948 and its associated circular (LAC(93)10; Department of Health, 1993) places on the local authority a duty to provide residential accommodation and the power (not duty) to provide welfare services to people with a mental illness aged 18 and older (among others).
- Section 45 (as amended) of the Health Services and Public Health Act 1968, concerning mainly the elderly, fills the gaps left by the National Assistance Act with powers (but not duties) to provide various services for them.
- Section 3(1)(e) of the National Health Service Act 2006 allows the National Health Service to provide for the domiciliary and community needs of those who have a mental disorder of any type (including illegal drug and alcohol problems). This is essentially the law which covers the basic work of non-hospital psychiatric services but it is vague in terms of what must actually be done for any individual.
- Section 117 of the Mental Health Act 1983 provides aftercare for people who have been detained under Sections 3, 37, 47 or 48. Case law dictates that this has to be provided without cost to the patient.

Fair access to care services

Since 1997, it has been established by case law (*R v. Gloucestershire CC and Secretary of State for Health* [1997]) that resources may only be taken into account when drawing up eligibility criteria. Once eligible needs are identified, local authorities are under a duty to provide those services. To codify this, the government produced guidance on eligibility criteria for adult social care, *Fair Access to Care Services* (Department of Health, 2003), which was supposed to have been implemented by April 2003. In reality it took much longer before it was universally recognised and used. At the heart of the guidance is the principle that councils should operate just one 'eligibility decision' for adults seeking social care support, namely, should people be helped or not? The decision should be made following assessment of an individual's needs. The main aim is to define eligibility for social care services based on the person's vulnerability and risk rather than using diagnostic or legal labels.

The framework within the guidance is fairly prescriptive and is divided into four bands: critical, substantive, moderate and low, with each band broadly defined. On the basis of these eligibility criteria, local authorities set a threshold below which they will not provide services – usually in the lower two bands.

The Fair Access to Care Services guidance also reinforces the principle that when someone is deemed to have eligible needs, the local authority must develop a care plan which should take into account needs and risks, preferred outcomes, contingency plans, details of services to be provided, contributions of carers and a review date. It will be appreciated that this language and structure very closely mirrors that of the CPA.

In *Fair Access to Care Services*, the greatest need in the hierarchy dictates the overall need band. Without the guidance, service users are not eligible to receive direct payments (see below), which curtails their choices.

What is meant by need?

There is no limit to what is meant by 'need' and no restriction on the type of services that can be provided

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(Clements, 2004, para. 15.25). The guidance on Mental Health (Patients in the Community) Act 1995 (Department of Health & Department of Social Services, 1996) suggests that the sorts of services which may be provided may include appropriate daytime activities, accommodation, treatment, personal and practical support, 24 h emergency cover, assistance in welfare rights and financial advice as well as support for voluntary (unpaid) carers and families.

A key legal case has established that psychological needs may properly be included in a needs assessment (*R v. Avon CC* [1994]), which means that, for example, the location of housing, such as to be near relatives, can be construed as a need. Realistically, it is psychiatrists who can decide to clarify this with social workers.

Direct payments

If a person is assessed as needing, for example, transport, care or even requisites for a leisure pursuit (providing this has been deemed a need using a Section 47 needs assessment incorporating the Fair Access to Care Services criteria), social services may give them the money to pay for it. The person has to express the wish to receive the service and, if required, an advocate can assist them. Direct payments are especially useful for leisure activities, 'befriending' (a formal service to allocate people to socialise with the affected person), laundry or other practical needs. They allow the person to pay for services others lend them, including transport or care, where appropriate.

Housing

It is not unusual for patients to wait in hospital for many months while appropriate accommodation is identified. All sorts of management effort goes into dealing with such 'bed-blockers'. When assessing the accommodation needs of people with mental illness, housing legislation must be explored first. A notification to the housing authority effectively amounts to an application made on behalf of the assessed person. However, for many mental health patients traditional housing is not an option and so the provisions of Part III of the National Assistance Act 1948 give duty to provide 'residential accommodation' for people over 18 with a mental illness.

The case of *R (Wahid) v. Tower Hamlets LBC* [2002] has shown that it can no longer be assumed that a need for care and attention can only be properly met in an institutional setting. Local authority social services may provide 'residential accommodation' in ordinary housing stock with appropriate care input, but this does imply the need to commission or buy suitable accommodation.

Carers

The Carers (Recognition and Services) Act 1995 states that carers must be involved in assessment and care planning and are entitled to an assessment in their own right. In practice, many local authorities have separate teams to complete the assessments but they need to be combined with the Section 47 needs assessments to reach sensible decisions which benefit both patient and carer.

Conclusions

Section 47 needs assessments are no panacea but service users are not going to receive what the law entitles them to unless these statutory assessments are properly completed. By being aware of this we can inform service users of their rights, request social workers to carry out Section 47 needs assessments (using Fair Access to Care Services criteria) and inform decision-making by, for example, clarifying that a 'wish' for a service user to live near their family is actually a 'psychological need'. We should think in terms of need to direct commissioning towards appropriate provision.

Declaration of interest

None.

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