



The Government response to *Law Commission consultation paper 192*

Review of the law on adult social care

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First published September 2010

Published to DH website, in electronic PDF format only.

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Review of the law on adult social care

Prepared by the Department of Health

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1. Introduction

In the 21st century, the role of adult social care is about personalisation empowerment, maximising autonomy and capability. Its function is to enable disabled and older people to make their own choices and decisions; it is about citizens gaining or regaining control over their lives and feeling valued and able to contribute. A modern social care system will help people to build their self-confidence by focusing on what people can achieve, with support, and how to realise their potential and aspirations. We need a social care system that recognises and responds to people as active and involved citizens as opposed to passive recipients of services. The current legal framework provides little support for these concepts. That is why this Law Commission project is so important.

The Government therefore agrees with the Law Commission that the legislative framework for social care is outdated and needs modernising. The current piecemeal state of the law leads to confusion and inefficiencies for users, carers and professionals. Trying to understand and use complex and outdated law takes longer and leads to uncertain outcomes.

As the Law Commission states, “More time and money are spent on understanding the law and on litigation than should be the case. Difficult law may also stifle innovation. It is also likely to lead to arbitrary differences in legal rights and status between different service users and different kinds of service.”

Alongside the Commission on the Funding of Care and Support, the Government sees reform of the law underpinning adult social care as a key component towards a new and sustainable settlement for the system.

We want a situation where people are empowered to make decisions and take responsibility for their own health and well-being. Individuals need a sense of what they can expect the state to provide in certain circumstances and how they might go about getting the support they need. The system must support and encourage people to make choices and in taking control of their lives. Professionals need to work in collaboration with each other and the individual to get the best possible outcomes.

There must also be a clear recognition that social care continues to have a role in helping people when they may be at risk or incapable of making decisions.

However, the current system and legal framework is largely based on a time when policy makers and others viewed users of social care as unfortunate, passive recipients of “care”. People were able to access a limited range of services, services that were “chosen” for them by the professionals and designed without them by providers. That can no longer be the case. Expectations have changed and the social care system needs a legal framework that promotes personalised care, increases choice and control and can be used and understood by those that need to access support. This is about doing things with people, not for, or to, them.

Although this document sets out the Government’s response to the consultation questions at this stage, the Government will need to look closely at how the Law Commission’s final recommendations are implemented. Any legislation to take forward reform in this area

following the Law Commission's final report will need to be set in the wider policy context. In particular, this will include the recommendations of the Commission on the Funding of Care and Support, but also the Government's commitment to greater local flexibilities and the localism agenda.

Through the Coalition Programme, the Government is committed to promoting decentralisation; and one of the key strands of this work will be removing barriers. This also means supporting local authorities to deliver vital front line services in a way that suits their local needs by seeking to impose fewer duties on them. Those measures will help transform the relationship between people and the Government by changing how the Government draws up, introduces and implements regulations. We propose to abolish inconsistencies, duplication and clarify those aspects of the law that are currently unclear. As in the new NHS Outcomes Framework, the intention is to improve transparency and accountability in the system leading to a better experience for those using services. However, if the Government concludes at any stage that a suggested duty for local authorities is appropriate, for example where it represents existing practice, this would not preclude the Government from reviewing or removing such duties in future, in line with the Government's commitments

We will also wish to reflect the Government's overall approach to regulation i.e. Government will use regulation only when it is proportionate and where alternative approaches would not achieve satisfactory outcomes. Currently there are over 30 pieces of legislation that relate to adult social care and many more pieces of guidance. This makes the law cumbersome, opaque, complex and susceptible to different, often unhelpful, interpretation. It also leads to money being wasted on legal proceedings that could be avoided. It is our intention to work with the Law Commission to simplify the process and make information transparent and useful to those seeking to use services, and their families, as well as professionals and small businesses. Our intention is to simplify and greatly reduce the number of pieces of legislation and guidance that govern social care, thus adhering to the "One In, One Out" approach to regulation.

This will make it easier for local authorities and their staff, and those in business and the third sector to understand their duties and responsibilities under the law. The new legal framework will need to ensure that a range of independent and voluntary sector providers can continue to provide innovative services in the field of care and support.

We will continue to work closely with the Law Commission as it develops its proposals, in particular where new policy approaches being considered within Government would have an impact on the legal framework. We are grateful that the Law Commission has agreed to bring forward its timetable in order for us to be in a position to make an early start in drafting legislation.

We have an unparalleled opportunity to bring coherence and transparency into the social care system and the law that governs it. We look forward to working with the Law Commission to support that endeavour.

2. Response to the provisional proposals and questions

Responses to the provisional proposals and questions in the Law Commission's consultation document are set out below.

Part 2 – Approach to Law Reform

Provisional Proposal 2-1: We provisionally propose that there should be a single adult social care statute for England and Wales, unless policy in Wales diverges enough to require separate statutes for England and Wales.

1. We believe it would be preferable to have separate statutes for England and Wales. This is in line with the approach taken in other areas recently – for example the consolidation of the single England and Wales NHS Act 1977 into the NHS Act 2006 and the NHS (Wales) Act 2006. In the longer-term, we think that this will provide for clearer law if further policy divergences emerge.
2. As the consultation paper states, we will need to revisit this issue in the light of the outcome of a referendum on fuller legislative powers for the Assembly, which now, we understand, is scheduled to take place in early 2011.

Question 2-1: Is our proposed three-level structure for the regulation of adult social care law (consisting of primary legislation, statutory instruments and guidance) appropriate?

3. We agree that the current system of approvals and directions linked to sections 21 and 29 of the NAA 1948, section 45 of the HSPHA 1968 and Schedule 20 to the NHS Act 2006 is confusing and lacks transparency. We would be happy to see that replaced by a clear statement of entitlement in a combination of primary or secondary legislation.
4. We do still think however that there is a role for directions in the social care system under the general power in section 7A of the Local Authority Social Services Act 1970. Directions do of course have the force of law although they are not subject to any Parliamentary procedure. We are not entirely clear from this section of the document whether the Law Commission intends this power to be retained. We think that it should be, both to allow the Secretary of State to deal with issues arising in individual authorities and to enable binding instructions to be issued more generally on issues relating to the exercise of social services functions not covered by a regulation-making power. Thought would clearly need to be given as to how such directions could be made accessible to the public.

Question 2-2: Should there be a duty on the Secretary of State and Welsh Ministers to prepare a code of practice to bring together statutory guidance?

5. We agree with the Commission that people should be able easily to find all the relevant guidance - and that it should be coherent and up-to-date, and brought together in one place. However, we do not feel that this necessarily means formulating it as a Code of Practice, which could be unduly cumbersome. We would be happy to discuss the practicalities of this further with the Commission.

Question 2-3: Is our process-driven approach to adult social care (a prescribed assessment and eligibility process, with support from prohibitions, a broad list of services, care plans and statutory principles) sufficient to determine the scope of adult social care, or is further definition required?

6. In principle, we support this approach. There is a balance to be struck between clarity of scope, and support for flexibility and innovation in how people's needs are met, and the approach will need to accommodate, rather than constrain, our desire for innovation and personalisation in the design and delivery of support. This affects, in particular, the approach to listing services, covered further under Provisional Proposal 9-1 below.

Part 3 – Statutory Principles

Provisional Proposal 3-1: We provisionally propose that our future adult social care statute should include a statement of principles.

7. We support the concept of defining statutory principles for a modern adult social care law, and believe that if framed and positioned effectively could provide an overarching sense of the purpose and outcomes that social care should achieve. We agree with the Commission's view (in 3.37) that the purpose of principles is to assist decision-makers in exercising their functions, rather than to establish enforceable legal duties.
8. The challenge will be to express principles in a way that provides coherence, legal certainty and purpose without being prescriptive. As the Law Commission notes, statutory principles need to meet a number of criteria, and further work will need to be done to ensure that principles are developed that meet those criteria.
9. We have considered the suggested principles in questions 3.1-3.9 carefully and we believe them to be a good starting point as core elements of what social care should be aiming to achieve, although they vary in the degree to which they meet the set criteria. We would value further discussions with the Law Commission to consider how best to frame, and position principles that are meaningful and relevant, but also meet the tests that will be used by Parliamentary drafters when it comes to drafting legislation.

Part 4 – Community Care Assessments

Provisional Proposal 4-1: We provisionally propose that there should be a duty to undertake a community care assessment in our future adult social care statute, triggered where a person appears to the local authority to have social care needs that can be met by the provision of community care services (including a direct payment in lieu of services) and where a local authority has a legal power to provide or arrange for the provision of community care services (or a direct payment) to the person.

10. We agree with the case made in this section, and the proposed approach. However, it will be important to look further at the scope of the terms “social care needs” and “community care services”. It is important that the list of community care services is not too narrow – which ties in with the questions in section 9 of the document dealt with below. It is also important that the power to assess also allows for links to be made with health, housing and other relevant services as is currently the case in section 47(3) of the NHSCCA 1990.

Question 4-1: Should our proposed adult social care statute include a right to have an assessment on request?

11. We recognise the point the Commission makes about self-funders, and agree that where someone is entitled to an assessment they should receive one, including where they subsequently arrange and fund services themselves. We want to consider whether a right to an assessment on request is the answer – there would be a concern both about vexatious or frivolous requests (as the Commission points out) and more generally whether authorities’ resources might be disproportionately tilted towards the process of assessment. We note that the Law Commission proposal on carers’ assessments (Provisional Proposal 5-3) recommends against an assessment being triggered by a request. We will be interested to see the responses from different interested parties on this question.

Provisional Proposal 4-2: We provisionally propose that the focus of the community care assessment duty should be an assessment of a person’s social care needs and the outcomes they wish to achieve, and should not focus on the person’s suitability for a particular service.

12. We agree with the intention of this proposal. We consider that some rephrasing is necessary as the term “social care needs” does not, in our view, reflect people’s experience nor encourage innovative responses. We wonder whether “needs for care and support” might be more appropriate. We are not decided on this and will be considering this as part of the wider policy agenda and will keep the Commission abreast of our thinking.

Question 4-2: Should our proposed adult social care statute recognise co-produced self-assessments as a lawful form of assessment?

13. We consider that this is a sensible step.

Question 4-3: Should our proposed adult social care statute allow for a pure self-assessment for certain people or groups of people?

14. We do not currently see a role for pure self-assessment, but to make the statute sufficiently flexible for the future, it may be sensible to allow it to be possible.

Provisional Proposal 4-3: We provisionally propose that our future adult social care statute should place a duty on the Secretary of State and Welsh Ministers to make regulations which prescribe details of the assessment process. The statute should specify the areas which these regulations must cover.

15. We would not want to be over-prescriptive or introduce a bureaucratic system that does not improve outcomes for individuals. In addition, we suggest it may be more helpful to think in terms of a framework rather than a process. We believe that there is a role for relatively high-level regulations to contain key points, such as eligibility criteria, to be underpinned by guidance that is more detailed. As the Commission states, in paragraph 4.55, it would be difficult to amend the primary legislation in order to keep up to date with changing practice.

16. We also would not want assessment to identify only needs that can be met by social care services, that is not the case now and is likely to be even less so in the future. An obvious example would be the need for appropriate and suitable accommodation, which in most cases is a housing issue. The local authority then notifying the local housing authority of that person's housing needs under section 47(3) of the NHSCCA 1990. As we indicate above (in response to proposal 4.2), we need to do some more thinking about the language and definitions. We need to create a meaningful link between needs and services that is fit for a modern statute.

Provisional Proposal 4-4: We provisionally propose that local authorities should retain the ability to provide temporary services in urgent cases.

17. We agree that this power should be retained in the new statute.

Part 5 – Carers’ Assessments

Provisional Proposal 5-1: We provisionally propose that there should be a duty to undertake a carer’s assessment in our future adult social care statute.

Provisional Proposal 5-2: We provisionally propose that the duty to assess a carer should apply to all carers who are providing or intend to provide care to another person, not just those providing a substantial amount of care on a regular basis.

Provisional Proposal 5-3: We provisionally propose that the duty to assess a carer should not be triggered by the carer making a request, but should be triggered where a carer appears to have, or will have upon commencing the caring role, needs that could be met either by the provision of carers’ services or by the provision of services to the cared-for person.

18. There is a duty to assess carers now – but only in certain circumstances. We can see that this proposal may be a better reflection of what we are trying to achieve as it addresses the impact, or potential impact, of caring, rather than setting specific criteria to be met. We are interested in what responses the consultation receives on these three linked proposals, including evidence of current practice. As a proposal that will extend local authorities’ current responsibilities we will also wish to consider any resource implications of these proposals.

Provisional Proposal 5-4: We provisionally propose that our future adult social care statute provides that the following carers are not excluded from the definition of a carer for the purposes of a carer’s assessment: (1) a previously unpaid carer who now receives payment for their services through direct payments received by the cared-for person; (2) a carer who is paid for some but not all of the care they provide; and (3) a carer where the local authority believes the caring relationship is not principally a commercial one.

19. We appreciate and agree with the intention of this proposal but believe a simpler test as represented by (3) alone would be sufficient. We need to ensure that we do not inadvertently bring volunteers under the scope of carers’ assessments.

Question 5-1: Should our proposed adult social care statute encourage a more unified assessment process for carers and cared-for people?

20. We agree it should. The revised Adult Social Care Eligibility Criteria already supports this approach.

Question 5-2: Do you think the carers’ assessment duty should be merged with the community care assessment duty in our proposed adult social care statute?

21. In principle, we agree with merging the two assessments but we would want to see sufficient flexibility built in to cover a range of possible circumstances, some of which the Law Commission describes in the consultation report. In particular, we would not want to see any loss of existing entitlement to assessment, or of the principle that a carer’s assessment is devoted to his/her needs. We look forward to hearing what other

respondents say, including those organisations representing carers and those representing older and disabled people.

Part 6 – Eligibility for Services

Provisional Proposal 6-1: We provisionally propose that our future adult social care statute should place a duty on local authorities to: (1) determine whether a person’s social care needs are eligible needs, using eligibility criteria; and (2) provide or arrange community care services (including a direct payment in lieu of services) to meet all eligible needs.

22. We agree in principle. The wording in (2) should be explicit that eligible refers to needs that are assessed as eligible.

Provisional Proposal 6-2: We provisionally propose that our future adult social care statute should place a duty on the Secretary of State and Welsh Ministers to make regulations prescribing the risks to independence that will call for the provision of services and the objectives that are to be achieved by the provision of services.

We agree that there should be a three-tier approach to this area of law and that the eligibility framework should not be on the face of Act itself. We would like to give further consideration as to whether regulations are the right place to set out such a framework. We will consider, as we develop our plans for outcomes frameworks in social care as well as other services, what the relationship might be between an outcomes framework and a description of “the objectives that are to be achieved by the provision of services”.

Provisional Proposal 6-3: If a right to re-ablement services is introduced, we provisionally propose this should be accommodated in our future adult social care statute.

23. We do not anticipate that there will be rights to specific services stated in statute.

Provisional Proposal 6-4: If the eligibility criteria are to be set at a national level in England and in Wales, we provisionally propose that the eligibility criteria should be prescribed in regulations issued by the Secretary of State and Welsh Ministers respectively.

24. We agree that if Government undertook such a step and introduced national eligibility criteria it would be reasonable to prescribe the criteria in this way.

Provisional Proposal 6-5: We provisionally propose that our future adult social care statute should prescribe that the Secretary of State or Welsh Ministers may by regulations require that a local authority must allocate a personal budget in fulfilling the duty to meet all needs that are eligible.

25. We support the power to set requirements in regulations. We are interested in finding ways to ensure that local authorities maximise individuals’ autonomy and decision making. However, in aiming for an enduring statute, we want to give further consideration whether we want to specify the particular mechanism of a personal budget, or take a broader approach.

Provisional Proposal 6-6: We provisionally propose that there be a mandatory national eligibility framework, which local authorities must use to decide whether or not to provide services to carers, and a duty to meet the eligible needs of carers.

26. We are of the view that there are arguments for and against this proposal. We will be interested to see what others think to enable us to come to a firm policy position.

Part 7 – S Section 21 of the National Assistance Act 1948 and Section 2(1) of the Chronically Sick and Disabled Persons Act 1970

27. We are considering this area further with other Government departments and we would welcome the opportunity to have more detailed discussions with the Law Commission.

Provisional Proposal 7-1: We provisionally propose that section 21 of the National Assistance Act 1948 should be repealed and that the Government should ensure a proper scheme for the provision of residential accommodation to those people who might lose their entitlement.

28. We agree in principle but we are concerned, like the Commission, that the existing rights of those in need of care and support must not be weakened. We think that it would be helpful for the Commission to ascertain from local authorities or ADASS the various ways in which they currently use their section 21 powers so that we can be sure that the new legal framework does not constrain existing practice, nor create new burdens on housing authorities.

Provisional Proposal 7-2: If the Government does not introduce a proper scheme for residential accommodation, we propose that section 21 should be retained but only in relation to those people who would otherwise lose their entitlement.

29. We agree.

Question 7-1: If section 21 of the National Assistance Act 1948 were repealed, do you think that any groups would lose their entitlement to accommodation under our proposed structure?

30. We would like to comment on an issue touched on in paragraph 7.14 of the paper although this is not one that has given rise to a question or proposal. The final sentence of this paragraph states that placements that involve nursing or personal care would still need to be in care homes registered with the CQC or its Welsh equivalent. This requirement has given rise to difficulties in two ways:

(a) it restricts the use of section 21 for Shared Lives placements since those providing such accommodation are not required to register with the CQC;

(b) it prevents placements in Scotland or Northern Ireland where there are separate registration schemes (although such placements could be made if the Government were to make regulations under section 56 of the Health and Social Care Act 2001).

31. In addition, the concept of registration as a care home, in England, will cease once the Care Standards Act 2000 is repealed in October 2010 and such establishments are required to register under the Health and Social Care Act 2008. Under that Act, registration is linked to the carrying-on of prescribed health and social care activities and the relevant activity – as prescribed in paragraph 2 of Schedule 1 to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 – is the provision of residential accommodation together with nursing or personal care.

32. In the light of these issues, it seems to us that there are a number of amendments which might be made to this provision in a future adult care statute in order to continue to ensure that local authorities only make arrangements with providers of accommodation which is of a reasonable quality (which was presumably the legislative intention of section 26(1A)). These are:

(a) to extend the provision to the equivalent registration schemes in Scotland and Northern Ireland. This may then avoid the need for regulations to be made under section 56, assuming that the practical implications of cross-border placements would then be left to be dealt with either by agreement in individual cases or by a memorandum of understanding and

(b) to provide for the option of local authorities being otherwise satisfied that the accommodation was of an equivalent quality to registered accommodation.

33. We would welcome the Commission's thoughts on this issue and would be happy to discuss it further.

Provisional Proposal 7-3: We provisionally propose that section 2(1) of the Chronically Sick and Disabled Persons Act 1970 should be removed from adult social care legislation.

34. We support this and believe it will be useful in bringing clarity and coherence to the law.

Part 8 – Ordinary Residence and Portability

Provisional Proposal 8-1: We provisionally propose that the local authority be placed under a duty to provide services for people ordinarily resident in their area and have the power to provide services for people who are not ordinarily resident in their area. In cases of urgent need of residential accommodation, there should be a duty to provide accommodation to those people not ordinarily resident in the authority's area. Assessments of need and the provision of temporary urgent services should not be limited by the ordinary residence rules.

35. We agree. In terms of the last sentence, this is something we have covered in the recent Prioritising Need guidance, which replaced FACS – see paragraph 50 of that guidance.

36. What the Commission is proposing is in line with the current law.

Provisional Proposal 8-2: We provisionally propose that the local authority in which the cared-for person lives should be given responsibility for providing carers' services.

37. We agree with this and think that in most cases it is what happens in practice and is a sensible approach. It may be that the number of carers living at a distance, but still providing essential support for significant periods, may be on the increase. It may be that a duty to cooperate between LAs would be a helpful addition to the law where it is not practicable for the cared-for person's LA to provide support to the carer.

Provisional Proposal 8-3: We provisionally propose that our future adult social care statute should enable the portability of services by the introduction of: (1) an enhanced duty to co-operate when service users move areas; and (2) if these policies are implemented, a national portable needs assessment and national eligibility criteria.

38. We understand the concerns raised and we will be interested to see the views of others. If the Government brings forward proposals in this area, the new statute will need to accommodate them.

Part 9 – Scope of Adult Social Care Services

Provisional Proposal 9-1: We provisionally propose that community care services should be defined by a short and broad list of services.

39. We think that the term and concept of “community care services” rather outdated. With the move to personal budgets and self-directed support, we have an opportunity to modernise the language we use. It is also important that any list is broadly defined and not set in such a way that constrains the flexibility and innovation that has, for instance, been seen in the way that direct payments have been used for support and services beyond the traditional view of what constitutes community care services. We prefer a focus on outcomes and a broad list of activities that could deliver desired outcomes (choice, control, independent living etc). However, we acknowledge the challenge of using language in a sufficiently clear and precise way that makes the statute meaningful yet capable of adapting to changing circumstances. We would be happy to talk with the Commission about this.

Provisional Proposal 9-2: We provisionally propose that the list of community care services should be set out on the face of our future adult social care statute.

40. In the context of our response above, we would agree that any list should be on the face of the statute.

Question 9-1: Do you think that community care services should be undefined in our future adult social care statute?

41. We will be interested to see what views the Law Commission receives from the consultation but we consider that some definition is desirable.

Provisional Proposal 9-3: Provisionally, we do not propose that our future adult social care statute should include a central definition of a disabled person or service user.

42. We agree with this proposal. We would welcome an approach that defines eligibility for care and support by identified need, rather than diagnostic “label”, though we would need careful drafting to get it right.

Provisional Proposal 9-4: We provisionally propose that carers’ services should remain undefined in our future adult social care statute.

43. We agree with the Commission that it would be unhelpful to include a prescriptive list of services for carers. It would be more helpful if we can consider how a range of support tailored to individual circumstances can improve outcomes for carers.

Provisional Proposal 9-5: We provisionally propose that our future adult social care statute should allow for regulations to be issued that are capable of defining Shared Lives schemes as being non-residential services in all cases.

44. Although Shared Lives is the name schemes are using, they remain, in law, Adult Placement Schemes.

45. We wonder if this would be needed if some of the other proposals put forward by the Commission were adopted such as the repeal of section 21 (which would involve rewriting the ordinary residence deeming provisions) and a new charging framework set out in regulations.
46. Assuming that the Commission is satisfied that such provision is necessary in the context of their other proposals we would be content. It is though important to ensure that all such services are treated as non-residential rather than preventing them from including a residential element. We would not want to do anything that prevented both current and future users from selecting this option. We are thinking of those people who have made arrangements under section 21 of the 1948 NAA.

Provisional Proposal 9-6: We provisionally propose that the existing divide between health and social care service provision should be maintained in our future adult social care statute. This would mean that local authorities would be prohibited from providing residential accommodation, if this is authorised or required to be provided under the NHS Acts 2006; any non-residential services that are required to be provided under the NHS Acts 2006; and nursing care which is required to be provided by a registered nurse.

47. We agree that it is important to preserve the existing law in this area. Section 21 of the NAA is currently central in determining the limits of LA responsibilities in relation to NHS Continuing Health Care.
48. The issues around the discretion that LAs currently have are important in a number of areas. The discretion available to LAs means that recipients of CHC in non-residential settings can fit within the category of those for whom an LA may provide or arrange a service under section 47(1) of the NHSCC Act 1990.
49. It is important to recognise that the Government has a wider aim to encourage further integration between health and social care so any legal framework should not undermine this intention.

Provisional Proposal 9-7: We provisionally propose that social services authorities should continue to be prohibited from providing ordinary housing services, if these services are authorised or required to be provided by or under other legislation.

50. We agree.

Question: 9-2: If Government policy towards asylum seekers continues, what are the likely consequences of retaining the prohibition on adult social care services to those subject to immigration control solely because they are destitute or because of the physical or anticipated physical effects of being destitute?

51. We are giving this further consideration and having discussions with colleagues in other Government departments.

Part 10 – Delivery of Services

Provisional Proposal 10-1: We provisionally propose that our future adult social care statute should place a duty on local authorities to produce a care plan for people who have assessed eligible needs. This would be supported by a duty placed on the Secretary of State and Welsh Ministers to make regulations concerning the form and content that the care plan must take.

52. We would prefer to see this couched in terms of co-production with the individual and / or their representative. It is also important that other key agencies, such as the NHS, play their full part in care planning to ensure that resulting services are joined up from the outset. We have concerns that this proposal might focus too strongly on process rather than outcomes. If we were to adopt this approach, it will be important to consider how any duty for a LA to produce a care plan inter-relates with other agencies also providing services to an individual so that this legal duty does not lead to multiple care plans that impede a multi-agency approach. We presume that it would be possible for the LA to fulfil this duty by developing a care plan in partnership with other agencies (where relevant), including where it contributes to a care plan led by another agency. We would want to retain the co-operation provisions in the NHS and Local Authorities Partnership Arrangements Regulations 2000, which were made under the predecessor to section 75 of the NHS Act 2006; this gives a regulation-making power for LAs and NHS bodies to make arrangements for working together including exercising some of each other's functions. We appreciate the legal complexity of establishing a workable legal framework for co-production in the light of the need for clear decision making processes, establishing legal entitlements and the LA's wider responsibilities to ensure consistency and fairness. We would want to work with the Law Commission on how this might be achieved.

53. There are links here with the Right to Control pilots under the Welfare Reform Act 2009 on which DWP have recently consulted on regulations and where DH will be issuing directions in relation to community care services.

Question 10-1: Should direct payments be extended to cover residential accommodation?

54. Everyone receiving care and support, regardless of where they live or what support they receive, should be able to exercise choice and control as to how their needs are met. This is the key issue, rather than the specific means by which choice and control could be furthered. We will be interested in any views expressed as a result of the Law Commission's consultation as we consider policy in this area.

Provisional Proposal 10-2: We provisionally propose that the choice of accommodation directions should be placed in statute law and that the additional payments regulations should be retained in secondary legislation.

55. We are not sure why retaining the Choice of Accommodation Directions would give rise to uncertainty about their status. We would however be content for the choice of accommodation provisions to be in secondary legislation subject to the negative resolution procedure. We do not think that it would be appropriate for them to be in primary legislation, which would be too inflexible.

Provisional Proposal 10-3: We provisionally propose that the direct payment provisions should be retained in their existing form in our future adult social care statute.

56. We are in favour of this proposal.

Provisional Proposal 10-4: We provisionally propose that our future adult social care statute should include a regulation-making power to enable the Secretary of State or Welsh Ministers to require or authorise local authorities to charge for residential and non-residential services.

57. We understand the proposal does not intend to alter existing arrangements but would give Government greater flexibility and avoid the need for primary legislation if Government wished to change the charging rules in the future. As such, we support the proposal.

Provisional Proposal 10-5: We provisionally propose that the existing regulation-making power, which enables certain community care services to be provided free of charge, should be retained. All services that must be provided for free should be listed in the regulations.

58. We agree with both parts of this proposal.

Part 11 – Joint Working

Provisional Proposal 11-1: We provisionally propose that our future adult social care statute should apply to those aged 18 and above, and the Children Act 1989 (and the CSDPA 1970) should apply to those aged 17 and below.

59. We agree and this has always been the scope of the work.

Provisional Proposal 11-2: We provisionally propose that local authorities should have a power to assess 16 and 17 year olds under our proposed adult social care statute and young people aged 16 and 17 (and their parents on their behalf) would have a right to request such an assessment.

60. We agree this is sensible. We think it reflects the need to improve transitional arrangements. We will be interested to learn the ideas of other respondents about how this might operate in practice and avoid the bureaucratic delays and internal disputes the Law Commission raises.

Provisional Proposal 11-3: We provisionally propose that the C(RS)A 1995 and the CDCA 2000 should be retained and amended so that they only apply to young carers.

Provisional Proposal 11-4: We provisionally propose that parent carers should continue to be eligible for a carer's assessment under the C(RS)A 1995 and the CDCA 2000. We also propose that where a young person aged 16 and 17 is being assessed under our proposed adult social care statute; parent carers should also be given a carer's assessment under this statute.

61. We note the two proposals to amend the legislation relating to disabled children, young carers and parent carers and understand that these proposals aim to provide greater clarity and a more distinct dividing line between legislation relating to children and adults. We look forward to the final proposals.

Question 11-1: We welcome further comments on how the well-being power is being or should be used in practice.

62. Whilst we would be interested to hear of responses from the field to this question, the Coalition Agreement for this Government set out a commitment to introduce a general power of competence for local government. The Government's intention is to include this in the forthcoming Localism Bill. The proposed power is likely to be wider than the well-being power and may impact upon some of the proposals made around specific duties on local authorities and / or changes to existing local authority powers and render them unnecessary. This is something that needs to be kept under review.

Provisional Proposal 11-5: We provisionally propose that the delayed discharge provisions should be retained in their existing form in our proposed adult social care statute.

63. We agree that we should integrate the duties and powers relating to hospital discharge into the new statute but we will need to ensure that we keep the Law Commission informed of current thinking and development of policy, where some changes to the

relationship between NHS and social care responsibilities following discharge from hospital have been set in train. This issue would benefit from further detailed discussion between us.

Question 11-2: We welcome comments about whether prisons should be included or excluded from adult social care.

64. The provision of social care to adults in prison is a complex area. The law is currently unclear where responsibility lies. We know we need more clarity, especially given the ageing prison population. Therefore, we welcome the Law Commission's consultation question on this issue and expect that the consultation exercise will inform our work in this area.

Provisional Proposal 11-6: We provisionally propose that the choice of accommodation directions should cover residential accommodation provided under section 117 of the Mental Health Act 1983.

Provisional Proposal 11-7: We provisionally propose that the additional payments regulations should cover residential accommodation provided under section 117 of the Mental Health Act 1983.

65. There will be certain people in receipt of section 117 after-care who are not free to choose their own accommodation, for example, where residence in a particular place is a condition of a community treatment order or conditional discharge under the 1983 Act. In other cases, we agree that it is anomalous that people accommodated by social services authorities under section 21 of the NAA 1948 should have a legal right to choose their accommodation, while those receiving equivalent accommodation under section 117 do not. It is similarly anomalous that the position on additional payments by service users and third parties should not be the same in both cases.

66. In principle, therefore, we welcome these two provisional proposals.

Provisional Proposal 11-8: We provisionally propose that the concept of ordinary residence should be extended to apply to after-care services provided under section 117 of the Mental Health Act 1983.

67. We agree that it is unhelpful that the rules for which social services authority is responsible for section 117 after-care are entirely separate from those in the NAA 1948. We agree in principle with the provisional proposal that the NAA concept of ordinary residence should be extended to apply to section 117 after-care as well. How easily this can be done in practice may depend in part on answers to the questions raised by provisional proposal 11-9 and questions 11-3 and 11-4 below.

68. We will be interested to see other commentators' views on the question of separate rules for section 117 after-care within the umbrella of ordinary residence. We suspect that it may not be possible to resolve this question of separate rules without taking some policy decisions (which the Commission rightly notes are outside its remit). That is because, on closer inspection, the fit between section 117 and the ordinary residence rules as they operate under the NAA 1948 is more complicated than suggested in paragraphs 11.68

and 11.69. There are at least two other scenarios in which the application of the ordinary residence rules would produce a different result to section 117 as it stands.

69. The first is where someone has been placed in a care home by local authority A in the area of local authority B, and is then detained under section 3 of the 1983 Act. Under the NAA ordinary residence rules, local authority A would retain responsibility for residential accommodation required on the patient's discharge, because the patient would be "deemed" still to be ordinarily resident in local authority A. However, under section 117, the deeming rules do not apply, so local authority B would be responsible if the patient had, as a matter of fact, become resident in its area by virtue of living in the care home. The second is where someone who is in receipt of section 117 after-care voluntarily moves from one local authority area to another. Under ordinary residence rules, that move would normally change the local authority responsible – under section 117 it does not.

70. We could accommodate these differences within an expansion of the special rules of the type the Commission suggest. But in practice it might be better to take the opportunity of a new statutory framework to review, as a matter of policy, whether (and to what extent) the distribution of local authority responsibilities under section 117 should be brought into line with those under the main ordinary residence rules.

Provisional Proposal 11-9: We provisionally propose that section 117 should be amended to clarify that the duty falls on health authorities to provide health care after-care, and on social services authorities to provide social care after-care. We also propose that section 117 should be amended to clarify that health and social services authorities can commission after-care services.

71. We agree that it would be helpful to clarify these two points.

Question 11-3: If the section 117 duty should be split between health and social services authorities, should the termination of the duty also be split so that, for example, social care after-care ceases when the social services authority is satisfied that the person no longer needs social care after-care; or should both authorities be involved in the decision?

72. We will be interested to see other commentators' responses to this question. Provisionally, however, we think that the duty should be split, as it is in other cases where people are in receipt of both health and social care.

Question 11-4: Should section 117 be recast from a free-standing duty to a gateway provision?

73. Again, we will be interested to see other commentators' responses to this question. Nevertheless, provisionally we can see advantages in recasting section 117 as a "gateway" duty, for the reasons set out by the Commission. In particular, we think it could help simplify the statutory framework, without affecting the substance. However, it would be necessary also to address the interface with the statutory framework for children's social services, as section 117 applies to people of all ages.

Provisional Proposal 11-10: We provisionally propose that our future adult social care statute should place a general duty on each social services authority to make arrangements to promote co-operation between the local authority and specified relevant organisations.

74. We agree in principle.

Provisional Proposal 11-11: We provisionally propose that our future adult social care statute should specify that a local authority can request certain authorities to assist in a number of circumstances, including when an assessment of a service user or carer is taking place and in providing services to a service user or a carer. In such cases, the requested authority would be under a duty to give due consideration to the request.

75. We agree in principle, but which authorities would be included in the definition is very important. The NHS is likely to be particularly important and law reform needs to take account of the recent NHS white paper “Equity and Excellence: Liberating the NHS”. In paragraph 11.92, the Law Commission mentions safeguarding as an example but do not mention the police. We are also interested in other respondents’ views whether in practice this would result in much change as the requirement is to “give due consideration”.

Part 12 – Safeguarding Adults at Risk

Provisional Proposal 12-1: We provisionally propose that our future adult social care statute should place a duty on local authorities to make, or cause to be made, such enquiries as it considers necessary where it has reasonable cause to suspect that a person appears to be an adult at risk and consider whether there is a need to provide services or take any other action within its powers in order to safeguard that person from harm.

76. We agree with the Law Commission that we need to achieve a balance in this area. We need law that promotes autonomy whilst offering protection. As the Commission points out, there are a number of definitional challenges in terms used in the proposal, such as "adult at risk", "duty to investigate", "make enquiries" and "significant harm".

77. We are committed to a whole system approach that brings together a number of key partners. Local authorities currently have the lead co-ordinating role in relation to adult safeguarding. The Government is actively engaged in developing a coherent approach to adult safeguarding. We need to have a broader discussion about the responsibilities of the wider system in relation to "adults at risk".

Provisional Proposal 12-2: We provisionally propose that the term vulnerable adult should be replaced by adult at risk for the purposes of the duty to make enquiries.

78. We can see the benefits in the term adult at risk in relation to safeguarding. Although as we point out earlier, there are, significant definitional challenges associated with this that require further consideration.

Provisional Proposal 12-3: We provisionally propose that an adult at risk should be defined in our statute as anyone with social care needs who is or may be at risk of significant harm.

79. We think this area is complex, not least because people are not necessarily continually at risk. We would welcome further discussion on this and the Law Commission's further consideration of what a definition might consist of. In addition, we are not sure that the phrase "social care" needs is helpful in general. People may have a range of needs, some, but not all of which, may require a social care response. Although the local authority has the coordinating role in relation to safeguarding, other key partners are the NHS and police for whom safeguarding may be more than a social care issue. We would like the Law Commission's final report to give more consideration of the local authority's coordinating role in safeguarding and how this interacts with the duties of other agencies. We will keep the Law Commission informed as Government policy in this area develops.

Provisional Proposal 12-4: We provisionally propose that if the Government in England or the Welsh Assembly Government decides to introduce new compulsory or emergency powers to safeguard adults from abuse and neglect then these will be included in our future adult social care statute.

80. If that were to be the case, we agree.

Provisional Proposal 12-5: We provisionally propose that section 47 of the National Assistance Act 1948 should be repealed.

81. We agree in principle with this proposal. However, we will want to satisfy ourselves that we can ensure people's rights under the European Convention on Human Rights.

Provisional Proposal 12-6: We provisionally propose that a local authority should continue to be under a duty to prevent the loss or damage of a person's property when they have been admitted to hospital or provided with residential accommodation.

82. This duty is generally associated with section 47 and people detained by the LA under this section. If we repeal section 47 and create a new duty, perhaps linked to the MCA 2009, there would have to be clear parameters.

83. However, whilst section 48 is, in part, associated with section 47, it has a much wider application. It applies, for example, where people are admitted compulsorily to hospital under the Mental Health Act (or indeed voluntarily). It is what gives local authorities the duty (and power) to ensure that people's homes are not left unprotected when people have to enter hospital.

84. We agree this is an important safeguard, and even if not retained in its current form, it will be necessary to ensure that an equivalent "safety-net" duty is in place. We need to give this further thought and discussion.

Provisional Proposal 12-7: We provisionally propose that our future statute should place a duty on each social services authority to establish an adult safeguarding board and should specify the functions and membership of the board, the requirement to share information and a duty to contribute to serious case reviews.

85. As noted above, we are considering our policy in this area. We are interested to see the responses to the consultation.

Provisional Proposal 12-8: We provisionally propose that the enhanced duty to cooperate, as proposed in Part 11 of this consultation paper, should include specific provision to promote co-operation between the organisations in safeguarding adults from abuse and neglect.

86. We are considering our policy in this area. We are interested to see the responses to the consultation.

Provisional Proposal 12-9: We provisionally propose that No Secrets and In Safe Hands, or their successors, are linked clearly to a local authority's statutory functions to safeguard adults from abuse and neglect, as set out in our future adult social care statute.

87. We are considering this issue.

Part 13 – Strategic Planning

Provisional Proposal 13-1: We provisionally propose that the disabled persons register should be abolished.

88. Our understanding is that these registers are very variable in quality and scope. This is, in part, because many disabled people choose not to register. Registers do not produce good data on the numbers of disabled people in England even at a strategic policy level.

89. Moreover, registers of disabled people do not offer the best tool for local authorities in planning services. Therefore, we would not mount any strong argument for maintaining disability registers - certainly not in their current form. We say this in the context of the existing duties of bodies under equality legislation, to monitor services and develop policies. We will be interested to see the other responses that the Law Commission receives on this question.

Provisional Proposal 13-2: Provisionally, we do not propose to include any strategic planning provisions in our future adult social care statute.

90. In principle, we agree with this.

Provisional Proposal 13-3: We provisionally propose that our future adult social care statute should place a duty on a local social services authority to provide information about services available in the local area.

91. We agree with this.

Department of Health
August 2010