

Adult social care

Summary of final report



Law

Commission

Reforming the law

ADULT SOCIAL CARE SUMMARY OF FINAL REPORT

Introduction

1. Adult social care refers to the responsibilities of local social services authorities towards adults who need extra support. The legal framework for the provision of adult social care services dates back to 1948, and consists of a complex and confusing patchwork of legislation. The Law Commission's review of adult social care law was announced in 2008. The first stage led to the publication of a scoping report in November 2008. This was followed by the publication of a consultation paper in February 2010 setting out provisional proposals for law reform. Our analysis of consultation responses is available on the adult social care project page at <http://www.lawcom.gov.uk>
2. We have now published our final report which sets out our recommendations for the reform of adult social care. The final report marks the completion of the Law Commission's project on adult social care law. The Government has announced that it will introduce legislation in 2012 to implement the recommendations it accepts in our final report.
3. The following is a summary of the main recommendations contained in the final report.

Structure of reform (Part 3 of the Final Report)

4. The legal framework for adult social care consists of an often incoherent patchwork of legislation, which makes interpretation and application of the law complex and time consuming. In our view, consolidation and simplification would be best achieved by establishing a unified adult social care statute.
5. This could be achieved by separate statutes in England and in Wales or a single statute covering both countries. In our view, this issue has been settled in practice by the outcome of the referendum supporting fuller legislative powers for the National Assembly, held in March 2011. The introduction of Part 4 of the Government of Wales Act 2006 has given the National Assembly for Wales the power to legislate for all of adult social care. We therefore recommend there should be single statutes for adult social care for each of England and Wales, and that in Wales this should be implemented by means of an Act of the National Assembly.
6. The new statute, in each of England and Wales, would be the first level of our new three-level structure for adult social care. The statute would set out the core duties and powers of local social services authorities, which would not be subject to further directions or approvals. To prevent duplication and excessive layers of law developing, the broad power to issue directions under section 7A of the Local Authority Social Services Act 1970 would be repealed as it relates to our scheme.
7. The second level of our scheme would be regulations made by the Secretary of State or Welsh Ministers, to

provide more detail where necessary and to allow for developments of policy in the future.

8. Each Government would also be required to issue consolidated guidance on the new statute in the form of a code of practice. This would be the third level of our scheme, and would provide guidance to local authorities about the implementation and operation of the new statute.

Statutory principles (Part 4 of the Final Report)

9. Statutory principles are intended to give legislative expression to the underlying purpose of a statute and guide decision makers acting under the legislation. In our view there is considerable merit in providing for a single unifying purpose around which adult social care is organised. We therefore recommend that 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.
10. The statute would not provide a precise definition of well-being, but would set out a checklist of factors that must be considered before a decision is made in relation to an individual. Thus the decision maker would be required to:
 - 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;

- follow the individual's views, wishes and feelings wherever practicable and appropriate;
- 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;
- 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;
- achieve a balance with the well-being of others, if this is relevant and practicable;
- safeguard adults wherever practicable from abuse and neglect; and
- use the least restrictive solution where it is necessary to interfere with the individual's rights and freedom of action wherever that is practicable.

Assessments (Part 5 of the Final Report)

11. In our scheme there would be two levels at which adult social care services could be provided. The first is a universal level, with the provision of universal services to the wider community to help prevent or delay the need for more targeted social care interventions. Here local authorities would have a broader role to ensure the provision of information, advice and assistance to people who have not had or do not want an assessment, or who are not eligible for services. Authorities would also have

a responsibility to stimulate the development of sufficient types of services and support in the local market. The second level would be targeted social care services, provided following a community care assessment.

12. The new statute would set out a single, clear duty to assess a person. As under the existing law, there would be a low qualifying threshold for an assessment which is triggered where it appears to a local authority that a person may have needs that could be met by community care services. So long as this threshold is met, the duty will be triggered even if the person does not consent to an assessment. However, under our scheme a local authority could accept a person's refusal of an assessment as discharging its duty to assess unless there were safeguarding concerns or concerns about the person's capacity.
13. To help prevent a service-led approach to assessment, the new statute would specify that an assessment must focus on the person's care and support needs and the outcomes they wish to achieve. In undertaking assessments, local authorities would be required to consult with the individual and their carer, unless it was impossible to do so.
14. Given the importance of the assessment process to accessing services, the Secretary of State and Welsh Ministers would be required to make regulations prescribing how an assessment should be carried out. These regulations would require at a minimum that assessors:

- adopt a proportionate approach to assessment, having regard to the needs of the individual;
- carry out a specialist assessment in specified circumstances; and
- consider all needs during an assessment, irrespective of whether they can or are being met by a third party (such as a carer).

The Government and Welsh Assembly Government would also be able to prescribe other details of the assessment process if they wished, such as timescales and the areas that an assessment must cover.

15. To encourage joined-up assessments the new statute would make it clear that a local authority can carry out a community care assessment at the same time as any other assessment is carried out, such as the Care Programme Approach, the Single Assessment Process and NHS continuing healthcare. A local authority would also be able to authorise others – such as a health professional – to undertake the assessment or aspects of the assessment on their behalf, subject to the local authority retaining overall control of the process. This would allow, for example, for joint health and social care assessments to be carried out by the same assessor.

Eligibility (Part 6 of the Final Report)

16. Under our scheme, an assessment of need and the application of eligibility criteria would be the sole means by which a person's eligibility for community care services (including residential care) is determined. Following an assessment, local authorities would be

required to determine whether a person's social care needs are eligible needs, using eligibility criteria, and to provide or arrange community care services to meet all eligible needs. The duty to meet eligible needs would be an individual duty, enforceable through judicial review.

17. The statute would require the Secretary of State and Welsh Ministers to make regulations prescribing the eligibility framework for the provision of community care services, which local authorities would have to use to set their eligibility criteria. The code of practice would specify how local authorities should set their eligibility criteria, including the needs the authority must, at a minimum, provide services to meet. However, our scheme would also allow the Governments to set eligibility criteria at a national level in England or in Wales, if either Government wished to do so.
18. To ensure existing rights to services are maintained, the duty to provide residential accommodation under section 21 of the National Assistance Act 1948 would be retained in the new statute as a long-stop legal duty. This would provide a right to residential accommodation to those who fall below the local authority eligibility criteria but still have a need for care and attention which is not otherwise available to them.

Carers' assessments and eligibility (Part 7 of the Final Report)

19. The new statute would set out a single and standalone duty to undertake a carer's assessment. This duty would not depend on the cared-for person simultaneously receiving a community care assessment, but would only

require that the cared-for person is someone for whom the local authority has a power to provide services. In effect, the duty to assess a carer will arise even if the cared-for person has refused an assessment or is not eligible for services.

20. The new duty to assess a carer would remove the existing requirement for the carer to be providing a substantial amount of care on a regular basis. In our view, this test is overly complex, subject to a range of different interpretations by local authorities, and creates inefficiency by requiring local authorities to undertake pre-assessments. Furthermore, a carer would no longer be required to make a formal request for an assessment in order to trigger the assessment duty. Instead, the duty to assess would 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.
21. Although paid or volunteer carer workers would be excluded from carers' assessments, local authorities would have discretion to assess such a carer where they believe the caring relationship is not principally a commercial or ordinary volunteering one.
22. A carer's assessment, once triggered, would be required to focus on the carer's ability to provide and to continue to provide care for the person cared for and also take into account whether the carer wishes to work or undertake education, training or any leisure activity. As with community care assessments, the Secretary of

State and Welsh Ministers would be required to prescribe the process for carers' assessments in regulations. To ensure a joined-up process between community care assessments and carers' assessments, the assessment regulations would require that the results of the carer's (including young carer's) assessment and cared-for person's assessment should inform each other.

23. Once a local authority has undertaken a carer's assessment, it would need to decide whether to provide services to the carer. Under our scheme, both Governments would be required to prescribe the eligibility framework for carers' services in regulations. Local authorities would use that eligibility framework to set their eligibility criteria and would determine whether a carer's needs are eligible by applying the criteria. Local authorities would be required to meet the eligible needs of carers, either by providing services to the cared-for person or to the carer.

The provision of services (Part 8 of the Final Report)

24. Once a local authority has undertaken an assessment and concluded that a person has needs that call for the provision of services, then the authority must make arrangements for those services to be provided. In the statute, the range of care and support that can be provided to service users (currently referred to as community care services) would be defined by reference to a list of general services and outcomes. In effect, community care services (however named) would be

defined in the statute as any of the following provided in accordance with the well-being principle:

- residential accommodation;
- community and home-based services;
- advice, social work, counselling and advocacy services; or
- financial or any other assistance.

25. The statute would also set out the following list of outcomes to which the well-being principle must be directed:

- health and emotional well-being;
- protection from harm;
- education, training and recreation;
- the contribution made to society; and
- securing rights and entitlements.

26. Carers' services would be defined in the statute by reference to the same list of services and outcomes that we recommend for service users. This would ensure greater consistency and clarity.

27. The new statute would place a duty on local authorities to ensure the production of a care and support plan for people with assessed eligible needs (including carers and self-funders). If a person falls below the eligibility criteria, then the authority would be required to put the

reasons for that decision in writing and make a written record of the assessment available to the individual.

28. The Secretary of State and Welsh Ministers would be required to prescribe the form and content of care and support plans in regulations. The regulations would:

- require that plans are set out in writing and are signed on behalf of the local authority;
- require that plans include a summary of assessed needs, eligible needs, and outcomes to be achieved;
- specify where appropriate that plans must include the amount of the personal budget and how this sum has been calculated;
- 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;
- require that plans are reviewed regularly; and
- specify that a copy of the plan should always be made available to the service user.

29. Our scheme would provide a legal framework for personal budgets and enable the development of policy in this area. The Secretary of State and the Welsh Ministers would be given a power to make regulations 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.

30. The existing legal provisions regulating direct payments – that is, a cash payment in lieu of services – would be maintained in our scheme. However, the current restriction on using direct payments to purchase long-term residential accommodation would be removed. This would allow service users and carers to use direct payments to purchase non-residential services as well as residential care. Furthermore, a regulation-making power would 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.
31. Finally, a regulation-making power would be introduced to enable the Secretary of State and Welsh Ministers to require or authorise local authorities to charge for residential and non-residential services, or to establish a charging regime for services (as in Wales). Furthermore, the existing regulation-making power which enables services to be provided free of charge would be maintained, and as a minimum the existing services that must be provided free of charge would be included in the regulations.

Adult protection (Part 9 of the Final Report)

32. As well as setting out the legal framework for the provision of care and support, our scheme would set out the duties and powers of local authorities to safeguard adults from abuse and neglect. The new statute would provide clearly that local social services authorities have the lead co-ordinating responsibility for safeguarding. As

part of that responsibility, the statute would place a duty on local authorities to investigate adult protection cases or cause an investigation to be made by other agencies, in individual cases.

33. Where the duty to investigate is triggered, the local authority would be able to undertake the investigation itself, or it could have the duty performed through a range of pathways – such as by referring the matter to another agency, or initiating a multi-agency investigation. However, local authorities may still need to have an ongoing monitoring role when they involve others in an investigation. To help facilitate multi-agency working, local authorities would have a power to request co-operation and assistance from certain bodies (such as health bodies and the police) during adult protection matters, and the requested body would have to give due consideration to the request.
34. The duty to investigate would apply to an adult at risk, which would be defined through four elements:
- (i) The person must appear to have health or social care needs, including carers (irrespective of whether or not those needs are being met by services).
 - (ii) The person must appear to be at risk of harm, rather than significant harm set out in the existing statutory guidance.
 - (iii) The person must appear to be unable to safeguard themselves from harm as a direct result of their health or social care needs.

- (iv) The local authority must believe it is necessary to make enquiries. This may be the case because, for example, other less restrictive courses of action (such as a community care assessment) will not remove or reduce the harm and abuse.

35. Harm would be defined in the statute as including but not limited to:

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

36. The new statute would give local authorities the lead role in establishing and maintaining adult safeguarding boards. The statute would specify the following functions for these boards:

- to keep under review the procedures and practices of public bodies which relate to safeguarding adults;
- to give information or advice, or make proposals, to any public body on the exercise of functions which relate to safeguarding adults;

- to improve the skills and knowledge of professionals who have responsibilities relating to safeguarding adults; and
- to produce a report every two years on the exercise of the board's functions.

37. The local authority, NHS and police would each be required to nominate a member to the board with appropriate knowledge and skills. The Care Quality Commission, the Care and Social Services Inspectorate Wales and the Healthcare Inspectorate Wales would have a power to nominate a representative. The adult safeguarding board would also be responsible for commissioning serious case reviews.

38. The new statute would not set out new compulsory and emergency powers for local authorities in adult protection cases, such as powers of entry or exclusion orders, unless either Government decided that such powers were needed. Furthermore, the existing power to remove a person from their home to suitable premises under section 47 of the National Assistance Act 1948 would be repealed, on the basis that it is incompatible with the European Convention on Human Rights, has several operational difficulties and is in practice obsolete.

Ordinary residence and portability (Part 10 of the Final Report)

39. The ordinary residence rules are used to establish which local authority is responsible for providing community care services to an individual. Under our scheme, these

rules would apply to all community care services and would establish, for example, that local authorities have a duty to provide services where the person is ordinarily resident in their area (subject to the application of the local authority eligibility criteria) and a power to provide services for people not ordinarily resident or of no settled residence. In relation to carers, the primary responsibility for providing carers' services would remain with the local authority in which the cared-for person lives.

40. Our scheme would also establish three mechanisms to facilitate portability of services. The new statute would:

- establish an enhanced duty to co-operate, to apply when a person moves area. This would allow a local authority to request assistance from another local authority or other body and the requested body would have to give due consideration to the request;
- establish that when a service user moves from one local authority area to another, or has a clear intention to move, the receiving authority must carry out an assessment. If, following the assessment, the new authority decides to give a significantly different support package to the service user then the authority must produce a clear written explanation to the service user and where appropriate their carer; and
- introduce a power for both Governments 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.

Other recommendations (Parts 11 and 12 of the Final Report)

41. In addition to the key elements discussed above, the final report also sets out our recommendations in a number of other areas, including:

The health and social care divide

42. The existing statutory prohibitions on the provision of healthcare by local authorities would be retained, but various aspects of the existing regime would be clarified. For example, the language of the prohibitions would be simplified, and the quantity and quality test which is used to determine which health services a local authority can lawfully provide would be put on the face of the statute (rather than left to case law).

43. Both Governments would also be given a power to establish in regulations an eligibility framework for the provision of NHS continuing healthcare and to specify what combination of needs establish a primary health need whereby the person would be eligible for NHS continuing healthcare.

Children and young people

44. The new statute would apply to those aged 18 and above, but to assist with the transition of young people from children's services to adults' services, local authorities would have a power to assess and provide service to 16 and 17 year olds under the adult statute.

Young people aged 16 and 17 (and their parents or carers on their behalf) would be able to request an assessment under the adult statute, and the local authority would have to give written reasons if it decides not to carry out the assessment. To allow for the development of policy, the statute would also give both Governments the power to require that certain groups of young people are always assessed under the adult statute.

Young carers and parent carers

45. To ensure that young carers and parent carers do not lose their existing rights to carers' assessments and services, the carers' assessment legislation would be retained and amended to only apply to these groups (or the Children Act 1989 would be amended to incorporate these provisions). To help with transition planning, the power to assess young people, described above, and the request mechanism would apply to young carers.

Section 117 of the Mental Health Act 1983

46. Section 117 would be retained in the Mental Health Act 1983, but recast from a free-standing duty to a gateway provision. This would mean that any social care after-care services would be regarded as services provided under the new adult social care statute. Furthermore, the choice of accommodation provisions and ordinary residence rules would be extended to section 117. The definition of after-care would be added to the 1983 Act.

Duties to co-operate

47. The new statute would establish a duty on each social services authority to make arrangements to promote co-operation with specified bodies, including other authorities, the NHS and police. It would also introduce an enhanced duty to co-operate to operate in particular circumstances, such as when a community care or carer's assessment is taking place, when services are being provided, or during adult protection investigations. The requested agency would be required to give due consideration to the request, and provide written reasons if it refuses to co-operate. The duty would also require the social services authority to give consideration to requests to co-operate and give written reasons if it decides not to co-operate.

Advocacy

48. There is an existing right to advocacy in adult social care legislation which has never been implemented. This would be maintained in our scheme, 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.

Disability registers

49. Our scheme would replace the existing duty on local authorities to maintain a register of all disabled people with a more discrete requirement to establish a register of blind and partially sighted people in their area. In other cases, local authorities would have a power to maintain registers, if they wished to do so.

Social care and prisons

50. Our scheme would set out clearly whether prisoners should or should not be excluded from adult social care.

Further information

51. For further information about any of the recommendations discussed above, please see the adult social care project page at: <http://www.lawcom.gov.uk>

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