

Reforming the law for adult care and support

*The Government's response to Law Commission
report 326 on adult social care*



Reforming the law for adult care and support: the Government's response to Law Commission report 326 on adult social care

Presented to Parliament
by the Secretary of State for Health
by Command of Her Majesty

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1 Introduction

- 1.1 Care and support law is opaque, complex and outdated. Over the past 60 years, a patchwork of legislation has evolved, but without fundamental reform. There are now around 30 different Acts of Parliament which relate to adult care and support, with the base statute still the 1948 National Assistance Act. The net result is confusion – for those providing services, for those who use services and for the public.
- 1.2 It was against this backdrop that the Law Commission conducted its three-year review into adult social care law, undertaking extensive consultation and culminating in its final report published in May 2011,¹ which made recommendations for a wholesale reform of the law.
- 1.3 The Government warmly welcomed the Law Commission's report on its publication, and over the past year, we have been considering their proposals in detail as part of our wider reform agenda for care and support. As the White Paper *Caring for our future* makes clear, law reform is not just a lever for implementing the Government's ambitions for care and support, but is a significant policy goal in its own right.
- 1.4 The Queen's Speech on 9 May announced the Government's intention to publish a draft Care and Support Bill in the current Parliamentary session, to modernise the law for adult care and support in England. The draft Bill is published today, alongside the White Paper for Parliamentary pre-legislative scrutiny and wider engagement over the coming year. This is the next critical step in our reform journey to modernise adult care and support, and will allow all those with an interest and expertise to influence the development of the legal framework which will underpin that future.
- 1.5 The work of the Law Commission has laid the foundations for the legal framework which is set out in the draft Care and Support Bill. It has not only provided crucial analysis of the problems posed by the current law, but also has given clear and practical solutions which will make a difference to those who receive care and support, and those who manage the system. The Government is grateful for the Law Commission's very significant contribution to the debate.
- 1.6 Our formal response to the Law Commission's report considers each of the recommendations and follows the format of the report itself. In each case, we outline the Commission's proposals, and set our response in the context of broader reform proposals to signal our legislative approach. Further detail on the Government's law reform proposals are included in the draft Care and Support Bill published today.

1 www.justice.gov.uk/lawcommission/publications/1460.htm

2 The structure of law reform

We will:

- bring forward a draft Bill to reform the statute for care and support in England;
- clarify the approach to duties and powers through a clear legal structure; and
- make new regulations and statutory guidance to fit in this structure.

Summary of Law Commission proposals

- 2.1 The Law Commission's report described the current legal framework as a "*confusing patchwork of conflicting statutes, built up over the past 60 years*" which '*urgently needs to be consolidated and simplified*'. Central to the Commission's recommendations for rectifying the complex web of law was the creation of a single, modern statute for adult care and support, which reforms and consolidates the existing provisions.
- 2.2 The Law Commission's first recommendations consider the overall approach to law reform, and how the guiding objectives of clarity and coherence should be built into the new legal framework. The first four recommendations propose a single statute, based around a simple three-layer legal structure:

Recommendation 1: *There should be single statutes for adult social care for each of England and Wales. In Wales, this should be implemented by an Act of the National Assembly for Wales.*

Recommendation 2: *Adult social care should be regulated through a three-level structure of statute, regulations and guidance issued under the statute. The general power to issue directions under section 7A of the Local Authority Social Services Act 1970 should be repealed as it relates to our scheme.*

Recommendation 3: *The statute should:*

- (1) *require the Secretary of State and Welsh Ministers to prepare and from time to time revise a code of practice to provide guidance for social services authorities on the exercise of their functions under the statute;*
- (2) *require consultation with concerned bodies and other persons before any code is prepared or revised;*

- (3) *provide that the code of practice, and any revisions made to it are subject to the negative resolution procedure in Parliament or the National Assembly; and*
- (4) *specify that the code of practice must be followed by decision makers acting under the legislation and can only be deviated from where there are good reasons to do so, but without freedom to take a substantially different course.*

Section 7(1) of the Local Authority Social Services Act 1970 should be repealed insofar as it relates to our scheme.

Recommendation 4: *If practice guidance is issued in relation to our scheme, it should be kept to a minimum and the legal status of the guidance should be clarified and stated clearly in the guidance itself. Future policy documents should state that they are not legal documents and should be understood as indicating the direction of Government policy.*

2.3 The following paragraphs consider the Law Commission's approach and respond to the specific proposals.

The Government's response

The structure of the statute

2.4 The way in which the adult care and support statute is structured will be crucial to the aim of achieving a simpler, more understandable legal framework. The central objective of the draft Care and Support Bill will be to create a single statute for adult care and support in England. The Government therefore accepts the Law Commission's first recommendation. We also note that, following the recent positive outcome to the referendum on Welsh Assembly law-making powers, the Welsh Assembly has competence to make Acts in relation to social care, and is considering its own proposals to legislate in this area.²

2.5 The Law Commission goes on to argue that care and support legislation lacks a clear, uniform legal framework, and that the result of this is confusion for those managing the system, and the public. The Government accepts this argument and intends to implement the Commission's three-layer approach to statute, regulations and guidance (recommendation 2). The layers in this model would make for a more straightforward structure, which balances the different legal status required in particular circumstances. The draft Care and Support Bill will take explicit powers to make regulations, and will be supported by new statutory guidance as set out below.

The effect on direction-making powers

2.6 Under section 7A of the Local Authority Social Services Act (LASSA) 1970, the Secretary of State has a general power to issue directions to local authorities in the exercise of their social services

2 The Welsh Government's consultation proposals on a Social Services (Wales) Bill are at: <http://wales.gov.uk/consultations/healthsocialcare/bill/?lang=en>

functions. These powers relate to all social services functions, and therefore also include children's social care. The Law Commission argues that section 7A should be repealed in relation to adults.

- 2.7 The Government accepts the Law Commission's argument that the use of directions issued under section 7A for general law-making adds further complication to the existing legal framework. Directions do not entail Parliamentary oversight or require consultation. Moreover, directions do not sit comfortably in the three-layer structure outlined above. Our intention, therefore, is to end the use of directions as an instrument of general law-making.
- 2.8 At the same time, we recognise that urgent, specific incidents can require a Government response, for example to protect safety or continuity of care. In such cases, there remains a strong rationale for Ministers to be able to act urgently, for which regulations can be poorly suited because of the time required.
- 2.9 Balancing these considerations, the Government's intention in reforming the legal framework is to produce provisions in which:
- general law-making is based around a clearly defined structure of primary legislation, regulations and statutory guidance;
 - directions are no longer used in this regard, and all existing directions are translated into the new three-layer structure but,
 - there remains an ability for Ministers to respond on occasion with proportionate, binding requirements on local authorities.
- 2.10 Although we support the principle of clarity behind the Law Commission's proposal, as noted above, our view is that repealing the section 7A powers in respect of adult social services functions would leave Ministers with no power to respond in urgent cases. Statutory guidance alone would not have the desired legal effect, and regulations may not be able to be tailored to the situation, or issued quickly enough. Our intention, therefore, is to leave the section 7A powers as they are in the statute, but not to use them for general law-making, and to reserve them for use in exceptional circumstances where there is a clear need for an immediate response. This is the approach taken in relation to children's social care, and we consider it to be workable and sensible, whilst respecting the Commission's concern about the inappropriate use of directions.

Statutory guidance and the code of practice

- 2.11 The third layer of the legal structure – statutory guidance – will be a crucial element for the manner in which local authorities are supported to exercise their adult care and support functions. The existing general power for the Secretary of State to issue guidance to local authorities is contained in section 7 of the LASSA 1970.
- 2.12 The Law Commission recommends that this power be replaced as it relates to adult care and support, with a duty to issue a 'code of practice' (recommendation 3). The 'code of practice' is a particular form of statutory guidance, and is typically laid before Parliament and subject to affirmative or negative resolution.

- 2.13 The Law Commission's analysis of the problem in relation to guidance is one which we share – there is a plethora of documents, whose status can be unclear, and which can cause confusion on the ground. Tackling this problem will be critical to the success of the care and support reforms overall. However, having considered the Law Commission's proposal, the Government does not intend to pursue the particular solution of a 'code of practice'.
- 2.14 There are a number of arguments for adopting an alternative approach. A 'code of practice', as distinct from other forms of statutory guidance, is particularly inflexible. Codes of practice require a sizeable lead-in time for amendment (being subject to Parliamentary timetabling), and so can quickly become out of date. They are unable to respond to more urgent situations for the same reason.
- 2.15 Existing practice in other sectors has shown that the Law Commission's key aims here (simplification, clarity and consultation) can be equally achieved by another means – a single, unified suite of statutory guidance, as is used in children's services. This would bring together all requirements in one volume of guidance (or a set of volumes) to promote coherence, with a duty to consult in its formulation and revision. Such a 'suite' or 'bank' of guidance would act like a code of practice for the frontline (it would look and feel the same, would be subject to consultation, and would consolidate all guidance in a single place). However, critically, it would be more responsive and flexible, and so of greater long-term value.
- 2.16 In summary, the Government intends to include a tailor-made power to issue statutory guidance in the draft Care and Support Bill. In doing so, we shall also consider how best to clarify the status of guidance, following the decision in *R v Islington ex parte Rixon* ([1997] 1 CCLR), as the Commission recommends.

Practice guidance

- 2.17 The Law Commission's analysis of the opaque nature of guidance includes particular reference to the issuing of non-statutory practice guidance and policy documents, which often contain major statements of policy but whose legal status is often unclear. Recommendation 4 is that such practice be minimised in the future, and that when such documents are published, their legal status is clear. The Government accepts the recommendation, and will ensure it is implemented in the future.

3 Statutory principles

We will:

- create a new set of statutory principles as a unifying purpose for the law; and
- focus on the overarching principle of promoting well-being, supported by the outcomes which matter most in care and support.

Summary of Law Commission proposals

3.1 A new set of governing principles for care and support is a key element of the desire for clarity and coherence in the new statute. The Law Commission considered the role for 'statutory principles' in the law, arguing that:

"there is considerable merit in providing for a single unifying purpose around which adult social care is organised...the new statute should establish that the overarching purpose of adult social care is to promote or contribute to the well-being of the individual. In effect, individual well-being must be the basis for all decisions made and actions carried out under the statute"

3.2 The Law Commission argues strongly in favour of an approach that would build a clear purpose into the statute and guide the decisions made under it. The Government agrees with this proposal, and sees considerable presentational and legal benefit in enshrining principles which match its ambitions for modern care and support.

3.3 The Law Commission's recommendation 5 is the key proposal:

Recommendation 5: *The statute should:*

- (1) *set out a single overarching principle that adult social care must promote or contribute to the well-being of the individual; and*
- (2) *state that in deciding how to give effect to this principle in relation to individuals, decision makers must:*
 - (a) *assume that the person is the best judge of their own well-being, except in cases where they lack capacity to make the relevant decision;*
 - (b) *follow the individual's views, wishes and feelings wherever practicable and appropriate;*
 - (c) *ensure that decisions are based upon the individual circumstances of the person and not merely on the person's age or appearance, or a condition or aspect of their behaviour which might lead others to make unjustified assumptions;*

- (d) give individuals the opportunity to be involved, as far as is practicable in the circumstances, in assessments, planning, developing and reviewing their care and support;*
- (e) achieve a balance with the well-being of others, if this is relevant and practicable;*
- (f) safeguard adults wherever practicable from abuse and neglect; and*
- (g) use the least restrictive solution where it is necessary to interfere with the individual's rights and freedom of action wherever that is practicable.*

3.4 Although considered later in this response in the section on the provision of services, recommendation 28 (which deals with the definition of the services) is also pertinent, since it refers to the Commission's core well-being principle. The relevance of this recommendation to this topic is considered below.

Recommendation 28: *Community care services (however named) should be defined in the statute as any of the following provided in accordance with the well-being principle:*

- (1) residential accommodation;*
- (2) community and home-based services;*
- (3) advice, social work, counselling and advocacy services; or*
- (4) financial or any other assistance.*

The statute should set out the following list of outcomes to which the well-being principle must be directed:

- (1) health and emotional well-being;*
- (2) protection from harm;*
- (3) education, training and recreation;*
- (4) the contribution made to society; and*
- (5) securing rights and entitlements.*

The Government's response

3.5 The Government accepts the Law Commission's proposal to establish statutory principles as a core feature of the new statute. In our view, a clear, upfront statement on the principles which should drive care and support is a key part of a modern public service, and will reinforce the reforms in the new statute.

3.6 Our approach takes the Law Commission's scheme as its foundation, and is based on the overarching principle that care and support must promote the well-being of the individual

(whether a carer or service user). Following the Law Commission's recommendations 5 and 28, our objective is to provide for:

- the principle that care and support must promote individual well-being;
- a set of outcomes or activities to support the way in which well-being is considered in this context; and
- a list of factors which must be considered by local authorities to support the well-being principle.

The well-being principle

- 3.7 The Government's intention is to legislate to create a single, overarching 'well-being principle' which directs local authorities in the exercise of their care and support functions. This principle will be set out upfront in the draft Bill.
- 3.8 The aim of the well-being principle, as the Law Commission described, is to be a "*single, unifying purpose around which adult social care could be organised*". Our view is that this single principle is preferable to a longer list of competing principles and priorities.
- 3.9 The well-being principle should be directed at local authorities (and their officers) making decisions about individuals, including carers, and it should apply throughout the statute. The well-being principle is not intended to be directly enforceable or an individual right. Instead, it should carry indirect legal weight, as a general duty where a local authority's failure to have regard may be challenged through judicial review.

The list of outcomes

- 3.10 We do not intend to define 'well-being' in fine detail in legislation, but we do see the need for some guidance on the interpretation of the well-being principle. To do so, we wish to incorporate a list of 'outcomes', or areas of activity, which will be based on the second part of the Law Commission's recommendation 28.
- 3.11 The aim of the list of outcomes is to expand on the concept of individual well-being with a description of the aspects or components of well-being which are most relevant. Although the Law Commission deals with this in its recommendation on the definition of services, this is an issue of far broader reach across the legislation. We will base the list of outcomes on those recommended, and will consider also how to recognise the importance of independent living – the principle that people should have equal choice, control and freedom in every setting.

The factors to be considered

- 3.12 We propose that the final element of the statutory principles should be a list of factors to which local authorities must have regard when making decisions in relation to individuals under the statute. This will comprise a number of considerations to be taken into account in the exercise of care and support functions, so giving effect to the overarching well-being principle.

- 3.13 Our intention is that these factors should not create further individual statutory duties or mini-principles in their own right, but should give direction on a number of issues to be considered. The factors should guide local authorities to make considerations which are appropriate to individual circumstances, but not direct compliance in every case. The Law Commission recognises this with the use of "*wherever practicable and appropriate*" in its recommendations.
- 3.14 The detail of the list of factors should be based on the Law Commission's recommendation 5, with the final wording decided through legal drafting. We accept the broad policy basis for each of the factors proposed by the Commission.

4 Universal services

We will:

- support the universal offer of local authorities to their population by updating the requirement to provide information and advice;
- clarify the local authority's responsibilities for shaping the market of care and support providers;
- reflect the priorities of policy and practice with a duty in relation to preventing, reducing or delaying the onset of needs for care and support; and
- consolidate and update requirements for integration, co-operation and local partnership working.

Summary of Law Commission proposals

- 4.1 Before turning to the core processes and systems which make up the more traditional view of adult social care, the Law Commission made important recommendations in relation to the wider responsibilities of local authorities for care and support.
- 4.2 As the White Paper has made clear, the Government's vision for care and support is about more than crisis care for those with the most pressing needs. Local authorities have a broader role in supporting their local populations to understand and plan for care and support needs, and find providers when they need them.
- 4.3 The Law Commission identified two critical responsibilities for local authorities which would support their role for the wider local community. The first is the provision of information, advice and assistance, which builds on existing duties, and the second is in relation to the developing function of market-shaping. Both are captured in recommendation 6:

Recommendation 6: *The statute should place duties on local authorities to provide information, advice and assistance services in their area and to stimulate and shape the market for services.*

- 4.4 Although the Law Commission did not consider them until later in its report, it also made a further important recommendation on the general duties which contribute to the broader role of the local authority, which we consider in this chapter of our response.

4.5 At recommendations 70 and 71, the Law Commission proposed a set of 'duties of co-operation' targeted at improving the partnership working of local authorities with other local public services. Together, these duties create a framework through which organisations can make a formal request for co-operation in relation to particular situations where integrated working is in the best interests of the individual. The recommendations are reproduced below.

Recommendation 70: *The statute should include a general duty to co-operate which would be imposed on each social services authority to make arrangements to promote co-operation with:*

- (1) other adult social services authorities;*
- (2) NHS public bodies;*
- (3) housing authorities, and bodies which provide housing on the nomination of housing authorities;*
- (4) education authorities;*
- (5) children's social services;*
- (6) the police; and*
- (7) subject to Government policy on prisons, the National Offender Management Service.*

The statute should also give examples, in the form of a non-exhaustive list, of arrangements that can be made under this duty, such as sharing information, pooling budgets or staff, or providing types of goods or services.

Recommendation 71: *The statute should include an enhanced duty to co-operate. This duty would apply when:*

- (1) an assessment of a service user or carer is taking place;*
- (2) providing services to a service user or carer;*
- (3) a service user is moving from one local authority area to another;*
- (4) an adult protection investigation is taking place;*
- (5) a request is made by a local authority for an NHS continuing healthcare assessment;*
- (6) someone moves from local authority care into NHS continuing healthcare; and*
- (7) a young person (including a young carer) is moving from children's to adults' services.*

This duty would apply to the same list of organisations above. The requested agency would be required to give due consideration to the request, and if it refuses to co-operate would be required to give written reasons. The duty would also require the social services authority to give consideration to requests to co-operate from other bodies and give written reasons if it decides not to co-operate.

The Government's response

4.6 The Government accepts the Law Commission's recommendation 6. This recommendation is a hybrid of two proposals: one on information, and the other on shaping and stimulating the market for services. We consider each below.

Information and advice

4.7 Information and advice is a critical factor in helping people find the care and support they need, and the Government accepts the recommendation that local authorities have a consolidated duty in this area. This should be a general duty – i.e. not restricted to any one group or influenced by individual circumstances such as care and support needs or financial means. Rather, information and advice should be available to all people who have need of such support, including carers and family members. Local authorities already undertake this as part of their functions as a provider and commissioner of care and support, and have existing duties in this area. However, the current legal duties do not reflect the importance of information and advice, and need to be updated.

4.8 In our view, the information that is offered locally, and the manner in which it is provided, should be matters for local authorities themselves, and there should be flexibility to meet the needs of local people. However, we do think that the law should specify some high-level requirements, to give some clarity on expectations and help local authorities implement the duty. We will provide that the duty requires that information and advice supports awareness of the care and support system, including services available locally, and helps people both to access those services and to plan for the future.

Market shaping

4.9 The Government agrees that there should be a separate duty in respect of local authorities' role in stimulating and shaping the market for care and support. This is an important element of the local authority's offer to its local population, and by understanding and influencing what is available across the market as a whole, local authorities will be in a better position to improve the quality of local services, and to support people to exercise an informed choice about how they meet their needs.

4.10 Our view is that there should be a duty on local authorities to promote the way in which the 'market' of care and support services in their local areas meets the needs of local people. We will define in legislation some of the key characteristics that we want the market to have, to support how local authorities go about meeting their duty, and focus on the quality and diversity of services. Such factors include, for instance, taking steps to understand the current and likely future needs for care and support in the area, or gathering information about providers of care and support services within the area, the services that they provide and the quality of those services.

Prevention

- 4.11 As the White Paper makes clear, it is critical that care and support acts to prevent, reduce or delay the onset of needs, to help people to maintain their well-being for longer. To support this, the Government believes that local authorities' legal responsibilities in relation to universal services should go farther than information and advice and market shaping, and reflect the focus of policy and practice on prevention.
- 4.12 The Law Commission does not make a recommendation specifically in relation to prevention. However, in considering how a focus on prevention fits with statutory principles, it says: *"We agree that the provision of prevention and early intervention services is a key aspect of adult social care and should form a central element of the statute...we take the view that this would be better achieved through general duties to provide these services rather than a statutory principle."* We agree that a general duty in this area would be appropriate, and intend to include this in the Care and Support Bill, alongside those others discussed above.

Co-operation and integration

- 4.13 The Government agrees that the new legislation should include clear requirements which support the integration of local services and co-operation between partners. We will use the Law Commission's twin recommendations as the basis for our approach, though we believe there to be good arguments to go further in promoting integration, as the Health Select Committee has argued, amongst others.³
- 4.14 We will create duties to co-operate which build on the Law Commission's proposals, and enshrine the basis that a local authority and its relevant local partners must co-operate in the exercise of their functions relevant to care and support. This should be a general principle which underpins how public bodies work together, and provide the basis for integration and mutual support.
- 4.15 In describing how local authorities should exercise this general duty, we see value in supplementing the Law Commission's proposal with a further focus on the importance of promoting integration between services. This would be similar to duties added by the Health and Social Care Act 2012 which require clinical commissioning groups to exercise their functions with a view to securing health services are provided in an integrated way, and would provide for consistency in the way partners approach integration, for both users and carers.⁴
- 4.16 In addition, we support the Law Commission's proposal in recommendation 71 to create an additional mechanism for requesting the co-operation of a partner organisation in relation to an individual case or situation. This will allow partners to highlight particular issues and request support where it is needed in relation to people with needs for care and support, including carers. There are a number of instances in which such a provision would be especially useful, in particular in relation to adult safeguarding cases and including those set out in the recommendation.

3 The Health Select Committee – 14th Report: Social Care: www.publications.parliament.uk/pa/cm201012/cmselect/cmhealth/1583/158302.htm

4 See section 26 of the 2012 Act: www.legislation.gov.uk/ukpga/2012/7/contents/enacted/data.htm

5 Assessments

We will:

- consolidate existing requirements into a single duty to assess for care and support on the appearance of needs; and
- place a duty on the Secretary of State to make regulations in relation to assessments, and ensure that these and guidance focus on the most important issues.

Summary of Law Commission proposals

- 5.1 Having considered the local authority's more general responsibilities, from Part 5 of its final report the Law Commission turned to the processes which together describe the existing core framework for the provision of care and support. The first of these is the gateway to care and support for the majority of those receiving public care: the assessment process.
- 5.2 Unlike the previous chapters, which make proposals for a new legal approach and new duties to reflect the modern priorities of care and support, the Law Commission's proposals in relation to assessment start from the basis of existing legislation, and attempt to consolidate and reform.
- 5.3 The Law Commission made nine separate recommendations in relation to assessments, which are set out below. They relate to assessments for those people who may go on to become users of care and support. Provisions on carers' assessments are covered separately in Part 7 of the report.

Recommendation 7: *The duty to assess should be triggered where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may have social care needs that can be met by the provision of services.*

Recommendation 8: *The statute should provide that the local authority duty to assess will be discharged if the person to be assessed refuses the assessment (or if someone else with appropriate authority refuses on their behalf), unless the person lacks capacity in some respect relevant to the assessment, or there are safeguarding concerns. If the person subsequently makes a formal request for an assessment, then the authority must carry out the assessment.*

Recommendation 9: *The focus of the assessment duty should be an assessment of a person's care and support needs and the outcomes they wish to achieve.*

Recommendation 10: *The statute should place a duty on the Secretary of State and Welsh Ministers to make regulations prescribing the assessment process.*

Recommendation 11: *The statute should require that in undertaking a community care assessment, a local authority must consult with the service user and carer, except if consultation is not realistically possible in the circumstances.*

Recommendation 12: *The community care assessment regulations must:*

- (1) require a proportionate approach to assessment, having regard to the needs of the individual;*
- (2) specify the circumstances in which a specialist assessment must be arranged; and*
- (3) require assessors to consider all needs during an assessment, irrespective of whether they can or are being met by a third party and to take into account if a third party is willing and able to meet a need at the care planning stage.*

The community care assessment regulations may: require consultation with other persons or agencies; specify timescales; specify who can carry out an assessment; require the provision of information; specify the considerations to which the assessment should have regard; and specify a particular form of self-assessment, if the Secretary of State or Welsh Ministers wish them to do so.

Recommendation 13: *The code of practice should provide guidance on how self-assessment should be integrated in the assessment process.*

Recommendation 14: *The code of practice should provide guidance on when it would be appropriate for a local authority to authorise other individuals or bodies to carry out an assessment, or aspects of an assessment, and what degree of oversight should be provided by the local authority.*

Recommendation 15: *The statute should include a clear statement to the effect that a local authority can carry out a community care assessment at the same time as any other assessment is carried out.*

The Government's response

5.4 The Government accepts all of the Law Commission's recommendations in relation to assessments.

The duty to assess

5.5 The duty to assess is a fundamental building block of the care and support system. Local authorities should, as now, have a duty to assess individuals' care and support needs as the means of determining whether they are eligible for public support. This should be a single duty which replaces the various overlapping existing duties in section 47(1) of the NHS and Community Care Act 1990, as well as additional duties at section 2(1) of the Chronically Sick and Disabled Persons Act 1970, section 4 of the Disabled Person (Services, Consultation and Representation) Act 1986, and section 47(2) of the NHS and Community Care Act 1990.

5.6 As the Commission proposes, there should be a clear and explicit requirement for local authorities to carry out an assessment. The duty to assess should be triggered where it appears to a local authority that an adult has needs for care and support – with a low threshold, which does not distinguish between groups of people. This is critical to ensuring that assessments are available on a more universal basis, to help people understand their needs and plan their care.

5.7 The statute must make clear that, as now, local authorities' duty to assess is not affected by whether the individual is able to contribute towards the cost of any services. In other words, it is not appropriate for local authorities to refuse to assess an individual's care and support needs simply because it appears to them that the individual is wealthy enough to fully self-fund his or her care.

5.8 We agree that the focus of the assessment should be the identification of the individual's needs and outcomes (recommendation 9). This should not be a service-led approach, i.e. assessing an individual's suitability for a particular service, but must be person-led, giving sufficient consideration to the outcomes the individual wishes to achieve. Only once needs have been identified should they be evaluated against an eligibility framework and a decision made about whether the person is entitled to care and support. There should also be flexibility to allow local authorities to conduct different assessments together, reflecting a 'whole family' approach.

Assessment regulations

5.9 We agree that there should be a duty on the Secretary of State to make regulations prescribing the assessment process (recommendation 10).

5.10 Regulations are intended to ensure clarity and consistent practice, but should cover only the key elements of assessment. It is a core principle of the Government's approach to regulations that they should not be overly prescriptive. Local authorities must be able to adopt a proportionate and flexible approach to assessment and regulations and guidance should not undermine professional judgement.

5.11 Based on the Law Commission's recommendation 12, our view is that the assessment regulations should include the following elements:

- *The way assessment is carried out* – the regulations should require a proportionate approach to assessment, having regard to the needs of the individual. This reflects existing statutory guidance.⁵
- *Who should carry out an assessment* – the regulations should specify the circumstances in which specialist assessment should be arranged. This should recreate existing guidance for a specialist assessment for deafblind people.⁶ It should also clearly empower self-assessment by the adult themselves.
- *Considerations to which the local authority must have regard* – regulations may require assessors to consider all needs during an assessment irrespective of whether they can or are being met by a third party. This reflects the approach in existing statutory guidance.⁷ Regulations may also require the local authority to consider the needs of the whole family in assessing an adult, reflecting the impact of caring roles, for instance.

5.12 The statute, supported by guidance, should also make clear that a local authority is able to carry out an assessment for care and support at the same time as another assessment is carried out (recommendation 15).

5 See, for example, Department of Health, *Caring for People: Community Care in the Next Decade and Beyond: Policy Guidance* (1990) para 3.20; Department of Health, *Prioritising Need in the Context of Putting People First* (2010) paras 69, 76, 79, 83, 84 and 86; and NAWFC 09A/2002, *Health and Social Care for Adults*, paras 2.8, 2.9, 2.11, 2.12, 2.17 and 2.28.

6 LAC(DH)(2009)6, *Social Care for Deafblind Children and Adults*, para 22 and NAWFC 10/2001, *Social Care for Deafblind Children and Adults*, para 21.

7 Department of Health, *Prioritising Need in the Context of Putting People First* (2010) para 94.

6 Eligibility and entitlements

We will:

- clarify individual entitlements to care and support to help people understand what they can expect from local authorities;
- consolidate existing requirements into single duties to determine eligible needs and to provide care and support to meet those needs; and
- place a duty on the Secretary of State to make regulations in relation to the exercise of the eligibility framework.

Summary of Law Commission proposals

- 6.1 Following on from the assessment process, Part 6 of the Law Commission's report detailed proposals to reflect the result of the assessment – the determination of needs which are eligible for care and support, and the core duty to meet those needs. This section covered proposals for users of care and support, with carers considered separately.
- 6.2 These proposals sit at the very heart of the legal framework for care and support. The duty of local authorities to meet eligible needs for care and support creates the most critical individual entitlement to care. It also overlaps and interacts with many of the other provisions, from charging to care and support plans and direct payments.
- 6.3 The Law Commission made two recommendations in relation to eligibility – one to set out the core duties, the other to specify the eligibility framework in regulations. Both are reproduced below.

Recommendation 16: *The 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 to meet all eligible needs. The wording of the duty must make it clear that the duty is an individual duty enforceable through judicial review.*

Recommendation 17: *The statute should place a duty on the Secretary of State and Welsh Ministers to make regulations prescribing the eligibility framework for the provision of community care services. The code of practice should specify clearly how local authorities should set their eligibility criteria, including the needs that a local authority must, as a minimum, provide services to meet.*

6.4 To conclude this part, the Law Commission made a further recommendation in relation to eligibility for residential care. Although this is related to the core duties above, it sits alongside them in the Law Commission scheme, which provides that the entitlements to residential accommodation in the National Assistance Act 1948 need to be retained to ensure that some people do not lose out in the new statute.

Recommendation 18: *Section 21 of the National Assistance Act 1948 should be retained in our scheme and, if it is possible to do so, be located in the adult social care statute and not as a separate standalone provision in the 1948 Act. Moreover, it should be retained with only such amendment that will have no consequences on its effect.*

The residual section 21 duty should be retained as a long-stop legal duty, available only to those who fall below the local authority eligibility criteria.

The Government's response

6.5 The Government accepts the Law Commission's recommendations 16 and 17 in relation to eligibility. However, the manner in which they should be implemented, and their relationship with other areas, is complicated and merits some further description.

Entitlements to care and support

6.6 As discussed, we see one of the objectives of the new statute as being to establish clearly an individual's legal entitlements to care and support. This will support awareness of care and support, and supplement the legal duties on local authorities which are required to facilitate the system. These entitlements are at the centre of recommendations 16 and 17.

6.7 We see two levels at which entitlements would operate for care and support. The first is in relation to 'universal services' – those services which the local authority is under a duty to provide to all local people, regardless of need – which has been described in chapter 4 of this document. The second is the specific entitlement to care and support for people who have eligible needs, as determined by an assessment.

6.8 The current legal framework is especially complicated in the area of entitlements to particular types of care and support. There are various different duties on local authorities, many of which are inconsistent, and the area in general has been the subject of much case law. In the new statute, we will provide for a single duty and consistent routes to entitlement for all people.

Determining eligible needs

- 6.9 Having undergone an assessment, the statute must create the pathway which the individual should follow, firstly to determine whether they have 'eligible' needs for care and support, and then to provide that they receive support (in whatever form) to meet those needs.
- 6.10 The first requirement following assessment is for the local authority to establish whether an individual's needs for care and support are eligible needs (i.e. needs of a level for which the local authority must provide support). The use of the word 'eligible' here refers to the person's needs, not to their financial resources.
- 6.11 We agree, therefore, that the local authority should have a *duty to determine whether the adult's needs are eligible needs for care and support*. This duty would have a similar effect to section 47(1)(b) of the NHS and Community Care Act 1990, but would be the sole means by which an individual's eligibility for care and support is determined.

The eligibility framework

- 6.12 The local authority must exercise the duty above according to the requirements of the eligibility framework, which is to be set out in regulations and supported by statutory guidance. There should be a duty on the Secretary of State to make such regulations. This implements the Law Commission's recommendation 17.
- 6.13 The existing eligibility framework (*Prioritising Need in the Context of Putting People First*) is contained entirely in guidance.⁸ This is a large and detailed topic, and we envisage that the future framework will also be of a level of detail that should, in part, be set out in statutory guidance. However, as with assessments, we also see the need for regulations to prescribe critical elements of the eligibility framework and the processes to be followed.
- 6.14 The current eligibility framework will require substantial reform to fit into the new system. The detail of that future framework is still to be determined, and will be developed with partners in the next phase of care and support reform, as set out in the White Paper. The new statute will need to provide flexibility to incorporate any new approach to eligibility arising from this work.

Relationship with section 21 of the National Assistance Act 1948

- 6.15 The current legal framework contains numerous anomalies in the way that 'residential accommodation' (provided under section 21 of the National Assistance Act 1948) is treated compared with other types of care and support. It is important to our aims of clarity and consistency that the new care and support statute does not create artificial dividing lines between people on the basis of a particular service or where they receive it. We want the legal framework to be fair and equitable, and built around the needs of the person.

8 www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_113154

- 6.16 The Law Commission suggested (in recommendation 18) that the effect of a new single eligibility framework could, in theory, be to remove some entitlements to residential accommodation under section 21 of the National Assistance Act 1948. Whilst the vast majority of people receiving such care would be unaffected by a route to entitlement based on eligible needs, we acknowledge the theoretical possibility of a small group of people losing an existing entitlement, and intend to address this.
- 6.17 In our view, however, to include a residual section 21 provision as a standalone duty would be anomalous with our overall approach, and perpetuate the same divisions we intend to remove. We propose, therefore, to deal with these cases through the eligibility regulations, so that individuals in the scope of these existing duties continue to be eligible for care and support, and in effect are 'mainstreamed' into the core processes for the provision of care and support.

Meeting eligible needs for care and support

- 6.18 Determining eligible needs is the main gateway to publicly-funded care and support. Having established that an individual has eligible needs, the law should provide that the local authority meet those needs for care and support, subject to establishing the person's residence and a potential financial assessment.
- 6.19 As indicated, we see this as a sensible place to incorporate the concept of 'ordinary residence', tied to the duty to meet eligible needs for care and support. The Law Commission deals with this topic separately in a later part.
- 6.20 Ordinary residence is not the only issue which relates here – financial assessment is also relevant. Where the local authority chooses to charge for a particular type of care and support, the outcome of the financial assessment will be taken into account in establishing whether the duty to meet eligible needs arises. The manner in which financial assessments take place will be set out in the charging provisions, which are also noted in paragraph 8.28 in response to the Law Commission's recommendations 37 and 38.

Other duties and powers to provide care and support

- 6.21 The main duty to meet needs for care and support above should be supported by a number of ancillary powers. These are largely dealt with by the Law Commission in separate recommendations.
- 6.22 The local authority should have a discretionary power to meet the assessed needs for care and support of any individual. This might include individuals who are not ordinarily resident in the area, or who do not have needs which meet the eligibility threshold. This meets the relevant part of the Commission's recommendation 47.
- 6.23 Additionally, a local authority should have a power to provide care and support, without having undertaken an assessment, to individuals who are in urgent need of such care. This would be the equivalent of sections 47(5) and 47(6) of the NHS and Community Care Act 1990. This power will encompass all individuals in the area, irrespective of ordinary residence.

7 Carers' assessment and eligibility

We will:

- create a new entitlement of carers to public support, to help people understand what they can expect from local authorities;
- consolidate existing requirements into a single duty to assess carers' needs on a similar basis to that for users; and
- mainstream carers' legislation within the new statute, to make clear the integral part carers play in modern care and support.

Summary of Law Commission proposals

- 7.1 Having described proposals for the system of assessment and eligibility for individuals who use care and support, Part 7 of the Law Commission's report contained its recommendations for the equivalent provisions for carers.
- 7.2 As the Commission says, the current legal framework for carers is "*fragmented and multi-layered*". It is also set out in separate legislation from that for users, perpetuating the notion that carers are outside of mainstream care and support provision. The cumulative effect of the Commission's recommendations is both to bring coherence to carers' entitlements to support, and to bring the legal provisions into the centre of the new statute.
- 7.3 This section of the report focuses on the law for adult carers – issues relating to young carers and parent carers are considered separately in chapter 11 (see paragraphs 11.13 onwards of this response). In this part, the Commission made nine recommendations in relation to assessments and eligibility for adult carers:

Recommendation 19: *There should be a single duty to undertake a carer's assessment in the statute, which is triggered where the local authority is satisfied that the cared-for person is someone for whom the local authority has a power to provide services (subject to the other criteria for an assessment being satisfied).*

Recommendation 20: *The duty to assess a carer should apply to any carer who is providing care to another person and not be restricted to those carers who are providing a substantial amount of care on a regular basis. Any such assessment undertaken should be proportionate to the needs presented by the carer.*

Recommendation 21: *The carers' assessment duty should no longer require a carer to request the assessment in order to trigger the duty. Instead, the duty should be triggered where it appears to the local authority that the carer may have, or will have upon commencing the caring role, needs that could be met by the provision of carers' services or services to the cared-for person.*

Recommendation 22: *The statute should provide that a carer's assessment must:*

- (1) be of the carer's ability to provide and to continue to provide care for the person cared for; and*
- (2) take into consideration whether the carer works or wishes to work, or is undertaking, or wishes to undertake, education, training or any leisure activity.*

Recommendation 23: *The statute should place a duty on the Secretary of State and Welsh Ministers to make regulations prescribing the process for carers' assessments.*

Recommendation 24: *A local authority should have discretion to assess a carer who receives payment for the care they provide or is a volunteer worker, where the authority believes the relationship is not principally a commercial or ordinary volunteering one.*

Recommendation 25: *The carers' assessment regulations must make provision to require local authorities to take into account the results of the cared-for person's community care assessment in determining whether to provide services to a carer.*

The carers' assessment regulations may require local authorities to have regard to the family's needs as a whole when undertaking a community care assessment or carer's assessment and in determining whether to provide services, if the Secretary of State or Welsh Ministers wish them to do so.

Recommendation 26: *The statute should place a duty on the Secretary of State and Welsh Ministers to make regulations prescribing the eligibility framework for the provision of carers' services.*

Recommendation 27: *Local authorities should be required to:*

- (1) determine whether a carer's needs are eligible needs using eligibility criteria; and*
- (2) provide or arrange services to meet all eligible needs of carers.*

The Government's response

7.4 The Government accepts the important principle in the Law Commission's recommendations that carers should have parity with the people they support in the new statute. We will ensure that provisions relating to carers are mainstreamed in the legislation, to be clear on carers' entitlements to assessments and to support provided by the local authority.

Carers' assessments

7.5 The Government accepts the Law Commission's recommendation that there should be a single duty placed on local authorities to undertake carers' assessments (recommendation 19). This will consolidate the fragmented legal framework that currently exists and clarify carers' right to an assessment.

7.6 Carers' assessments should not be restricted to those carers who are providing a substantial amount of care on a regular basis, as is stipulated by current legislation. We accept the Commission's recommendation 20 that this additional element should be removed. Removing this element is an important part of our objective to achieve consistency between carers and users in the threshold for triggering assessments.

7.7 The carers' assessment duty should not depend on the cared-for person simultaneously receiving an assessment. The local authority's duty to assess should arise even if the cared-for person has refused an assessment, or does not qualify for care and support in their own right. With this new threshold for triggering an assessment, we agree with the Law Commission that the formal 'right to request' mechanism is no longer necessary (recommendation 21).

The focus and process of carers' assessments

7.8 We agree that the current focus of carers' assessments should be retained as the identification of the individual's needs (recommendation 22). This should be a person-led approach, giving sufficient consideration to the outcomes the individual carer wishes to achieve. The new statute should consolidate the existing requirements set out in the Carers (Recognition and Services) Act 1995 and the Carers and Disabled Children Act 2000. The assessment must, therefore:

- be of the carer's ability, including their willingness, to provide and to continue to provide care for the person cared for; and
- take into consideration whether the carer works or wishes to work, or is undertaking, or wishes to undertake, education, training or recreation.

7.9 The Government also agrees that the statute should place a duty on the Secretary of State to prescribe the process for carers' assessments in regulations (recommendation 23). This would be consistent with the approach which we have already signalled for assessments for cared-for people. This should encourage a unified approach to assessments for carers and the people they support.

- 7.10 The assessment regulations should make provision to require local authorities to take into account the results of the user's assessment (where there is one) in determining whether to provide support to a carer (recommendation 25). They should also give local authorities the scope, where appropriate, to carry out assessments in conjunction with other bodies, for instance to cover health and well-being, and require local authorities to have regard to the family's needs in a holistic way when undertaking assessments.
- 7.11 We also believe that the statute should provide that the local authority's duty to assess would be discharged if the carer refuses the assessment. This would be equivalent to the rights in relation to the assessment of users of care and support.
- 7.12 As with the current legislation, professional carers should be excluded from the duty to undertake a carer's assessment. Similarly, those providing care as a volunteer should also be excluded. However, we agree with the Law Commission that local authorities should have a power to assess such carers, where they believe the relationship is not principally a commercial or ordinary volunteering one. This will allow flexibility in the approach where a local authority believe that a carer should be assessed (recommendation 24).

Carers' eligibility for support

- 7.13 In the current system, local authorities have a power to provide support to carers, but not an express duty to do so. When exercising this power, local authorities can, but are not required to, apply an eligibility framework. This approach is not being applied consistently across local authorities and there can be a lack of transparency in relation to how local authorities decide whether carers receive support. The Government supports, therefore, the Law Commission's recommendations to make explicit provision to require a determination of needs, and to provide support to meet eligible needs (recommendation 27).
- 7.14 As the White Paper has made clear, the Government agrees that the statute should place a new duty on local authorities to meet the eligible needs of carers. This duty should be similar to the duty set out for users (as per chapter 6 of this document), and should require local authorities to determine first whether a carer's needs are eligible needs for support.
- 7.15 The statute should place a duty on the Secretary of State to make regulations prescribing the eligibility framework for the provision of carers' support (recommendation 26). This would again replicate the approach to users. Local authorities should apply an eligibility framework which ensures that carers' entitlements to support are implemented in a consistent and equitable manner. This eligibility framework for carers will be developed with stakeholders, based on best practice and the parallel development of a revised framework for users.
- 7.16 As for people who use care and support, local authorities should have discretion to determine how eligible needs are met, and should have the power to meet any needs for support that fall below the eligibility threshold.

8 Care and support planning and provision

We will:

- support innovation in the provision of care and support by defining services in an open manner;
- strengthen the position of care and support plans by creating an entitlement based on eligible needs;
- give personal budgets a new central place in the statute, and consolidate the law on direct payments;
- maintain the right to a choice of accommodation; and
- update and clarify the requirements on charging, to be clear what support is subject to charges, and how means-testing should be carried out.

Summary of Law Commission proposals

- 8.1 Having established an entitlement to care and support, the Law Commission's report considered next the process for planning and providing for how to meet a person's needs for care and support.
- 8.2 This part of the Law Commission's report is detailed and varied. It covers the individual's journey from the point of having determined eligible needs, through the care planning process, to the delivery of care and support. It applies to both users and carers, and it also includes integral policy priorities, such as personal budgets, which have not been reflected in the law before.
- 8.3 The first two recommendations consider how 'care and support' should itself be defined in law to give some indication of the range of services.

Recommendation 28: *Community care services (however named) should be defined in the statute as any of the following provided in accordance with the well-being principle:*

- (1) *residential accommodation;*
- (2) *community and home-based services;*
- (3) *advice, social work, counselling and advocacy services; or*

(4) *financial or any other assistance.*

The statute should set out the following list of outcomes to which the well-being principle must be directed:

- (1) health and emotional well-being;*
- (2) protection from harm;*
- (3) education, training and recreation;*
- (4) the contribution made to society; and*
- (5) securing rights and entitlements.*

Recommendation 29: *Carers' services should be defined in the statute through reference to the same list of services and outcomes that we recommend for service users.*

8.4 In the next section, the Law Commission makes proposals around care and support plans.

Recommendation 30: *The statute should place a duty on a local authority to ensure the production of a care and support plan for people with assessed eligible needs (including carers). If a person falls below the eligibility criteria, then the authority should be required to put the reasons for that decision in writing and make a written record of the assessment available to the individual.*

The code of practice should provide guidance on when it would be appropriate for local authorities to authorise others to produce the plan and what degree of oversight should be provided by the local authority, and clarify that self-funders with assessed eligible needs have a right to a care and support plan.

Recommendation 31: *The statute should place a duty on the Secretary of State and Welsh Ministers to make regulations prescribing the form and content of care and support plans.*

Recommendation 32: *The care and support plan regulations must:*

- (1) require that plans be set out in writing and signed on behalf of the local authority;*
- (2) require that plans include a summary of assessed needs, eligible needs, and outcomes to be achieved;*
- (3) specify where appropriate that plans must include the amount of the personal budget and how this sum has been calculated;*
- (4) require that plans must include a summary of the services that will be provided, whether a direct payment will be provided and any financial contributions;*

- (5) *require that plans are reviewed regularly; and*
(6) *specify that a copy of the plan should always be made available to the service user.*

The care and support plan regulations may specify other requirements for the plan, if the Secretary of State or Welsh Ministers wish them to do so. The code of practice should provide concrete examples of the form and content of care and support plans, addressing both the requirements in the regulations and other legal requirements.

- 8.5 The Law Commission next makes proposals to create the concept of 'personal budgets' in the new legislation, alongside consolidated provisions on direct payments. It also recommends that the scope of direct payments be extended to remove the current prohibition on their use in residential care settings.

Recommendation 33: *A regulation-making power should be introduced to enable the Secretary of State and Welsh Ministers to require local authorities to allocate a personal budget to service users and carers. The regulations, if made, must prescribe who is eligible for a personal budget and the circumstances in which budgets should not be allocated.*

Recommendation 34: *The direct payments provisions should be retained in their existing form in our scheme.*

Recommendation 35: *Direct payments should be extended to cover residential accommodation.*

- 8.6 Also relating to residential care, recommendation 36 proposes that two existing requirements be carried over into the new statute – the right for individuals to have a choice over their residential accommodation, and the ability to make 'top-up' payments beyond the amount which the local authority will pay for such care.

Recommendation 36: *A regulation-making power should be introduced to enable the Secretary of State and Welsh Ministers to require or authorise local authorities to accommodate a person at the place of their choice within England and Wales and to allow for the making of additional payments.*

- 8.7 The remaining two recommendations in this section turn to the issue of charging, and consider the powers which the Secretary of State and local authorities require to implement charging arrangements for care and support.

Recommendation 37: *A regulation-making power should be introduced to enable the Secretary of State and the Welsh Ministers to require or authorise local authorities to charge for residential and non-residential services, or to establish a charging framework for services.*

Recommendation 38: *The existing regulation-making power, which enables services to be provided free of charge, should be maintained in our scheme. As a minimum the current services that must be provided free of charge should be included in the regulations.*

The Government's response

8.8 A large amount of detail is included in this section, and the Government's responses to the recommendations are considered individually below.

Defining care and support

8.9 Having established the parameters within which a local authority must, or is able to, meet needs for care and support, the statute should provide some indication of the types of care and support the local authority may provide. Although the use of a definition provoked divergent views during the Law Commission's consultation, on balance we support the Law Commission's key argument that a definition gives "*at least some indication about the range of services that can be provided*".

8.10 The Law Commission's recommendation 28 proposes a 'hybrid' solution which marries a list of service categories with a list of intended outcomes or activities. As we have already made clear in chapter 3 on statutory principles, we see the 'outcomes' element proposed here as being a description of the principle of 'well-being'. Having redirected the focus of the 'outcomes' in this way, we prefer the approach taken in the first half of recommendation 28 – a short, open list of categories of care and support. This would provide a partial definition to act as a guide, but it must not restrict the way in which care and support is provided, or hinder the ability of local authorities or providers of care and support to innovate.

8.11 We support recommendation 29, that the approach above should be a single definition which applies equally to carers' support and to that for users.

Care and support plans

8.12 Care plans have played a key role in the assessment process since the Community Care Act 1990, and have been a requirement of statutory guidance. *Caring for People: Community Care in the Next Decade and Beyond: Policy Guidance* (1990) advises that such plans should be drawn up following an assessment and identification of eligible needs. However, the concept of a care and support plan has changed markedly over the years, moving from a simple summary record of the services that someone will receive from particular agencies, to one in which the

user or carer is placed centre-stage and takes a more active part in its development and the outcomes associated with it.

- 8.13 Our view, therefore, is that the inclusion of care and support plans more prominently in the statute is overdue, and we support the Commission's recommendation 31.
- 8.14 Care planning is a crucial part of the journey through the system, for users and carers alike. It is more than just the preparation of the care and support plan; it answers the central question of how a person's needs for care and support should be met. We intend that the new statute will reflect the importance of care planning, incorporating the role of the personal budget in informing the process.
- 8.15 The care and support plan itself acts as a record which should capture the core details of the person's situation – their assessed needs and outcomes, decisions on how they want those needs to be met, and details on any direct payments. Having a care and support plan is not just good administrative practice for the local authority; it is crucial to the involvement of the person, their carer and their family in designing a package of care.
- 8.16 In designing the provisions for care and support plans, we recognise that there is no single concept, and the plan itself will inherently be determined by the needs, circumstances and choices of the individual themselves. A care and support plan for an individual receiving a direct payment and planning their own care is likely to look very different to one which acts as the basis for local authority-managed provision. Whilst there will be some broad similarities in the content of the care and support plan, we do not believe that these call for regulations to specify core detail (as proposed in recommendation 31).
- 8.17 Instead, we intend to specify in primary legislation the few, high-level items which should be included in the plans provided both to people who use care, and to carers. This would include details of the assessed needs, any assessed financial contributions, the care and support to be provided, and the amount of the personal budget. This would reflect existing practice, and obviate the need for further regulations. It would also support the principle of recommendation 32.
- 8.18 We also intend to provide for those people who do not have eligible needs, or do not go on to receive any care and support arranged by the local authority. Whilst these people will not receive a care and support plan which is the same as that above, they should expect to receive a written record of their assessment, as well as information and advice to support them to meet their needs independently, and to prevent or delay needs from arising in the future. This is noted as part of recommendation 30, and will apply equally to carers.

Personal budgets

- 8.19 Personal budgets are a critical element of achieving the Government's policy objectives for care and support. The Government's view is that personal budgets should be given a clear legal status which fits their role, and we support the Law Commission's recommendation 33.

8.20 However, we want to go further than this recommendation in primary legislation to meet our ambitions for personal budgets. As the White Paper makes clear, we want personal budgets to be more clearly part of the user's or carer's entitlements to care and support.

8.21 To achieve this, we propose to legislate that personal budgets be provided to individuals who are entitled to care and support, as a matter of course. We want the personal budget to be a default part of the care and support plan, to enable users or carers to decide how much control they wish to exercise in deciding how their needs for care and support will be met.

8.22 This position would have only limited exceptions, for instance for certain one-off or short-term services where allocating costs upfront in a personal budget may be less relevant. We will specify such exceptions in regulations.

Direct payments

8.23 The Government accepts recommendation 34 that the direct payment provisions, largely located in section 57 of the Health and Social Care Act 2001, be retained in the new statute. This would reflect the fact that a personal budget should be a core element of the process of care and support planning, and a direct payment the means of receiving that budget, where the person chooses to do so. These provisions will clearly relate to both users and carers.

8.24 In implementing this recommendation, we consolidate and update the existing legislation, some of which is of technical detail better suited to regulations than to primary legislation. However, in principle the existing rules on the making of direct payments will be retained, as will prohibitions on their use to purchase care and support which is provided by the local authority, or to purchase services from a family member or partner who lives with the person receiving the payment, unless the local authority is satisfied that securing the service from such a person is necessary to meet their assessed needs.

8.25 Recommendation 35 proposes a substantial policy and legal change in relation to the provision of direct payments, by extending them to residential care for the first time. The Government's view, as set out in the White Paper and in light of the views expressed during the autumn engagement, is that this is a proposal worth testing further. We will use existing powers to pilot direct payments in residential care at selected sites, with a view to making final policy decisions on their extension before the implementation of the new care and support statute.

Choice of accommodation

8.26 Recommendation 36 proposes to retain the existing requirement to accommodate a person in the care home of their choice, and to maintain the ability for individuals to make additional 'top-up' payments where they choose care more expensive than that for which the authority would usually pay. Both provisions are currently included in directions, and the Government accepts the recommendation that both be brought into the new legislation.

Charging

8.27 The process for deciding whether a charge is due for a particular type of care and support, and calculating the amount through a financial assessment, is a complex area of existing law, with much technical detail spread across numerous Acts and regulations. As a core element of care and support, it is important that provisions are reformed and clearly linked into the mainstream legal framework. The Government therefore accepts both recommendations 37 and 38. The manner in which charging takes place should be set out in a coherent manner in the new statute and supporting regulations, to support understanding and enable people to anticipate what the local authority may be able to provide with or without charge.

9 Safeguarding and adult protection

We will:

- create a new statutory framework for adult safeguarding, to clarify the roles and responsibilities of local authorities and other organisations;
- legislate to create Safeguarding Adults Boards in every local authority area, as the vehicle for co-ordinating partners' activity on safeguarding; and
- consult on whether to introduce new powers for local authorities to support their ability to make safeguarding enquiries.

Summary of Law Commission proposals

- 9.1 The Law Commission's report concluded that the current legal framework for adult safeguarding is *"neither systematic nor co-ordinated, reflecting the sporadic development of safeguarding policy over the last 25 years"*.
- 9.2 The Commission identified a lack of coherence around local authority adult protection powers and duties, and recommended the creation of a new statutory framework to cover this important area of local authority responsibility. Its first recommendations considered the role of local authorities themselves, and the scope of their safeguarding responsibilities:

Recommendation 39: *The statute should:*

- (1) *provide clearly that local social services authorities have the lead co-ordinating responsibility for safeguarding;*
- (2) *place a duty on local social services authorities to investigate adult protection cases, or cause an investigation to be made by other agencies, in individual cases; and*
- (3) *place a duty on the Secretary of State and Welsh Ministers to make regulations prescribing the process for adult protection investigations.*

Recommendation 40: *'Adults at risk' should be those who appear to:*

- (1) *have health or social care needs, including carers (irrespective of whether or not those needs are being met by services);*
- (2) *be at risk of harm; and*
- (3) *be unable to safeguard themselves as a result of their health or social care needs.*

In addition, the statute should provide that the duty to investigate should apply only in cases where the local authority believes it is necessary. 'Harm' should be defined as including but not limited to:

- (1) ill treatment (including sexual abuse, exploitation and forms of ill treatment which are not physical);*
- (2) the impairment of health (physical or mental) or development (physical, intellectual, emotional, social or behavioural);*
- (3) self-harm and neglect; or*
- (4) unlawful conduct which adversely affects property, rights or interests (for example, financial abuse).*

9.3 The Law Commission Consultation Paper argued that it is for the Government to decide policy on the powers and rules that should apply in adult protection cases; it therefore did not consider the introduction of new compulsory powers:

Recommendation 41: *The statute should not include any new compulsory or emergency powers, unless the Government or the Welsh Assembly Government decides that such powers are needed.*

9.4 With regard to existing compulsory powers, the Law Commission's analysis of the power to remove individuals from their home in section 47 of the National Assistance Act 1948 concluded that the provision cannot be made compliant with the European Convention on Human Rights without substantial reform. As a result, the power cannot be amended without creating a completely new compulsory safeguarding order. The Law Commission therefore considered that the power should be repealed.

Recommendation 42: *The compulsory removal power under section 47 of the National Assistance Act 1948 should be repealed. The Government and the Welsh Assembly Government should consider commissioning research into the existing use of section 47, and then decide, on the basis of that research, whether it would be appropriate to reform the section, following public consultation.*

9.5 Following on from this, the Law Commission confirmed its provisional recommendation that section 48 of the National Assistance Act 1948, which places a duty on local authorities to prevent the loss or damage of a person's property when they are admitted to hospital or residential care, should be retained.

Recommendation 43: *Local authorities should be required to protect property when a person is admitted to hospital or residential care.*

9.6 The Commission then went on to make proposals in relation to the establishment of new statutory adult safeguarding boards. These boards, discussed in detail during the Commission's consultation, are intended to bring together key local partners in each area and co-ordinate activity on safeguarding and adult protection. Recommendation 44 gives further detail on how the boards should be constituted, what their statutory remit should be, and the roles of each of the member organisations. Shortly after the publication of the Law Commission's recommendations, the Government announced its intention to legislate to require such boards.

Recommendation 44: *Adult safeguarding boards should be placed on a statutory footing. In order to achieve this, the statute should:*

- (1) give the local social services authority the lead role in establishing and maintaining adult safeguarding boards;*
- (2) specify the following functions for adult safeguarding boards:*
 - (a) to keep under review the procedures and practices of public bodies which relate to safeguarding adults;*
 - (b) to give information or advice, or make proposals, to any public body on the exercise of functions which relate to safeguarding adults;*
 - (c) to improve the skills and knowledge of professionals who have responsibilities relating to safeguarding adults; and*
 - (d) to produce a report every two years on the exercise of the board's functions;*
- (3) give the Secretary of State and the Welsh Ministers a regulation-making power to add to this list;*
- (4) require each of the following to nominate a board member who has the appropriate skills and knowledge:*
 - (a) the local social services authority;*
 - (b) the NHS; and*
 - (c) the police;*
- (5) give the Secretary of State and the Welsh Ministers a regulation-making power to add to this list;*
- (6) give the Care Quality Commission, the Care and Social Services Inspectorate Wales and the Healthcare Inspectorate Wales a power to nominate an appropriate representative to attend meetings;*
- (7) give the local social services authority a power to appoint any other person with the necessary skills and knowledge relevant to the board, and responsibility for appointing the chair; and*

(8) provide that adult safeguarding boards should commission serious case reviews and establish a duty to contribute to these reviews.

The code of practice should provide guidance on when information can and should be shared with adult safeguarding boards.

Recommendation 45: *The enhanced duty to co-operate should include specific provision to promote co-operation between relevant organisations in adult protection cases.*

9.7 Finally in this section, the Law Commission raised three further issues in the area of safeguarding which had been raised during consultation, and suggested that Government consider these further.

Recommendation 46: *The Government and the Welsh Assembly Government should consider reviewing the following issues:*

- (1) the application of guardianship under the Mental Health Act 1983 to people with learning disabilities;*
- (2) protecting adults at risk who are being ill treated or neglected but who are not subject to the powers of the Mental Health Act 1983 or mentally incapacitated;*
- (3) the powers of local authorities to apply for occupation orders on behalf of a person under the Family Law Act 1996.*

The Government's response

General responsibilities

9.8 The Government accepts the first part of recommendation 39: that the law should establish the lead responsibility of local authorities for adult safeguarding. This should frame the responsibility as being the lead co-ordinating agency, as other agencies also need to contribute to adult safeguarding in their day-to-day work within their existing statutory duties (for example, within healthcare for the delivery of NHS services and within law enforcement and crime prevention for the police).

9.9 We also accept the recommendation placing a duty on local authorities to make enquiries, or cause them to be made, about adult safeguarding concerns. We agree that the current 'patchwork' of relevant legislation is not as clear as it should be, and we should take this opportunity to set out that local authorities have a clear statutory duty to make such enquiries.

9.10 The Government prefers using the term 'enquiries' rather than 'investigations' here, because we feel the term 'investigation' is too closely associated with police functions. We must remain very clear that the police's role is to investigate when an alleged or suspected criminal offence has

been committed. It will often be appropriate to conduct an adult safeguarding enquiry when no criminal offence has been committed.

- 9.11 We do not propose taking a power to make regulations about the duty to make enquiries. Our view is that regulations for adult safeguarding enquiries would be over-prescriptive, and would run the risk of governing the process by prescribed procedures, rather than emphasising the need for professional judgement and user and carer voice. Not all enquiries should or need to have the same breadth or depth, depending on the specific circumstances involved.

The scope of safeguarding

- 9.12 Recommendation 40 considers the scope of safeguarding responsibilities, and the important issue of terminology. We recognise that there is a lobby advocating a move away from the term 'vulnerable adult' as some groups feel the term is pejorative. *Hidden in plain sight*, the recent report of the EHRC inquiry into disability-related harassment, largely reflects this view. The Law Commission suggests the use of the term 'adult at risk' instead, but others feel that the common understanding of to whom this term would apply would be very broad, as anyone can be 'at risk' under certain circumstances.
- 9.13 The Government's view is that the use of any particular descriptive term in the legislation will be problematic and unlikely to be future-proof or suitable for a modern care and support statute. We think it would be more appropriate to find another way to address this issue rather than perpetuate the use of unhelpful terminology. What matters most is that the underpinning criteria are coherent, since they create the scope of adult safeguarding.
- 9.14 The Law Commission also set out a proposal as to the definition criteria for who is 'in scope' for adult safeguarding with reference to a concept of 'harm'. Although we recognise the reasons for the Commission making this recommendation, based as it is on the children's safeguarding equivalent, we are not minded to follow this precise approach.
- 9.15 Our preference would be to define the scope of safeguarding in law with clearer reference to concepts of 'abuse' and 'neglect'. This is where the core work of adult safeguarding should sit – where adults in vulnerable situations are hurt because of the actions (or lack of action) of others. In our view, this would be a more straightforward description of the policy, showing explicitly that safeguarding is a response to the actions and omissions of others in a way that 'harm', however defined, cannot capture alone.
- 9.16 For similar reasons, we do not intend to set out 'self-harm' as a specific example of the type of situation where an adult safeguarding response might be required. Adult safeguarding activity should be focused on cases where a person is at risk as a result of the act or omission of another person. Cases of self-harm or self-neglect may raise professional concerns, but we do not believe they should be specifically set out as examples of where a *safeguarding* response would always be necessary. This, of course, would not stop Safeguarding Adults Boards making local decisions to consider activity in this area, if that is thought to be a local priority.

Compulsory powers and duty to protect property

- 9.17 We accept recommendation 42 that the compulsory removal power under section 47 of the National Assistance Act 1948 should be repealed. We do not intend to propose any new powers in this area in the draft Care and Support Bill.
- 9.18 However, we recognise that this is a complex issue, and many stakeholders expressed a view that local authorities should have some powers to access a person who may be at risk of abuse, in cases where they may not be able otherwise to carry out a safeguarding enquiry. In the consultation on the review of *No Secrets*, 60% of the respondents agreed that there should “be a power to enter premises where it is suspected that a vulnerable adult is being abused”. 27% of respondents did not support this.
- 9.19 We intend to use the opportunity of pre-legislative scrutiny on the draft Bill to consult specifically on whether a new power should be created for local authorities in this area. We will launch a separate consultation alongside the draft Bill which focuses on this issue specifically, to ensure that this important debate receives sufficient attention, and can inform the scrutiny of the draft Bill.
- 9.20 We accept recommendation 43 that local authorities should be required to protect property when a person is admitted to hospital or residential care. This is the current position arising from section 48 of the National Assistance Act 1948, and we intend to incorporate the effect of this provision in the statute.

Safeguarding Adults Boards

- 9.21 The Government announced an intention to seek to legislate for Safeguarding Adults Boards (SABs) on 16 May 2011, in the *Statement of Government Policy on Adult Safeguarding*. The Government supports, therefore, the principle of recommendation 44, as well as a majority of the detail. The design and development of SABs will be critical to their effectiveness and sustainability, and we need to balance prescription with local flexibility in how they are constituted and managed.
- 9.22 It is critical that the new statute creates clear responsibilities for securing SABs in all local authority areas. The legislation should require that each local authority must establish a Safeguarding Adults Board for their area. This would be the equivalent of the duty at section 13(1) of the Children Act 2004, which requires the local authority to establish a Local Safeguarding Children Board.
- 9.23 In relation to the functions of the SAB, we propose that the primary objective should be to protect adults from significant harm by providing leadership, ownership and co-ordination of multi-agency working at local level, reducing the risk of abuse. However, we think agencies working collaboratively at a local level should determine the means by which SABs achieve this goal.

9.24 Although we intend to leave the detail of SAB functions to local decision, we do want SABs to be clear with their members and the local community about how they operate. Therefore, we wish to impose three specific requirements:

- (i) that SABs must agree and publish a plan which discusses the outcomes that they are going to focus on and how the members of the SAB are going to work together. This should be reviewed by the SAB on an annual basis;
- (ii) that SABs must publish an annual report on the exercise of their functions and their success in achieving the outcomes described in the plan; and,
- (iii) that SABs must commission 'safeguarding adults reviews', with members having a duty to co-operate in this regard. Such reviews should focus on learning from experience and improving services for users.

9.25 We support the Law Commission's recommendation on the required membership of the SAB. In order to allow flexibility for SABs to add to the required core membership to reflect local circumstances, the Board should have a power to include other relevant persons or bodies as members of the SAB. We also agree that it would be appropriate to allow the Government by regulations to add to the membership requirements of SABs in response to any emerging situation.

9.26 Our goal is to strike a balance: giving local authorities a clear statutory mandate for co-ordination and leadership, whilst also strengthening the sense of responsibility of other agencies for adult safeguarding within their respective areas, such as healthcare or policing and crime prevention.

Other considerations

9.27 The Government notes the Law Commission's argument in recommendation 46(1) that amending existing rules on guardianship could offer increased powers for local authorities to intervene in the lives of adults with a learning disability to safeguard their welfare. However, we are not convinced that this would offer any additional protection to people with learning disabilities over and above that provided by existing adult safeguarding powers. We do not, therefore, propose extending mental health guardianship powers to people with learning disabilities.

9.28 In relation to protecting adults at risk of abuse but who have mental capacity (and therefore are outside the scope of the protections in the Mental Capacity Act), we note the recent Court of Appeal judgment, which held that the High Court can intervene to protect adults who are subject to coercion or undue influence.⁹ The judgment reaffirmed the 'inherent jurisdiction of the High Court', meaning that it can protect adults with capacity, even where there are no formal statutory powers. In light of this judgment, and our proposed new approach to adult safeguarding which covers all adults, the Government has no further plans to legislate in this

9 DL v A Local Authority [2012] EWCA Civ 253

area at this time. However, we will consider this issue further with stakeholders during pre-legislative scrutiny of the draft Bill.

9.29 Finally, the third element of recommendation 46 (local authority powers to apply for occupation orders under the Family Law Act 1996) relates to provisions for protection from domestic violence. Under section 60 of the 1996 Act, specified people may make an application for an occupation order on the person's behalf. However, as the Law Commission noted, this provision has never been brought into force. Government has no plans to bring this provision into force at this time, but will continue to consider its status.

10 Ordinary residence and portability

We will:

- incorporate ordinary residence into the core eligibility provisions for care and support, to reduce confusion and clarify entitlements; and
- provide for a new duty that when a person moves between areas, the new local authority must continue to meet their assessed needs for care and support, until it carries out its own assessment.

Summary of Law Commission proposals

- 10.1 Although the concept of ordinary residence is central to the entitlement to certain types of care and support, the Law Commission considered the issue in a separate part of its report, alongside the related topic of portability and the entitlements which should follow an individual when they move between areas.
- 10.2 The Law Commission made two recommendations in relation to ordinary residence, which largely reflect the existing legislation, and two further in relation to the provisions which should apply when an individual moves areas:

Recommendation 47: *Under our scheme, a local authority should have:*

- (1) *a duty to provide services where the person is ordinarily resident (subject to the application of the local authority's eligibility criteria);*
- (2) *a power to provide services for people not ordinarily resident or of no settled residence;*
- (3) *a duty to provide residential accommodation where a person is not ordinarily resident but is in urgent need of accommodation;*
- (4) *a duty to carry out an assessment of needs, irrespective of ordinary residence; and*
- (5) *a power to provide temporary urgent services, without carrying out an assessment, irrespective of ordinary residence.*

Recommendation 48: *The local authority in which the cared-for person lives should be given primary responsibility for providing carers' services. The code of practice should provide guidance on how local authorities are to address the particular needs of carers living at a distance.*

Recommendation 49: *The enhanced duty to co-operate should include specific provision to promote co-operation between local authorities when individuals are moving areas.*

Recommendation 50: *The statute should establish that when a service user moves from one local authority to another, or has a clear intention to move, the receiving authority must carry out an assessment. If the new authority decides to give a significantly different support package, it should be required to produce a clear written explanation to the service user and where appropriate their carer.*

The Secretary of State and Welsh Ministers should have a power to make regulations requiring that when service users move from one authority to another, the new authority must provide the person with equivalent services or direct payments to those provided by the original authority to cover their support needs until they undergo an assessment in the new authority.

The Government's response

Ordinary residence

10.3 As we have already made clear in chapter 6 of this response, we see ordinary residence as a central part of the core individual entitlement to care and support, and want it to be incorporated into the new statute to support determination of eligibility. Ordinary residence should apply equally to all types of care and support under the new statute (including, as discussed in paragraphs 11.28-11.32, mental health after-care services provided under section 117 of the Mental Health Act 1983). We also agree that carers' support should be subject to similar residence requirements, based on the responsibility resting on the local authority in which the cared-for person is ordinarily resident (recommendation 48).

10.4 There are also particular rules relating to ordinary residence, under the National Assistance Act 1948, for people in residential accommodation who are placed in another local authority's area. This provision means that the person is 'deemed' to remain ordinarily resident in the area of the original local authority (which is arranging the placement), so that responsibility does not move to the new area. Although the Law Commission did not make a specific recommendation on the effect of this provision, we are aware that in practice this only applies to care home placements, and not to other types of accommodation. We also intend to provide for removing this anomaly, so that other types of accommodation are treated equally.

Portability

10.5 We support the use of a duty to co-operate to encourage local authorities to work together when an individual moves from one area to another (recommendation 49). Duties to co-operate are discussed further in chapter 4 of this response.

- 10.6 We also support the principle that an individual should have the ability to choose where they want to live and move between places without fear of losing the care and support they need. As announced in the White Paper, we intend to make provision for 'portability' to ensure that such discontinuity of care does not take place when people move between areas (recommendation 50).
- 10.7 In our view, the key issue should be that the person's needs for care and support continue to be met when they move to a new area. We do not wish to require that a particular *service* be provided by the new local authority, since the same type of service may not always be available locally, but rather focus on the outcome that the *needs* are met. This will achieve the same goal of empowering people to move between areas with the confidence that assessed needs that were being met by the previous local authority will not go unmet on arrival in their new area.
- 10.8 The portability provisions will be closely related to those for ordinary residence – in effect, the purpose of portability is to provide protection for potential gaps in ordinary residence status between one area and another. The portability duty will continue until the new local authority has carried out an assessment, determined eligible needs, and put in place care and support to meet those needs. The person would be ordinarily resident in the new area at this point, and so the portability provisions can lapse.

11 Overlap and other areas

We will:

- clarify the legal boundaries between adult care and support and other local services, to avoid confusion and support partnership working;
- modernise and incorporate the provisions on delayed discharges and streamline requirements on registers;
- provide powers for local authorities to provide temporary urgent services; and
- clarify the status and treatment of Shared Lives schemes and remove anomalies between types of accommodation.

Summary of Law Commission proposals

11.1 The final two parts of the Law Commission's report considered a number of further areas for law reform, particularly in relation to where adult care and support inter-relates and overlaps with other public services and their legal frameworks. Because of the breadth of issues covered across the 26 recommendations in these sections, in this part of our response we consider and respond to the recommendations in small groups based around the particular topics to which they relate.

The Government's response

The health and social care divide

11.2 The first of the critical overlaps which the Law Commission considered was the relationship in law between health and social care. The legal boundary between health and social care, is still largely based around the 1948 National Assistance Act, and has been the subject of much debate and case law. In the Law Commission's view, this boundary needs to be clarified and incorporated into the new statute, to provide support to help people understand where local authorities' responsibilities end and the health service's begin.

11.3 In this part, the Law Commission made recommendations on the legal divide between health and social care, proposing simplification and clarification in this area. It also made recommendations as to how the NHS and local authorities should work together on the provision of NHS Continuing Healthcare (a package of ongoing care which may include care and support elements but is paid for by the NHS), and the related dispute process. The recommendations are reproduced below.

Recommendation 51: *The existing statutory prohibitions on the provision of healthcare by local authorities should be retained, and:*

- (1) the wording of the prohibitions should be reviewed and where appropriate simplified;*
- (2) where possible NHS guidance and directions should always distinguish between legal powers and duties;*
- (3) the prohibitions should include a clear statement to the effect that the range of powers and duties given to the NHS are those set out in regulations and guidance issued under the NHS Acts 2006;*
- (4) the quantity and quality test should be set out in statute law; and*
- (5) the Secretary of State and Welsh Ministers should be given a power to establish in regulations an eligibility framework and what combination of needs would make a person eligible for NHS continuing healthcare.*

Recommendation 52: *The enhanced duty to co-operate should apply when a request is made by a local authority for an NHS continuing healthcare assessment and where someone moves from social care into NHS care.*

Recommendation 53: *If direct payments are extended to healthcare, the statute should require the NHS to consider reasonable requests to continue to provide direct payments to social care service users who become eligible for NHS continuing healthcare, and where the NHS has decided not to provide direct payments, it would be required to consider whether existing service provider or agency arrangements should be kept in place.*

Recommendation 54: *The Government and Welsh Assembly Government should consider reviewing whether the courts are the appropriate forum for determining disputes over NHS continuing healthcare.*

Recommendation 55: *The code of practice should provide concrete examples of how the prohibitions apply in cases involving residential or non-residential services.*

11.4 The Government accepts the principle of recommendation 51, and agrees in particular that the existing divide between NHS and local authority responsibilities should be recreated in the new statute. It is important that the law specifies the prohibitions placed on local authorities with regard to the provision of healthcare, to be clear about the division of responsibilities.

- 11.5 We also agree that the wording of the current prohibitions, taken from an Act over 60 years old, is potentially confusing and that the prohibitions in the new statute, while retaining the same practical effect, should if possible be clarified and simplified. We will consider how best to implement this recommendation.
- 11.6 We will also consider how to incorporate the 'quality and quantity test' (the 'test' which seeks to identify those small-scale healthcare services that a local authority should be able to provide) in the new statute.
- 11.7 In relation to recommendation 52, we have already accepted the principle of the duties to co-operate (as discussed in chapter 4), and agree this to be an occasion when co-operation between services is especially important.
- 11.8 On 4 October 2011, the Secretary of State announced that, subject to the evaluation of the pilot programme by April 2014, everyone who is eligible for NHS Continuing Healthcare will have the right to ask for a personal health budget, including a direct payment. There should be ease of transfer from local authorities to the NHS, and vice versa, and the person concerned should be able to continue to receive direct payments in respect of their care. We therefore accept recommendation 53.
- 11.9 In relation to dispute resolution (recommendation 54), our view is that, in the first instance at least, such disputes should, as now, be settled by an appropriate dispute resolution procedure agreed between the NHS body and the local authority. It is our intention to recreate similar requirements for local authorities through regulations made under this statute, and in parallel provide for the NHS responsibilities through standing rules.
- 11.10 Finally, in relation to recommendation 55, the Government accepts this proposal for inclusion in the statutory guidance to be issued in support of the new scheme.

Prohibition on general housing

- 11.11 Building on the theme of borderline issues where adult care and support meets other public services, recommendation 56 considered the general prohibition on local authorities providing housing services:

Recommendation 56: *Our scheme should prohibit social services authorities from providing ordinary housing and connected services, if these services are authorised or required to be provided under other legislation.*

- 11.12 The Government accepts this recommendation, which effectively maintains the current prohibition on the provision of ordinary housing under care and support legislation. It is important that the legislation is clear about what types of care and support a local authority may provide under this statute, and what it may not, to avoid any confusion about powers and responsibilities.

Children, young carers and parent carers

11.13 A third crucial area of overlap is between adult care and support and children's services. Most adult care and support law applies to people over the age of 18 years. However, there are some existing provisions where that is not the case, and legislation applies to all ages, including children and young people (for instance, section 2 of the Chronically Sick and Disabled Persons Act 1970, which creates a specific duty to provide community services to disabled people). The majority of carers' legislation also applies to all ages. As a result, the interface between the adults' and the children's statutes is not clear-cut.

11.14 The relationship between the law relating to children and that relating to adults is, therefore, another area of confusion in care and support law which the Law Commission sought to rectify. Moreover, we know that it represents an area which is the focus of many stakeholder concerns – including the transition between children and adult services and support for young carers. The Law Commission made four recommendations in this area:

Recommendation 57: *The adult social care statute should apply to those aged 18 and above (subject to a power to provide transitional services).*

The Government and the Welsh Assembly Government should consider amending the Children Act 1989 to incorporate the same rights to services for children that are currently contained in the Chronically Sick and Disabled Persons Act 1970, the Disabled Persons (Services, Consultation and Representation) Act 1986 and the NHS Acts 2006.

Recommendation 58: *The statute should:*

- (1) introduce an enhanced duty to co-operate, which should include specific provision to promote co-operation between relevant organisations when a young person is moving from children's to adults' services;*
- (2) give local authorities a general power to assess and provide services to 16 and 17 year-olds under the adult social care statute;*
- (3) require the local authority to give written reasons if a young person aged 16 and 17 (and their parents or carers on their behalf) requests to be assessed under the adult social care statute, and the authority decides not to carry out the assessment;*
- (4) state that any young person may make the request irrespective of their capacity and a parent or carer can make a request on behalf of the young person, if the young person has capacity and gives consent or if the young person lacks capacity and it is in their "best interests" as defined under the Mental Capacity Act 2005 to be assessed under the adult social care statute; and*
- (5) create a duty, to be implemented via regulations issued by the Secretary of State and the Welsh Ministers, on local authorities to assess certain young people under the adult social care statute and to specify groups to whom this duty is owed.*

Recommendation 59: *The Carers (Recognition and Services) Act 1995 and the Carers and Disabled Children Act 2000 should be retained and amended so that they would apply only to carers aged under 18.*

The duties to assess a young carer in the 1995 and 2000 Acts should be amended to make them consistent with the threshold for a carer's assessment under the adult social care statute.

The Government and the Welsh Assembly Government should either consolidate the 1995 and 2000 Acts so that there is a single young carer's statute or repeal this legislation and incorporate the provisions into the Children Act 1989.

Local authorities should have a general power to assess and provide services to 16 and 17 year-old young carers under the adult social care statute. The statute would require the local authority to give written reasons if a young carer aged 16 and 17 (and their parents on their behalf) requests to be assessed under the adult social care statute, and the authority decides not to carry out the assessment. A young carer would be able to make a formal request using this mechanism on behalf of the person they are caring for.

The assessment regulations made under the adult social care statute should contain a requirement that any community care assessment must have regard to the results of any assessment of a young carer.

The enhanced duty to co-operate should include specific provision to promote co-operation between relevant organisations when a person is moving from children's to adults' services.

Recommendation 60: *Parent carers should continue to have a right to a carer's assessment under the Carers (Recognition and Services) Act 1995 and the Carers and Disabled Children Act 2000. The duties to assess a parent carer in the 1995 and 2000 Acts should be amended to make them consistent with the threshold for a carer's assessment under the adult social care statute.*

The Government and Welsh Assembly Government should either consolidate parent carers' assessments into a single young carers' statute, as described in Recommendation 59, or incorporate them into the Children Act 1989.

If a parent carer who is looking after a young person aged 16 and 17 initiates a formal request that the young person is assessed under the adult social care statute and the local authority agrees to this request, then the parent carer should also be given a carer's assessment under the same statute.

- 11.15 The Government agrees with the Law Commission's analysis of the confusion in care and support law at the boundary of children and adults, and accepts recommendation 57 that the new statute should make a clear general principle that adult care and support is for people aged 18 years and over.

- 11.16 However, as the Commission describes, establishing this age boundary in law will create a number of legal and policy challenges to be overcome, to ensure that the statute does not put up an artificial wall between services and hinder integrated working. It will be important that the statute encourages partnerships to focus on transition between children's and adults' services in the best interests of the individual themselves.
- 11.17 The Law Commission considers that it will be necessary for local authorities to plan around the general age boundary, and have powers to assess and provide services to individuals on both sides of the 18-year mark. The Government agrees that any age boundary can be arbitrary, and the needs of individuals around this age will vary considerably. The law needs to support local authorities to plan effectively and tailor transition around the needs of the individual, and not create a 'cliff edge' at the age of 18 years.
- 11.18 There is already some planned overlap across the 18-year boundary. The Special Educational Needs and Disability Green Paper proposes a single co-ordinated assessment process and Education, Health and Care Plan covering education, health and care needs for individuals aged up to 25 years who are in school or further education provision, and under the current system would have a statement of Special Educational Needs or a Learning Difficulty Assessment.¹⁰
- 11.19 To support planning ahead of transition, we agree with the Law Commission that local authorities should have a power to assess a child under 18 years old under the adult statute. This would allow for early identification of needs based on the adult assessment and eligibility framework, and mean that information could be provided, and support provisionally put in place, in advance of the 18th birthday. Such assessment should only be provided where the young person consents, and therefore we also support the recommendation that young people aged under 18 years have a formal request mechanism, whereby they can ask the local authority to exercise this power. The request mechanism should also be open to their parents, guardians or carer.
- 11.20 We do not, however, believe that we should go further and give the local authority a *general power to provide services* to young people aged under 18 years in the adult statute. There will be very few, if any, cases in which it is in the child's best interests to move to adult care and support sooner. We want the law to promote the involvement of adult care and support considerations in multi-agency planning, rather than to take over service provision unnecessarily.
- 11.21 However, we do think there is the need for some further transitional protection for young people who have been receiving services under the Children Act 1989 at their 18th birthday. Even where transition planning works well, it may not always be the case that adult care and support is in place on the day, and there is the risk of a gap in services. We will provide that if

10 Support and aspiration: A new approach to special educational needs and disability
<http://www.education.gov.uk/childrenandyoungpeople/sen/a0075339/sengreenpaper>

a young person is receiving children's services on turning 18, and adult care and support assessments and care planning have not happened to put support in place, then services provided under the Children Act must continue until those steps are taken.

- 11.22 As regards young carers (recommendation 59), our view is that the general approach to young carers in law should reflect the proposals for young people who use services outlined above, following the principle of equity and mainstreaming in our new adult statute. This would mean that the general boundary in law between a young carer and an adult carer should be at age 18, that provisions for adult carers should be included in the new adult statute, and those for young carers provided under children's legislation.
- 11.23 In addition, we propose similarly that there should be a power to assess young carers aged under 18 years in adult care and support law, and an equivalent request mechanism and duty to explain the reasons for not assessing. For the same reasons as are given above, we do not believe that this should extend to a general power to provide support, but rather should be used to prepare for transition ahead of the young carer turning 18. The duty to continue providing children's services outlined in paragraph 11.21 would also apply to young carers.
- 11.24 Finally, in relation to parent carers (recommendation 60), we also want to adopt a consistent approach. The principle behind the Law Commission's recommendation is to ensure the whole-family focus by services working together around the needs of the family. We support this principle.
- 11.25 Parent carers are also adults who care, and we believe that they should have the option of receiving adult support, as well as that provided to the family via children's services. Therefore, we propose to provide a duty for local authorities to assess parent carers under the adult care and support statute, on request. Local authorities would also have a power to meet the needs of parent carers, so that any services available only through adult care and support can be provided.

Mental health after-care services

- 11.26 The Mental Health Act 1983, provides the legal framework for making sure that vulnerable people with mental health problems get the care they need, when they need it, for their own health and safety or to protect other people. Sometimes it is necessary to take action without people's consent in order to protect them, or other people, from the ill effects of their mental disorder. The 1983 Act allows this to happen, while at the same time protecting the rights of the individual.
- 11.27 Section 117 of the Mental Health Act 1983 places a duty on clinical commissioning groups and local authorities to provide after-care for people who have been detained in hospital for treatment for a mental disorder. They must provide after-care, in co-operation with relevant voluntary agencies, until such time as they are satisfied that the person is no longer in need of care. The relationship between this existing duty and the new care and support statute is explored in seven of the Law Commission's recommendations:

Recommendation 61: *The power to make regulations requiring or authorising local authorities to accommodate a person at the place of their choice within England and Wales, set out in Recommendation 36, should apply to those receiving after-care under section 117 of the Mental Health Act 1983.*

Recommendation 62: *The power to make regulations to allow for the making of additional payments, set out in Recommendation 36, should apply to those receiving after-care under section 117 of the Mental Health Act 1983.*

Recommendation 63: *The concept of ordinary residence should be extended to apply to after-care services provided under section 117 of the Mental Health Act 1983. The issue of how the ordinary residence rules should be applied to section 117 should be taken forward as a general review of the policy of the Government and Welsh Assembly Government.*

Recommendation 64: *The joint duty in section 117 of the Mental Health Act 1983 should be divided between health and social care. In addition, the section 117 duty on the NHS should continue until it is satisfied that after-care is no longer required, and likewise the duty on the local social services authority should continue until it is satisfied that after-care is no longer required.*

Recommendation 65: *Section 117 of the Mental Health Act 1983 should be amended to clarify that social services authorities may commission services from other providers.*

Recommendation 66: *Section 117 of the Mental Health Act 1983 should be recast from a free-standing duty to a gateway provision in both England and Wales. The code of practice should clarify the relationship between section 117 and local authority eligibility criteria.*

Recommendation 67: *After-care services provided under section 117 of the Mental Health Act 1983 should be defined on the face of the 1983 Act as those services necessary to meet a need arising from the person's mental disorder; and aimed at reducing that person's chance of being readmitted to hospital for treatment for that disorder. The code of practice should provide guidance on distinguishing between accommodation which is and is not related to a mental disorder.*

- 11.28 The Government has accepted recommendation 36 of the Law Commission's report, which is to introduce a power to make regulations to require local authorities to accommodate a person at the place of their choice within England, and a power to make regulations to allow additional (i.e. top-up) payments to be made for more expensive accommodation. In line with our approach to other types of care and support, we agree that these provisions should apply to those receiving mental health after-care, and hence support recommendations 61 and 62.
- 11.29 We similarly support the Law Commission's recommendation 63 that the concept of ordinary residence should be extended to apply to people receiving services under section 117. This would address the problem in some cases of a person's mental health needs being catered for by one authority and their other needs by another, and help reduce some of the anomalies associated with this type of care and support.
- 11.30 During the passage of the Health and Social Care Act 2012, the status of the joint duty in section 117 was debated at length. Having listened carefully to the concerns raised in the House of Lords in discussion of section 40 of the 2012 Act, the Government has decided to preserve the joint duty in section 117 of the 1983 Act. It is not therefore possible for us to accept recommendations 64 and 66. The 2012 Act will transfer the duty under section 117 from PCTs to clinical commissioning groups, but this will not affect any local authority responsibilities under section 117.
- 11.31 Section 117 is a freestanding duty because some of the specific characteristics of these services do not apply to mainstream care and support. The most significant of these is that after-care services cannot be charged for and must be provided free of charge. Whilst we wish to remove some of the anomalies of section 117 by specifically applying certain provisions to after-care services (as per recommendations 61-63), we do not intend to change its status. In our view, it would be more straightforward to retain section 117 as a freestanding provision, albeit amended as proposed in other recommendations.
- 11.32 Recommendations 65 and 67 are to make two changes to clarify the meaning of certain existing provisions in section 117. They suggest we make clear that local authorities may commission section 117 services from other providers, and that the needs to be met under section 117 should be solely those which relate to a person's mental disorder. We note that the Mental Health Act 1983 Code of Practice addresses the first of these points (see paragraph 27.4) and that there is case law on the latter point.¹¹ We nevertheless agree that the recommended clarification would be helpful and we therefore accept the recommendations to add text to section 117 in order to make both these points clear on the face of the 1983 Act.

Delayed discharges

- 11.33 The Community Care (Delayed Discharges etc.) Act 2003 was designed to reduce the number of patients delayed in hospital, and the length of time delayed. The Act created a procedure

11 R (Mwanza) v LB of Greenwich (2010) EWHC 1462 (Admin)

for notification of patients ready for discharge, to promote joint working between frontline teams in the NHS and social care, and made local authorities liable to reimburse NHS trusts for patients who were delayed in hospital because they were waiting either for an assessment for care and support, or for a package of care to be provided by the local authority. The Law Commission considered that the existing provisions should be brought forward into the new statute:

Recommendation 68: *The delayed discharge provisions should be incorporated into our scheme.*

11.34 The Government accepts this recommendation and, in implementing it through the new statute, will seek simplification of the legal provisions to improve understanding. We note that some respondents to the Law Commission consultation proposed that the entirety of the delayed discharge provisions and procedure be repealed, and although this was outside the scope of the Commission's review, we have considered this proposal. However, in our view the provisions still provide a useful framework for local authorities and the NHS to manage their relationship around hospital discharge, and complete removal might disadvantage some areas to the detriment of patients. We propose, therefore, that they be retained to support those partners who are making the most beneficial use of them.

People in prison

11.35 The Law Commission subsequently considered the situation of care and support in prisons, and the responsibilities of local authorities to this end. As in other areas, the Commission found that the legal framework provided no assistance in determining whether people in prison are, or are not, within the scope of care and support functions. Without proposing whether or not this should be the case, the Commission recommended that the situation be made clear in the new statute:

Recommendation 69: *If the policy decision is that prisoners should not be excluded from adult social care, then the legal framework must facilitate this policy, for example through the ordinary residence rules and eligibility framework. If the policy decision is that prisoners should be excluded, then the statute must make this position clear.*

11.36 The Government agrees that the position of prisoners in the context of adult care and support law has been open to interpretation. It is our intention to address this ambiguity in the new statute.

11.37 To achieve this in practice, we intend to work with stakeholders, including local government and the National Offender Management Service, to develop a new framework for the provision of care and support in prisons. This will consider the roles and responsibilities of prisons and local authorities, and how prisoners could be incorporated in mainstream processes such as assessment, as well as where specific approaches may be required.

Advocacy

11.38 Advocacy has long been seen as a key element in enabling independent living and personalisation for those who need support. The Disabled Persons (Services, Consultation and Representation) Act 1986 makes a number of provisions with regard to advocacy, including creating the concept of an 'authorised representative' with certain rights to be involved in the care and support process. However, although this Act is now over 25 years old, the provisions have never been commenced. The Law Commission considered this and proposed that these rights be translated into the new statute:

Recommendation 72: *The right to advocacy contained in the Disabled Persons (Services, Consultation and Representation) Act 1986 should be retained in the statute, with a power for the Secretary of State and Welsh Ministers to implement the right and modify it to bring it into line with modern understandings.*

11.39 The Government agrees that the availability of advocacy services is helpful to support people to live independently and take as much control over their lives as they can, and should be encouraged in a range of ways, including as part of the broader focus on information, advice and support which the White Paper has signalled.

11.40 In our view, this issue links strongly to the implementation of recommendation 6 in relation to the provision of information and advice, which the Government has accepted. This goes a long way towards ensuring that individuals who may need care and support have the access to the advice of which advocacy services are one type, without constraining local planning and priority setting. In the context of an outcome-focused approach to policy and law-making, it is not our intention to require local authorities to provide a specific service, but rather to focus on meeting the needs of individuals.

11.41 For this reason, we do not agree that the provisions in the 1986 Act, which have not been commenced or implemented in over 25 years, should be retained in the new legislation. Although they concern an important area, these provisions demonstrate a service-orientated approach to care and support which does not accord with our focus on needs and outcomes.

Registers

11.42 Existing legislation dating back to 1948 requires local authorities to compile and maintain registers of disabled people in their area. However, feedback from local authorities has suggested that registers are often incomplete, of variable quality, and not regularly used to plan services. On these grounds, the Law Commission's Consultation Paper initially recommended dropping the requirement for a register completely.

11.43 During the consultation, the Commission heard a strong case that the requirement to maintain a sight loss register should be retained on the grounds that – unlike the general register –

it does fulfil the purpose of assisting local authorities to plan services and furthermore acts as the gateway to enable access to appropriate disability benefits. This led to the revised recommendation 73:

Recommendation 73: *Local authorities should be required to establish and maintain a register of blind and partially sighted people. In all other cases, local authorities should be given a power to establish and maintain registers.*

The code of practice should maintain the existing requirements for local authorities to analyse data on a number of issues including which groups are referred for assessment and receive services; and identify, make contact with and keep a record of deafblind people in their catchment area.

11.44 The Government supports recommendation 73. It is clear that there is a high level of reporting of sight loss to the register – ophthalmology services are accustomed to sending certificates of visual impairment to local authority registers. This information is then collated nationally by Moorfields Eye Hospital and remains of national value. We also accept the proposal to empower local authorities to continue registers in other areas, should these be of use locally, and to support best practice in the revised bank of statutory guidance.

Urgent services

11.45 Although the topic had already been noted as part of the discussion on ordinary residence and in recommendation 47(5), the Law Commission separately made a supplementary recommendation to propose that existing powers for local authorities to provide urgent services be retained:

Recommendation 74: *The statute should retain local authority powers to provide temporary urgent services before an assessment is carried out.*

11.46 The Government accepts this recommendation. The power for local authorities to provide urgent care and support outside of the formal assessment process is an important lever for responding to crisis situations.

Shared Lives

11.47 Shared Lives schemes were developed to provide care and support in a more domestic setting for adults who do not need a residential care home, but may not be able to live in their own home. Schemes are often tailored and a wide variety is available. The Law Commission considered the definition of such schemes in response to concerns raised during its consultation that local definitions of the schemes varied, potentially having adverse effects on the user's entitlements to benefits and the regulatory burden on those providing care.

Recommendation 75: *The statute should give the Secretary of State and Welsh Ministers a regulation-making power to prescribe whether Shared Lives schemes should be considered to be residential or non-residential services. This power should allow the regulations to apply differentially to specific Shared Lives schemes.*

- 11.48 The Government wishes to reduce the anomalies in law between the treatment of different types of care and support, whilst recognising that there remain some legitimate differences in particular circumstances (see also paragraphs 6.15 and 6.16). Where certain requirements relate only to specific types of care and support, the statute will be clear about the types of care to which they relate, to reduce the potential for confusion. Otherwise, we intend to provide for a consistent set of provisions applying to care and support in general, to reflect a focus on the individual and not on service types. This approach will allow for the status of such individual forms of care and support as Shared Lives to be clear in the future.
- 11.49 We believe this approach meets the principle of the Law Commission's recommendation. The important factor is to be clear about the legitimate differences which apply to particular types of care and support, but not otherwise create anomalies by breaking care and support into broad categories, unless there is a particular reason to do so.

Complaints

- 11.50 In its final recommendation, the Law Commission turned to an issue raised during its consultation, though outside of the remit of its review – the complaints process. The Commission recommended that the Government consider how the complaints system worked, and whether any further reform was necessary.

Recommendation 76: *The Government and Welsh Assembly Government should consider reviewing the complaints and redress system and whether a community care tribunal should be established.*

- 11.51 The complaints and redress system for adult care and support was reformed as recently as 2009, and is set out in regulations.¹² These require that local authorities set up arrangements for dealing with complaints made in relation to care and support.
- 11.52 Complaints are also the responsibility of the provider. All providers should, by law, have a clear and effective complaints system. If the care provider, or the local authority, does not resolve a complaint to people's satisfaction, they can then ask the Local Government Ombudsman (LGO) to investigate. The LGO is a national body, with responsibility for complaints against care providers. It covers both local authority-funded people and, since October 2010, people who fund their own care and support.

12 The Local Authority Social Services and NHS Complaints (England) Regulations 2009: <http://www.legislation.gov.uk/uksi/2009/309/contents/made>

11.53 The Government already has plans to develop the complaints system to improve the experience of those who use it. As set out in the White Paper, we are strengthening the ways in which people can feedback, by supporting new public feedback websites, and pooling these comments in accessible provider scorecards. These websites will be monitored by care providers, and will incentivise them to take action to address complaints. This action takes place in the context of the existing legislative framework around complaints, and we do not believe that any more substantial legal reform in this area is required at this time.

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