

Title: Adult social care law reform Lead department or agency: Law Commission Other departments or agencies: Department of Health and Welsh Assembly Government	Impact Assessment (IA)
	IA No: LAWCOM0010
	Date: 11 May 2011
	Stage: Final
	Source of intervention: Domestic
	Type of measure: Primary legislation
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Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

The legislative framework for adult social care is inadequate, often incomprehensible and outdated. It consists of a confusing patchwork of statutes enacted over 60 years. The existing legislation often overlaps and is inconsistent, leading to confusion and inefficiency as much time is needed to interpret and apply the law. The complexity of the framework may also frustrate the delivery of key government policies, such as personalisation and self-directed support. Government intervention is necessary as primary legislation is required to reform the law into a single, modern statute which local authorities, service users and carers can look at to understand whether services can and should be provided.

What are the policy objectives and the intended effects?

The policy objectives are simplification of the legal framework to ensure a greater degree of consistency in decision making; create a legal framework that is clear and accessible; modernise the law; remove the use of outdated and discriminatory concepts; and produce a clear legal structure which can work at any level of expenditure. The intended effect is to create a clear, cohesive, modern and accessible statute for adult social care, which sets out the responsibilities of local authorities and the rights of individuals.

What policy options have been considered? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing.

Option 1: Consolidation and reform of the adult social care legal framework (the preferred option). In general terms, this option involves repealing much of the existing community care legislation and establishing a single adult social care statute.

Will the policy be reviewed? It will not be reviewed. **If applicable, set review date:** Month/Year

What is the basis for this review? Please select. **If applicable, set sunset clause date:** Month/Year

Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?

Yes/No

Chair's Sign-off For final proposal stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Chair:

Date:

Summary: Analysis and Evidence

Policy Option 1

Description:

Reform the law based on accepted practice. This is the preferred option, as it will embed good standards and clarify the law in this area, thereby increasing confidence in the industry and improving regulatory compliance, without imposing additional burdens.

Price Base Year 09-10	PV Base Year 2011	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £40.754	High: £95.484	Best Estimate: £68.453

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£2.131	£0	£2.131
High	£2.800	£0	£2.800
Best Estimate	£2.131	£0	£2.131

Description and scale of key monetised costs by 'main affected groups'

Local authorities / students: transitional costs of legal training for social workers and students (£1,426,009 in year 0, £729,879 in year 1).

Other key non-monetised costs by 'main affected groups'

None.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	£0	£5.152	£42.886
High	£0	£11.809	£98.283
Best Estimate	£0	£8.480	£70.584

Description and scale of key monetised benefits by 'main affected groups'

Local authorities / social workers: savings in social workers' time (£4,665,100)
 Local authorities / Local Government Ombudsman: fewer complaints (£1,797,389)
 Local authorities: lower legal advisor costs (£1,336,436)
 Local authorities / LSC: lower litigation costs (£569,400)
 Local authorities / social workers: time savings in on-going training (£111,962)

Other key non-monetised benefits by 'main affected groups'

Local authorities / social workers: time savings in social work courses could lead to more in-depth and higher quality training.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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Assumptions

- There are 10,591 adult and 25,695 children's social workers affected by our proposals.

Sensitivities

- Between 5% and 15% (best estimate 10%) fewer complaints to local authorities, and 2.5% to 7.5% (best estimate 5%) fewer to the Local Government Ombudsman.
- Savings of 10% to 20% (best estimate 15%) of the costs of local authority legal advisors and costs of litigation.
- There will be savings in the time of social workers' work of between 0.68% to 1.54% (best estimate 1.111%)
- Between 50% and 66.67% of legal training is done by external trainers, best estimate 50%.

Risks

- In house training may attract additional costs, which would increase the estimated transitional costs.
- We have double counted savings associated with less legal advice required.

Direct impact on business (Equivalent Annual) (£m):	In scope of OIOO?	Measure qualifies as
Costs: £0	No	IN / OUT
Benefits: £0		
Net: £0		

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?	England and Wales				
From what date will the policy be implemented?	Not known				
Which organisation(s) will enforce the policy?	Local authorities, the Courts				
What is the annual change in enforcement cost (£m)?	£0				
Does enforcement comply with Hampton principles?	Yes				
Does implementation go beyond minimum EU requirements?	N/A				
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)	Traded: £0		Non-traded: £0		
Does the proposal have an impact on competition?	No				
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?	Costs: 100%		Benefits: 100%		
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	Micro 0%	< 20 0%	Small 0%	Medium 0%	Large 0%
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
Statutory equality duties ¹ Statutory Equality Duties Impact Test guidance		Page 30
Economic impacts		
Competition Competition Assessment Impact Test guidance		Page 31
Small firms Small Firms Impact Test guidance		Page 31
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance		Page 31
Wider environmental issues Wider Environmental Issues Impact Test guidance		Page 31
Social impacts		
Health and well-being Health and Well-being Impact Test guidance		Page 31
Human rights Human Rights Impact Test guidance		Page 31
Justice system Justice Impact Test guidance		Throughout
Rural proofing Rural Proofing Impact Test guidance		Page 32
Sustainable development Sustainable Development Impact Test guidance		Page 32

¹ Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
1	Law Commission, <i>Adult Social Care: Scoping Report</i> (2008)
2	Law Commission, <i>Adult Social Care: Consultation Paper (No 192)</i> (2010)
3	Law Commission, <i>Adult Social Care: Final Report (No 326)</i> (2011)

+ Add another row

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y ₀	Y ₁	Y ₂	Y ₃	Y ₄	Y ₅	Y ₆	Y ₇	Y ₈	Y ₉
Transition costs	£1.426	£0.730	£0	£0	£0	£0	£0	£0	£0	£0
Annual recurring cost	£0	£0	£0	£0	£0	£0	£0	£0	£0	£0
Total annual costs	£1.426	£0.730	£0	£0	£0	£0	£0	£0	£0	£0
Transition benefits	£0	£0	£0	£0	£0	£0	£0	£0	£0	£0
Annual recurring benefits	£0	£8.480	£8.480	£8.480	£8.480	£8.480	£8.480	£8.480	£8.480	£8.480
Total annual benefits	£0	£8.480	£8.480	£8.480	£8.480	£8.480	£8.480	£8.480	£8.480	£8.480

* For non-monetised benefits please see summary pages and main evidence base section



Microsoft Office
Excel Worksheet

EVIDENCE BASE

Part 1: Introduction

Background to the problem

Most of us will need adult social care services at some time in our lives, either for ourselves or for a family member or friend. In 2009-10, an estimated 1.7 million people received adult social care services from local authorities in England,² and there were 107,985 adult social care clients in Wales.³ In addition, many people also receive informal care and support from family and friends – around 5 million adults in England provided help to a sick, disabled or elderly person in 2009-10. Around two in five of these carers were the only support for the main cared for person, while the remainder reported shared caring responsibilities.⁴

The cost of providing adult social care services is significant. The estimated gross current expenditure by Councils with Adult Social Services Responsibilities in England on personal social services was £16.8 billion.⁵ In addition to this, it is estimated that the economic value of the contribution made by family carers in England and Wales each year is £76 billion.⁶

The importance of adult social care is growing and will continue to grow in the years ahead. Given its enormous importance, it is essential that the legal framework regulating its delivery is clear, simple and effective. Unfortunately, the current legal framework is anything but. Rather, it is widely regarded as complex, confusing, inconsistent, and outdated.

The need to reform adult social care has been recognised by all quarters, including the Department of Health, Welsh Assembly Government, local government, the judiciary, key representative groups, lawyers, service users and carers. It was also reflected in the results from the broad public consultation exercise we carried out in February to July 2010, which indicated widespread support for the need to reform this area of law as a matter of priority.⁷

Problem under consideration

Patchwork of legislation

The legislative framework for adult social care – including residential care, community care services and support for carers – consists of a patchwork of legislation built up over the past 60 years. There are currently over 30 Acts of Parliament dealing, to varying degrees, with adult social care.⁸ There is much overlap and duplication between the various statutes. For example, while section 47 of the NHS and Community Care Act 1990 provides the primary duty to assess, there is another assessment duty in section 2(1) of the Chronically Sick and Disabled Children Act 1970, and two further gateway duties to the 1970 Act duty in other Acts.⁹ The legal framework for carers' assessments is similarly fragmented and overlapping, with four statutes covering carers' assessments, one of which applies to all carers regardless of their age, and one of which only applies to carers aged 16 and above.¹⁰

In addition to primary legislation, there is also a vast array of regulations, directions, circulars and guidance – often covering the same or similar issues. For example, in order to carry out a comprehensive community care assessment and carer's assessment, a social care professional would need to have regard to: two sets of statutory guidance on the assessment process and one set of practice guidance;¹¹ many different pieces of statutory and practice guidance on carers' assessments;¹²

² Information Centre, *Community Care Statistics 2009-10 – Social Services Activity Report, England* (2010).

³ Information Base Cymru, *Social Care* (2011), at <http://www.infobasecymru.net/IAS/dataviews/view?viewId=50> (last visited 28 March 2011).

⁴ Information Centre, *Survey of Carers in Households 2009-10* (2010) p 7.

⁵ Information Centre, *Personal Social Services Expenditure and Unit Costs England, 2009-10* (2011) p 4.

⁶ L Buckner and S Yeandle, *Valuing Carers – Calculating the Value of Unpaid Care* (2007) p 3.

⁷ See Law Commission, *Adult Social Care: Consultation Analysis* (2011).

⁸ The main statutes are listed in Law Commission, *Adult Social Care: Scoping Report* (2008) Appendix A.

⁹ These are Disabled Person (Services, Consultation and Representation) Act 1986, s 4 and NHS and Community Care Act 1990, s 47(2).

¹⁰ These are the Disabled Person (Services, Consultation and Representation) Act 1986, Carers (Recognition and Services) Act 1995, Carers and Disabled Children Act 2000 and Carers (Equal Opportunities) Act 2004.

¹¹ Community Care in the Next Decade and Beyond (1989) Cm 849; Department of Health Social Services Inspectorate, *Care Management and Assessment: A Practitioners Guide* (1991); Department of Health, *Prioritising Need in the Context of Putting People First* (2010) and in Wales NAFWC 09A/2002 *Health and Social Care for Adults*.

specific user group assessment guidance;¹³ and directions.¹⁴ Added to this are: the National Service Frameworks; targets; performance indicators; and auditing regimes.

Complexity

The overlapping and inconsistent statutes, regulations and directions create much complexity for everyone who has to navigate through the law, including social workers and local authority staff, service users and carers.

A particular difficulty with adult social care law is that a statute by itself rarely gives an answer to the question whether a service can or must be provided – it is necessary to have regard to a number of other instruments, some of which are not readily obvious and/or are difficult to access. This causes confusion and inefficiency for practitioners in terms of time taken to locate and understand the law.

The complexity of the current law was reflected in the results from our broad public consultation period. At many consultation events, individuals told us about the difficulties they were experiencing as a result of the complexities of the law and some individuals were confused or unaware of basic legal entitlements.

Not only does the complexity of adult social care cause confusion for local authorities, service users and carers, but it is also difficult to understand for lawyers and judges. Adult social care law, including how it relates to other legislation, has been described at various times by judges as “piecemeal ... numerous”, “exceptionally tortuous”, “labyrinthine” and as including some of the “worst drafted” subordinate legislation ever encountered.¹⁵

Outdated concepts

Adult social care is widely criticised for perpetuating outdated and discriminatory concepts of disability. Section 29 of the National Assistance Act 1948, which contains the principal definition of a disabled person for the purposes of community care legislation, includes a cross heading describing the content of the section as: “welfare arrangements for blind, deaf, dumb and crippled persons, etc”. This definition has been described by the Prime Minister’s Strategy Unit as “out of date, offensive and does not provide a useful starting point for enabling disabled people to fulfil their roles as citizens”.¹⁶

More broadly, some of the legislation is based on old fashioned philosophies which do not reflect new policies in adult social care, such as personalisation in England and self-directed support in Wales. Furthermore, the way the legislation operates can hinder or restrict the delivery of these policies, with the consequence that Government policy may be frustrated by the law.

Rationale for intervention

The overarching decision of whether or not to intervene in the area of adult social care is not the subject of this project. The provision of adult social care services by the state is a very broad policy decision which was beyond the scope of the project to consider.

¹² See, for example, Department of Health Social Services Inspectorate, *Carers (Recognition and Services) Act 1995: Policy Guidance* (1996), <http://www.carersnet.org.uk/documents/documents.html> (last visited 7 April 2011); Department of Health Social Services Inspectorate, *Carers (Recognition and Services) Act 1995: Practice Guide* (1996), <http://www.carersnet.org.uk/documents/documents.html> (last visited 7 April 2011); Department of Health, *Carers and Disabled Children Act 2000: Carers and People with Parental Responsibility for Disabled Children: Practice Guidance* (2001); Department of Health, *A Practitioner’s Guide to Carers’ Assessments under the Carers and Disabled Children Act 2000* (2001); Department of Health, *Carers and Disabled Children Act 2000 and Carers (Equal Opportunities) Act 2004: Combined Policy Guidance* (2005) and National Assembly for Wales, *Practitioners Guide to Carers’ Assessment: Carers and Disabled Children Act 2000* (2001).

¹³ For example for older people, see Department of Health, *National Service Framework for Older People* (2001) and Department of Health, *Single Assessment Process: Guidance for Local Implementation* (2002); for mental health, see HC(90)23/LASSL(90)11, *The Care Programme Approach for People with a Mental Illness, Referred to Specialist Psychiatric Services* and Department of Health, *Refocusing the Care Programme Approach: Policy and Positive Practice Guidance* (2008); for learning disability see Department of Health, *Valuing People Now: From Progress to Transformation: A Consultation on the Next Three Years of Learning Disability Policy* (2007); and for autism see Department of Health, *Implementing “Fulfilling and Rewarding Lives”: Statutory Guidance for Local Authorities and NHS Organisations to Support Implementation of the Autism Strategy* (2010).

¹⁴ LAC(2004)24, *The Community Care Assessment Directions 2004*.

¹⁵ *A v London Borough of Lambeth* [2001] EWHC Admin 376, [2001] 2 FLR 1201 at [24] by Scott Baker LJ; *R (F) v Wirral Borough Council* [2009] EWHC 1626 (Admin), (2009) 12 CCLR 452 at [8] by McCombe J; *Crofton v NHS Litigation Authority* [2007] EWCA Civ 71, (2007) 10 CCLR 123 at [111]; and *Ryan v Liverpool Health Authority* [2001] All ER (D) 15 at [5] by Munby LJ (when he was a High Court judge).

¹⁶ Prime Minister’s Strategy Unit, *Improving the Life Chances of Disabled People* (2005) p 73.

As the fact of Government intervention in adult social care is a given, our focus in this project and in this impact assessment is on whether there is sufficient justification to reform the *means* by which the state intervenes to provide adult social care services. Those *means* currently consist of a legal framework made up of many different Acts of Parliament, regulations and other statutory instruments. Therefore, the question is whether there is a strong case to reform this legal framework.

The above discussion of the problem under consideration demonstrates the compelling need to reform this area of law as a matter of urgency. The complexity and confusion of the current law is causing inefficiency and may be frustrating the delivery of Government policy. There is therefore a strong case for reform of the law.

Given that adult social care is currently regulated through law, it follows that the only mechanism for intervention is through reform of the law, which requires Government intervention and Parliamentary time.

Policy objectives

There are five policy objectives:

Simplification

The purpose of reform is to replace this current patchwork of laws with a clearer and more cohesive legal framework for adult social care. This would simplify the legal requirements on local social services authorities and make the law easier to use by social workers, health professionals and others. It would also clarify the rights of service users and carers for services. A simplified legal framework would, in turn, promote a more efficient and less burdensome legal system and would lead to less time being spent on law and litigation.

Consistency

A key objective of reform is to establish a greater degree of consistency in adult social care law. A consolidated adult social care statute would provide, for example, that adult social care is no longer based on a series of piecemeal and inconsistent Acts of Parliament. It would streamline the duties and powers on local social services authorities and ensure that the legal framework is able to accommodate the current and future direction of policy.

Transparency

Reform of adult social care law is intended to remove inconsistency and undue complexity in the law and create a legal framework that is clear and accessible. Law that is easy to understand will help to ensure that people who approach their local authority for assistance are clear about how decisions to provide services are made by the authority. Transparent law should also be easier to enforce, since service users will be aware of their rights and local authorities will understand their responsibilities.

Modernisation

Reform of adult social care law would aim to bring the law in line with modern understandings of disability. It is intended to remove the use of discriminatory and stigmatising concepts in adult social care law and to develop legislation that is more consistent with equality and human rights law.

In this area, reform is also intended to ensure that the legal framework does not frustrate government policy and is able to accommodate development of policy in the future.

Resource neutrality

The aim of this proposed reform is to provide a resource neutral system for adult social care. Our intention is that the new legal structure we are recommending for adult social care will not require any specific level of overall resources for services. It provides a framework for decision making about the allocation of resources dedicated to adult social care and it can work at any level of funding which is allocated. This does not mean that the system would not require services to be provided to a particular person with social care needs or that services may not be provided in general. It will ensure both of these. But the system allows the relevant policy makers to make separate policy decisions on the rationing of the resources available to the system as a whole.

The Department of Health and Welsh Assembly Government would be obliged by law to prescribe an eligibility framework for adult social care services in regulations. In so doing, they would commit the system to some level of spending on adult social care as a whole. If the eligibility framework made

provision for local authority decision making, then local authorities would take on the role of local rationing and in part would also need to commit to some level of spending. These separate decisions for the Department of Health and Welsh Assembly Government would require their own consideration of impact, which only they would be in a position to undertake.

Accordingly, the level of resources to be devoted to adult social care is a policy matter for Government (both local and national), to be determined independently of the legal structure we propose. The costs and savings relevant to this impact assessment, therefore, are the costs and savings of introducing and running the new legal system, not providing services under it. This is what this draft impact assessment primarily concerns itself with.

We have also put forward some recommendations for duties, to be implemented via the introduction of regulations. It will be a policy decision for both Governments as to whether to introduce such regulations to bring the duties into effect. Any decisions made will need their own impact assessments.

However, within and as a result of the legal changes we propose, there *may be* some rebalancing of resource allocation as a consequence of the systemic change. The principal example of this is the recommendation for a duty to provide services for eligible carers, which is discussed separately below.

Nevertheless, it is the costs and benefits of the legal system as a system that is our central concern in this impact assessment. We emphasise that our purpose here is to identify the value of savings, and costs, of our reform. We do not say anything about how the value of such savings should be deployed. Whether the savings we identify are used to improve services for clients or whether they are used to reduce the overall cost of adult social care is a policy choice.

We do not believe our recommendations would constitute a new burden.

Intended effects

The intended effect of reform is to create a clear, cohesive, modern and accessible scheme for adult social care, which sets out the responsibilities of local authorities and the rights of individuals.

Scale and scope

This section describes the starting points for this impact assessment. These are the relevant current costs of administering the adult social care system. We cite data which we have collected from statistical sources and our own surveys. These figures are the point of departure when we go on to consider the cost benefit analysis in Part 2 of this impact assessment.

(1) Numbers and payment of social workers

There were 9,300 full time equivalent social workers working in adults/elderly services in England in 2010 employed by local authorities.¹⁷ There were 1,291 full time equivalent social workers working in adult services in Wales in 2009-10.¹⁸ This number was projected to grow to 1,293 in 2011, but we do not know if this growth is expected in England as well.¹⁹ This gives a total in 2009-10 of 10,591 full time equivalent social workers in England and Wales working in adult services, which we will use in later calculations.

There were 24,400 full time equivalent children's social workers in England 2010.²⁰ There were 1,295 full time equivalent children's social workers in Wales in 2009-10.²¹ This gives a total of 25,695 full time equivalent social workers in England and Wales working in children's services, which we will also use in later calculations.

The average basic salary of social workers is £30,633, and the mean gross salary is £31,388.²² The

¹⁷ Information Centre, *Personal Social Services Staff of Social Services Departments at 30 September 2010, England* (2011) p 10.

¹⁸ Local Government Data Unit Wales, *Social Worker Workforce Planning Baseline Year 2009-10* (2010) p 3 at <http://dissemination.dataunitwales.gov.uk/nesstar/temp/EGMS20110307094724884/DOCEN.pdf> (last visited 4 April 2011).

¹⁹ *Ibid.*

²⁰ Information Centre, *Personal Social Services Staff of Social Services Departments at 30 September 2010, England* (2011) p 10.

²¹ Local Government Data Unit Wales, *Social Worker Workforce Planning Baseline Year 2009-10* (2010) p 3 at <http://dissemination.dataunitwales.gov.uk/nesstar/temp/EGMS20110307094724884/DOCEN.pdf> (last visited 4 April 2011).

²² Personal Social Services Research Unit, *Unit Costs of Health and Social Care* (2010) p 172.

average on-costs of employment are £9,010 a year.²³ For future calculations we use the basic salary plus the on-costs, £39,643, as the total cost to the employer in accordance with Treasury guidance.²⁴ Social workers are contracted for 37.5 hours per week and work an average of 40 weeks per year.²⁵

In 2009-10, 6,113 students enrolled on regulated social work degrees in England.²⁶ In 2007, 161 students gained social work qualifications in Wales.²⁷ The figure for new graduate entrants into the non-agency sector is slightly over 1,000.

(2) Regional / Wales survey

Following the consultation process, we undertook a small scale survey to assist our assessment of legal and complaints costs. We surveyed the chairs of the nine Directors of Adult Social Services (ADASS) regions in England, and the chair of Association for Directors of Social Services Cymru (ADSS Cymru), for responses relevant to their regions/all of Wales. In the event, we received responses relating to three English regions and Wales.

We scaled the figures to a national basis for both countries using national and local cost data. In relation to the English regions, we were able to rely on figures which are available from the NHS Information Centre.²⁸ These statistics gave us the total spends on adult social care by each region and the overall total in England. In relation to the Welsh regions, we acquired the equivalent data through an enquiry to the Welsh Local Government Data Unit. By inputting the figures received from each region we were able to scale up potential savings to give an indicative national figure. The figures received were, nevertheless, based on the writers' own authority, and were based on only five returns (three for English regions, two in Wales). We have therefore treated the results with caution. This survey is referred to below as the regional/Welsh survey.

(3) Complaints regarding adult social care

The National Audit Office estimated that, in 2006-07, adult social care complaints cost local authorities in England £13,976,541 (in 2009-10 prices).²⁹ This figure relates to the internal costs to local authorities of dealing with complaints, excluding the costs of complaints to the ombudsman (including the cost to a local authority of dealing with an ombudsman complaint), and litigation costs.

Since this research was conducted, the complaints systems for both health and adult social care have been reformed in England. The impact assessment prepared in relation to this reform, which has been effective since April 2009, estimated an increase in costs to local authorities of £2 million.³⁰ This brings the total spending by local authorities on complaints to an estimated £15,976,541 (in 2009-10 prices).

Wales accounts for 11% of the combined England and Wales adult social care spend.³¹ We assume that this ratio applies to the cost of complaints to England and Wales. By scaling the £13,976,541 cost of complaints to local authorities in England we reach a figure of £1,727,438, which is an estimate of the cost to local authorities in Wales of adult social care complaints. The £2 million is not included as those reforms pertained to England only.

Scaling up the results of the regional/Wales survey produced very divergent results, from close to the NAO figure (£13.75 million) to a very low figure of £2.7 million for England; and, for Wales £2.7 million and £1.5 million.

Research conducted by the National Audit Office breaks down complaints as follows:³²

²³ Personal Social Services Research Unit, *Unit Costs of Health and Social Care* (2010) p 172.

²⁴ HM Treasury, *The Green Book: Appraisal and Evaluation in Central Government* (2003) p 59.

²⁵ Personal Social Services Research Unit, *Unit Costs of Health and Social Care* (2010) p 172.

²⁶ General Social Care Council, *A Report on Social Work Education in England 2009-10: A Summary* (2010) p 1.

²⁷ Care Council for Wales, *Social Work Qualifying Training: Annual Review of Trends 2007-08* (2009) p 7.

²⁸ NHS Information Centre, *Community Care Statistics: Social Care Activity, England - 2009-10* (initial release).

²⁹ National Audit Office, *Feeding Back? Learning from Complaints Handling in Health and Social Care* (2008) p 6.

³⁰ Department of Health, *Impact Assessment of the Reformed Complaints Regulations for Health and Social Care* (2009) para 9.

³¹ Total spent in England 2009-10 was £11,457,245,000 (source: NHS Information Centre). Total spent in Wales 2009-10 was £1,423,392,448 (source: Data Unit Wales).

³² National Audit Office, *Feeding Back? Learning from Complaints Handling in Health and Social Care* (2008) p 33.

Table 1: Reason for dissatisfaction with adult social care services

<i>Reason for dissatisfaction</i>	<i>Percentage</i>
Bad standard of treatment/not treated properly	26%
Uncaring attitude/being fobbed off	13%
Inaccurate/mis-diagnosis, bad/wrong advice	10%
Patronising/rude/intimidating attitude	9%
Not being listened to/not being understood	7%
Expense/payment/costs	6%
Lack of information/bad communication	5%

In addition to local authorities, the Local Government Ombudsman (LGO) considered 836 complaints on adult social care in 2009-10 in England.³³ Of these, 667 were passed on to an investigative team.³⁴ The figure supplied by the Local Government Ombudsman for the average cost in 2009-10 for a complaint forwarded to an investigative team is £780.³⁵ The cost in 2008-09 of giving advice irrespective of whether the complaint is forwarded was £23.39 (in 2009-10 prices).³⁶ Combining these figures gives a total figure spent on adult social care complaints of £539,816.

The Public Service Ombudsman for Wales has jurisdiction over complaints around social care in Wales. However we do not have sufficient information to scale the cost to the LGO for the Public Service Ombudsman for Wales, so their spending is not included. Therefore the overall spending, and therefore savings, on complaints is underestimated.

(4) Local government legal advisors

An analysis of figures provided by the Law Society shows that there are 3,372 solicitors working for local authorities with social services functions in 2009.³⁷ This is a count of people, so includes both full and part timers. A workforce survey of local government lawyers found that about 80% were full time.³⁸ A full time equivalent figure could be derived from the part timers, as 1.8 part time employers are equivalent to a full time legal advisor. Therefore in 2009 there were 3,072 full time equivalent solicitors working for local authorities.

We have not been able to ascertain the number of employed barristers working for such authorities. However, comparable figures are available for the Government Legal Service, which provides legal services to central Government departments and other national public bodies. These show that about 25% of their lawyers are employed barristers and 75% are solicitors. We do not think it is likely that there are more employed barristers in local government, and there may be somewhat less. We will therefore assume that the ratio of employed barristers to solicitors in local government is 20% to 80%. This gives an estimate of 768 full time equivalent barristers working for local authorities, and a total of 3,840 full time equivalent lawyers.

An exploratory survey by the Law Commission of local authority legal departments indicates that perhaps 5% of the workload of lawyers in local authorities with social services responsibilities relates to adult social care.³⁹ We have therefore estimated that there are 192 lawyers working full time on adult social care.

³³ This includes all complaints, except premature complaints and enquiries – see Local Government Ombudsman, *Annual Report 2009-10* (2009) p 16.

³⁴ Local Government Ombudsman, *Annual Report 2009-10* (2009) p 16.

³⁵ The Local Government Ombudsman provided us with a range of £780 to £790. We have used £780 so not to overestimate our benefits.

³⁶ The figure of £23 is taken from Local Government Ombudsman, *Annual Report 2008-09* (2009) p 31.

³⁷ Based on unpublished figures provided by the Law Society of England and Wales (November 2009).

³⁸ Conducted by Local Government Analysis and Research, see D Wilks, "Legal Workforce Survey 2005" (2006) 43 *NOTERup* 16, 16.

³⁹ Telephone survey conducted in 2009. The authorities surveyed were Kent County Council, Newcastle City Council, Somerset County Council, Waltham Forest County Council, Warwickshire County Council and Vale of Glamorgan Council.

The average annual salary range of local government lawyers is £29,700 to £39,900.⁴⁰ In the absence of more detailed information, we will assume that the mean is in the middle of this range, at £34,800. To calculate the total cost to the employer we have added on 33.33% to cover on-costs (pension, national insurance). Therefore the average cost to the local government of a lawyer is £46,400.

This calculation suggests a total spend of £8,908,573 on local authority lawyers working on adult social care.

We asked a question to determine the actual spend of authorities on adult social care legal advice in the regional/Wales survey. The results for England suggested a higher total. Scaled up as a national figure for England, the totals were £13 million; £11 million and £16.5 million. For Wales, the national figures implied by two responses were £460,000 and £1.6 million. Wales accounts for 11% of the combined England and Wales adult social care spend, so the higher figure is reasonably consistent with the highest English figure.

So far as we can determine, the difference between the survey data and those from the workforce calculation are attributable largely, but not wholly, by a lower estimate of the cost of lawyers in the first calculation, rather than the numbers of lawyers. We think this is the area in which the regional/Wales survey is likely to be most reliable. The costs of employing lawyers are easily accessible to the respondent authorities, and reasonably constant over time. Moreover, four of the five responses were broadly consistent with each other.

(5) Other costs of litigation

There are other direct costs of litigation to social services authorities. These include counsel's fees, court costs and other disbursements, and time spent by non-legal staff on the litigation.

One way of estimating the non-staff time costs is by considering the costs of adult social care litigation in the Administrative Court. Figures show that in licensed work in 2009-10, the total case cost in community care only cases (namely, the gross costs met from public funds) was £2,480,000.⁴¹ This is broken down between solicitors' profit costs, disbursements and counsel's fees.

There were a further 45 instances where costs were agreed with and met by opponents in community care only cases. These cases came to a total cost of £746,000, which was broken down between solicitors' profit costs, disbursements, legal aid only costs and counsel's fees.⁴²

Together this gives a total cost of £3,226,000, which we will use in our calculations in the cost benefit analysis.

We note that under Part 44 of the Civil Procedure Rules, the costs awarded by the court will not usually be the full costs of the successful party. Therefore the actual costs of litigation before the courts for social services authorities may be higher than our estimate.⁴³

We asked the same question in the regional/Wales survey. The answers, scaled up nationally, give figures of £2.5 million, £1.6 million and £5.4 million for England (a mean of £3.17 million), and £330,000 for Wales (one of the Welsh authorities did not conduct any litigation in the relevant year). Given the sample size, and the fact that expenditure on litigation will vary significantly from year to year, these figures can be read as broadly endorsing the calculated figure, without adding more.

It is very difficult to arrive at a figure for the costs of the involvement of social workers, managers and other non-legal staff in litigation. Two English authorities answered the relevant question in the regional/Wales survey, but both expressly said it was a guess. One thought £3,000 a year; the other £50,000 (their budgets were in the ratio 7:11). The one Welsh authority giving a positive answer thought £15,000. We do not think we can safely extrapolate a significant range of costs from these figures. But there clearly *are* costs here. We think the £3,000 figure is very likely to be an underestimate. Doing the best we can with minimal information, we therefore scale up that figure to give us £570,000 for England and Wales as a whole. This allows us to take some account, albeit most likely an underestimate, of

⁴⁰ See, <http://www.lgcareers.com/career-descriptions/supporting-your-community/solicitor/> (last visited 5 February 2010).

⁴¹ This was in respect of the 683 of the 728 applications for licensed work which were closed. Licensed work is defined as "work under the civil contract that covers all Legal Representation (representation by solicitors and barristers for civil cases which could go to court) except work covered by Controlled Work or Very High Cost Cases, where are managed under separate contracts. See Legal Services Commission, *Statistical Information 2009-10* (2010) p 7.

⁴² Legal Services Commission, *Statistical Information 2009-10* (2010) p 8.

⁴³ Under the Civil Procedure Rules, r 44.4, the court has discretion over the amount of costs awarded to the successful party, and may, for example, make an order for part payment only of costs. The court will usually assess costs on the standard basis, and will award only costs that are proportionate to the matters in issue.

these costs.

We therefore have a total cost of £3,796,000.

Options description

Two options have been considered:

- Option 0: Do nothing
- Option 1: Consolidation and reform, as recommended in the Report.

Option 0: Do nothing

This option would mean retaining the existing law relating to adult social care. Some of the key features of the current law, which give rise to the problems identified earlier, are:

- There is not one unified adult social care statute to which local authorities and service users can look at to see what services can or should be provided. There are currently over 30 Acts of Parliament dealing, to varying degrees, with adult social care. The law is also subject to further direction and approval, with the consequence that a statute by itself may not provide the answer to whether a local authority has a power or a duty to provide services.
- There is no statement of fundamental principles on which community care legislation is based, to aid interpretation in the implementation and operation of the law.
- There is more than one duty to assess a service user and the process for assessment is spread across many different pieces of statutory and practice guidance, as well as directions and legislation.
- The process for determining a person's eligibility services is split between legislation and statutory guidance, with the consequence that it is not always clear whether there is a power or duty to provide a service.
- There are multiple duties to assess a carer, which operate in different circumstances and with different purposes. The legal threshold for triggering the duty to assess a carer is complex, subject to a range of different interpretations by local authorities, and creates inefficiency by requiring local authorities to undertake pre-assessments.
- There is no clear single legal duty on local authorities to protect vulnerable adults who are or may be being abused or neglected. Instead this duty must be discerned from a range of statute law, case law, common law, and guidance. It is also unclear legally how and when adult safeguarding boards should be constituted, what are their functions and who should attend.
- The statutory framework for ordinary residence is inconsistent; local authorities can provide the same or a similar service under different legislation and the relevance of ordinary residence will depend on which statute is being used. The current legal framework can impede portability of care and support when service users move area.
- There is an overlap between adult and children's social care legislation.
- There remains a duty on local authorities to compile and maintain a disability register even though it is of limited utility as a strategic planning tool.

Option 1: Consolidation and reform, as recommended in the report

The main recommendations set out in the final report, Adult Social Care, are summarised below.

Structure of reform (Part 3 of the Final Report)

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.

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.

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.

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.

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)

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.

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)

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.

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.

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.

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.

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)

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.

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.

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)

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.

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. 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.

Although paid or volunteer care 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.

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.

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)

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 other assistance.

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.

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.

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.

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.

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.

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.

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)

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.

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.

The duty to investigate would apply to an adult at risk, which would be defined through four elements:

- 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).
- The person must appear to be at risk of *harm*, rather than *significant harm* set out in the existing statutory guidance.
- The person must appear to be unable to safeguard themselves from harm as a direct result of their health or social care needs.
- 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.

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).

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.

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.

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)

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.

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)

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

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).

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

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

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

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

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

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

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

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

Part 2: Cost benefit analysis

This impact assessment identifies both monetised and non-monetised impacts of intervention, with the aim of understanding the overall impact on society and the wider environment. The costs and benefits of each option are measured against the “do nothing” option. Impact assessments place a strong emphasis on valuing the costs and benefits in monetary terms. However there are important aspects that cannot sensibly be monetised. These might include impacts on equity and fairness, either positive or negative, or enhanced (or diminished) public confidence.

The impact assessment process requires that we make an assessment of the quantifiable costs and benefits even when there is insufficient material on which to base those calculations. Where possible we have spoken to practitioners to inform our view of the number of cases likely to be affected by aspects of the policy and have used this as the basis for our calculations. Where it has not been possible to obtain a rough indication of numbers in this way we have had to make a realistic estimate. In such cases we have taken a conservative approach and have tended to use figures that we considered likely to underestimate benefits and over-estimate costs.

When calculating the NPVs for the impact assessment we have used a time frame of ten years, with the current year (2011) being year 0.⁴⁴ With the exception of the increased cost of appeals we have assumed that the transitional costs and benefits occur in year 0, and ongoing costs and benefits accrue in years 1 to 10. In the case of the cost of appeals – which we have identified as a transition cost lasting over a five year period – we have discounted the values accordingly. A discount rate of 3.5% has been used in all cases in accordance with Treasury guidance. Unless stated, all figures are in 2009-10 prices, and have been updated using the GDP deflator.

Option 0: Do nothing

Option 0 is the base case against which our other options are measured. Because the do-nothing option is compared against itself, its costs and benefits are of course zero, as is its NPV. While there would not be any additional costs, current costs incurred would continue to be incurred. These are discussed below to provide context for the assessment of the other options.

Costs

The do-nothing option would leave the existing system unchanged. It is not a cost-free option. Unnecessary and inefficient costs associated with the current unsatisfactory state of the law would persist. Conversely, there would be no transitional costs.

Benefits

Doing nothing will avoid the costs of reform, including training costs of social workers.

Net present value

Because the do-nothing option is compared against itself its NPV is **£0**.

Option 1: Consolidation and reform of adult social care law

The *preferred option* is to consolidate and reform the existing system as set out in the Report.

As explained above, the costs and benefits which fall to be assessed for the purposes of this assessment relate to the costs of the system itself, not the costs of providing adult social care services. If

⁴⁴ The net present value is the discounted stream of benefits less the discounted stream of costs. The present value of an annual cost is the discounted stream of that cost.

the system is implemented as we recommend, the level of resources spent on front-line services will be a matter for policy makers, and the system will be sufficiently flexible to enable them to set spending at any particular desired level. There are two potential exceptions to this approach which we discuss below. In the first place, we address the question of whether the changes to our system would *necessarily* have an effect on the provision of services to carers, increasing costs. We conclude that they would not. Secondly, we consider whether allowing direct payments for residential care would allow for further savings. We conclude that it might, but that pursuing those savings involves policy choices independent of the introduction of our system, and so should be disregarded for the purposes of this assessment.

Costs

The costs of option 1 are costs of change. We divide these into costs of training on the new system (the largest element), costs of disseminating information, and costs to Government/Parliament of implementing the changes.

Transitional costs

Training of existing social workers

Existing social workers and social work students who have already had legal training will need to be trained in the new law.

There would be an initial requirement for, on average, four days training per adult social worker in year 0; plus a further two days in year 1. After that, normal continuing training requirements would fulfil any ongoing need. We do not think it would be necessary to buy-in cover for time spent training. Social workers would expect to work round additional training requirements with other members of the team covering for those being trained, and training taking place in a staggered way.

Training can either be done in house or by an external trainer. We assume the costs of external training are limited to the costs and expenses of the trainee. A reasonable average cost for an external legal trainer (fee plus expenses) would be £900 per day, with an average class size of 20 social workers. That gives a figure for external training of £45 per social worker per day. There would be no additional cost for venue hire, as local authority offices could be used for free.

Lawyers would not expect special training on the new system – on-going legal awareness and continuing professional education would be expected to take care of their needs. A significant amount of legal training of social workers takes place in house. Currently local authorities budget for training of social workers in house, and we have assumed that training on our proposals could be included in this allowance at no additional cost. Therefore the cost of in house training is estimated at £0.

Our low and best estimate is that half of training of social workers is given in house. The high estimate is that only one third is done in house.

A particular problem is that social work students generally study law in the first or second year of their degree. This means that for the first year or two of the new system, newly qualified social workers will have to be retrained. One could assume that they would only require the same training as established social workers, and so are included in the (rolling over) figure for the total adult social work workforce. However, it would be prudent to allow, say, an extra two days for each of the two years. The figure for new graduate entrants into the non-agency sector is slightly over 1,000. We have assumed that 750 are employed by social services authorities and require training.

There will be some training needs for the 25,695 children's social workers. We have assumed half a day each for the first year, and a quarter of a day in the second year.

There will be smaller amounts of training for other groups of staff, so we have added in an allowance of £150,000 in year 0 and £75,000 in year 1.

Table 2: Transitional costs of training

	Low	Best	High
Proportion of training external	50%	50%	66.67%
Cost per day of in house training	£0	£0	£0
Cost per day of external training		£45	
Adult social workers (4 days, 2 days)		10,591	
Students already trained (2 days, 2 days)		750	
Children social workers (0.5 days, 0.25 days)		25,695	
Total training days in year 0		56,712	
<i>Cost in year 0</i>	£1,426,009	£1,426,009	£1,851,345
Total training days in year 1		29,106	
<i>Cost in year 1</i>	£729,879	£729,879	£948,173
Present value	£2,131,206	£2,131,206	£2,799,518

On-going costs

We do not foresee any on-going costs.

Benefits

Transitional benefits

We do not foresee any transitional benefits.

On-going benefits

1. Savings in relation to the everyday activities of social workers

We have not been able to find much significant data expressly on the time spent by social workers considering legal issues. For reasons we will come on to, this is not surprising. Consultees endorsed the paucity of hard data. However, in recent times, a significant amount of work has been done to analyse what social workers do spend their time on, and to identify trends within that.

Research shows that social workers currently spend a great deal of time on administrative work and less time on face to face contact with service users. A recent UNISON survey indicated that 96% felt that too much of their time was spent with paper work. Of those surveyed, 73% felt the time they had available to spend with service users was “insufficient” or “very insufficient”.⁴⁵

Similarly, research from 2003 found that three of the activities most frequently reported by social workers was office-based paperwork relating to caseload, negotiating and arranging social services for users, and completing assessment documentation in the office. The research found that face to face contact with service users and carers combined represented a little over one-fifth of the working week of sampled care managers working with older people, and accounted for 50% of face to face contact time. Assessment activity accounted for 27% of time. The research noted that “emotional and psychological needs were often missed in assessments and one possible explanation could be the relatively low level of face to face contact recorded”.⁴⁶

When it comes to legal knowledge, there is also some evidence in the literature to suggest that social workers are generally lacking in legal knowledge, and do not devote much, if any, of their working time to legal matters. One survey suggested that many social workers do not use law (or feel they use law) at

⁴⁵ UNISON, *Not Waving But Drowning: Paperwork and Pressures in Adult Social Work Services* (2009), <http://www.unison.org.uk/acrobat/B47110a.pdf> (last visited 4 April 2011). These figures relate to all social work, not just adult social care. We see no reason to suppose there is a significant difference between child work and adult work.

⁴⁶ A Weinberg and others, “What Do Care Managers Do? A Study of Working Practice in Older Peoples’ Services” (2003) 33 *British Journal of Social Work* 901, 914.

all in practice. They report that law has a “low profile in daily practice” and that the lack of “overt use of the law to inform practice” results in a dependency on policy and procedure rather than professional discretion.⁴⁷

It may be that the current legal framework increases the administrative burden on social workers, even where the administrative work itself is not of a legal character. In particular, it has been suggested by some researchers that the uncertainty created by the complexity of the law may cause more defensive administrative practices in response to the threat of litigation. Professional discretion is substituted for a “checklist” approach, which leads to an increased emphasis on paperwork and less time for direct contact with service users and carers.⁴⁸

The National Occupational Standards for social workers published in 2002 highlight the significance of legal information and skills in the working practices of social workers. Sixteen of the 21 practice units identified by these Standards contain at least one legal element.⁴⁹

These results present a contradiction. On the one hand, there is an apparent blindness to a legal dimension in their work by social workers. On the other, we conclude that there is a substantial legal input into everyday tasks. But the contradiction, we consider, is illusory. The reason is that the comparatively high level of legal input into social work is mediated by training and guidance which presents itself as “social work practice” rather than “social work law”. The law is there, but hidden behind the everyday processes and the associated documents used by social workers.

It has been suggested that this lack of legal knowledge results in increased delays (and therefore costs) in these processes. This may be due to social workers’ lack of knowledge of possible alternative solutions for difficulties (for example, whether a family member or a donee of an Enduring Power of Attorney has authority to arrange an older person’s admission to residential care), or where a social worker lacks sufficient confidence in their knowledge to assert themselves when consulting with other professionals.⁵⁰ Similarly, a lack of legal knowledge can lead to an over-reliance on limited statutory powers or local authority policies. Research suggests this could cause additional hostility from service users, where they view the legal system as operating against them. Antagonistic practice is likely to cause additional delays in the assessment and care planning process.⁵¹

It would be artificial to single out particular elements in social workers’ daily tasks, and persuasively claim that a certain percentage of time spent on that task will henceforth be saved.

We think, therefore, that the appropriate way to attempt to quantify the savings in social workers’ daily tasks is to make a global estimate of what sort of overall time savings a clearer and simpler legal structure (enabling clearer and simpler practice guidance) might be expected to deliver. No written consultation response dealt with the accuracy or otherwise of this approach (so at least it was not contradicted). When we raised the question with social workers and social work managers at consultation meetings, our approach was accepted as broadly reasonable, although this qualifies as no more than anecdotal evidence.

With those caveats as to the significance of the figures, we have adopted a conservative approach. We consider that overall, it would be reasonable to suggest that social workers will save between twenty and forty-five minutes a week, on average. No doubt this is comparatively crude. In particular, the time saving for front-line social workers might be towards the bottom of this range, whereas that for more senior managers (who cost more) might be higher. Nevertheless, it appears to us a realistic approach to take in the absence of more detailed data.

In proportionate terms, twenty minutes to forty-five minutes of adult social workers’ contracted weekly hours (37 hours and 30 minutes) for the 40 weeks which they spending working (not training or absent) equates to 0.68% to 1.54% of their time saved annually. Using 2009-10 figures, there are about 10,591 full time equivalent adult social care social workers in England and Wales. The cost of each social worker to their employer is £39,643 per year. The savings are presented in the table below:

⁴⁷ S Braye and others, “Beyond the Classroom: Learning Social Work Law in Practice” (2007) 7 *Journal of Social Work* 322, 330.

⁴⁸ K Postle, “Working ‘Between the Idea and the Reality’: Ambiguities and Tension in Care Managers’ Work” (2002) 32 *British Journal of Social Work* 335.

⁴⁹ Topps England (now Skills for Care), *National Occupational Standards for Social Work* (2002).

⁵⁰ A McDonald and others, “Barriers to Retaining and Using Professional Knowledge in Local Authority Social Work Practice with Adults in the UK” (2008) 38 *British Journal of Social Work* 1370, 1379.

⁵¹ S Braye and others, “Beyond the Classroom: Learning Social Work Law in Practice” (2007) 7 *Journal of Social Work* 322.

Table 3: Savings in social workers' time

	<i>Low</i>	<i>Best</i>	<i>High</i>
Number of social workers		10,591	
Average total salary to employer		£39,643	
Time savings	0.68%	1.111%	1.54%
<i>Annual savings</i>	£2,870,831	£4,665,100	£6,459,369
Present value	£23,875,567	£38,797,797	£53,720,026

2. Complaints and legal costs

We divide consideration of the possible savings into fewer complaints, savings in local authority legal advisors time and savings in other costs of litigation.

Complaints

It is likely that a simpler and more modern legal structure will reduce the number of complaints. We do not think that there will be fewer complaints because of a significant difference in the decisions made about service provision under our proposed system (that is, that more services will necessarily be offered to more people). Rather, we consider the reason why there may be fewer complaints is that there will be fewer mistakes. Clearer and simpler law, which allows for clearer and simpler practice guidance, will mean better decisions.

We think that the reduction in complaints is likely to be moderate. It seems unlikely that improved law will have a great effect on most of the categories of complaints in Table 1 above. We might expect, however, a significant improvement in relation to "inaccurate/mis-diagnosis, bad/wrong advice" and "lack of information", and some impact on "expense/payment/costs". Together, these categories represent 21% of complaints. We therefore assume a savings range of between 5% to 15% of complaints, best estimate 10%. We received no responses relevant to these calculations as a result of consultation which would allow us to reduce this range.

We also consider that clearer law will help prevent the wrong advice being given to older people by the local authorities. A recent report by Counsel and Care found that one of the top three issues that older people, their families and carers contacted Counsel and Care's advice service about in 2010 was concerns about being given "incorrect and often illegal advice by their council".⁵² In particular, increasing numbers of people have been told by their council that because there is no money available, they will not receive an assessment". In our view, reforming the legal framework should help clarify local authority responsibilities in relation to community care and carers' assessments. In particular, we recommend establishing one central duty to undertake a community care assessment and restating its low threshold, as well as establishing a general duty to provide information, advice and assistance (which would include information on the duty to assess), all of which we believe should reduce the risk of older people being refused assessments on the basis of resources.

We think that the reduction in complaints to the ombudsmen will be lower than 5% to 15%. This is because it is likely that the more clearly mistaken decisions, which, we suggest, are less likely to have been wrongly made under our proposals, are more likely to have been corrected earlier in the process. We assume that there will be a reduction in their complaints regarding adult social care by 2.5% to 7.5%, best estimate 5%.

The savings from fewer complaints are set out in the table below. The savings to local authorities include Wales, but we do not have information on savings to the Public Service Ombudsman for Wales:

Table 4: Savings from fewer complaints (2009-10 prices)

	<i>Low</i>	<i>Best</i>	<i>High</i>
Reduction in complaints to local authorities	5%	10%	15%
Spending on complaints by local authorities		£17,703,979	

⁵² See C Bernard, *Care Concerns 2010: "No Help Here"* (2011) pp 3 to 4.

<i>Savings to local authorities (including Wales)</i>	£885,199	£1,770,398	£2,655,597
Reduction in complaints to LGO	2.5%	5.0%	7.5%
Spending on complaints by LGO		£539,816	
<i>Savings to the LGO (England only)</i>	£13,495	£26,991	£40,486
<i>Annual savings in money spent on complaints</i>	£898,694	£1,797,389	£2,696,083
Present value	£7,474,086	£14,948,172	£22,422,258

Note that while there may be a small amount of double counting, in that we consider reduced litigation costs separately, the NAO was specifically asked for information about complaints where legal advisors were not involved.

Local authority legal advisors' time

In order to assess the amount of legal advisors' time that might be saved by simpler law, it is necessary to assess the total spend on local authority legal advice and the proportion that might be saved. From the discussion in the scale and scope section we are using £8,908,573 as an estimate of the total cost to local government of lawyers working on adult social care matters.

In our consultation impact assessment, we suggested that between 30% and 40% of the time of lawyers working on adult social care would be saved by simpler law. One local authority contested this, on the basis that most of their work was on safeguarding and Court of Protection work, not mainstream adult social care.⁵³ We received no other comments.

We conducted research on the adult social care workload of the higher courts. The purpose of the exercise was to establish the proportion of issues litigated that would not have to be litigated if our system were to be introduced. We considered adult social care cases in the Court of Appeal and Administrative Court for the year from 1 July 2009. As expected, there were few cases. There were 12 adult social care cases. In eight of them, our proposals would have made no substantive difference. Of the remaining four, one would not have to have been litigated at all, and we estimate that a third of the issues in the other three cases would not have to be litigated. This gives a figure of 16.67%.

This potentially underestimates the savings, however, in that where litigation would still have been necessary, consolidated and clearer provisions would have made the process quicker. We think that it is reasonable to extrapolate from the proportion of adult social care issues litigated to the workload of adult social care lawyers, on the basis that the proportion of difficult problems litigated which would be alleviated by our system will be at least similar to the proportion of problems dealt with in lawyers' everyday case-load. Therefore we assume that an appropriate range for the annual savings in local authority advisors time would be 10% to 20%, best estimate 15%.

The savings are shown in the table below:

Table 5: Savings from less lawyers' time required

	<i>Low</i>	<i>Best</i>	<i>High</i>
Number of lawyers		192	
Median salary and on-costs		£46,400	
Time savings	10%	15%	20%
<i>Annual savings</i>	£890,957	£1,336,436	£1,781,915
Present value	£7,409,741	£11,114,611	£14,819,481

Other costs of litigation

From the discussion in scale and scope we reach an estimate of the other costs of litigation (including

⁵³ This was to a degree undercut by their view that it was unlikely that social workers and their managers would need to consult lawyers less, as we had suggested, for cultural reasons.

counsel's fees, court costs and other disbursements, and time spent by non-legal staff on the litigation) of £3,796,000. The savings from reducing litigation by 10% to 20% are shown below:

Table 6: Savings from lower litigation costs

	<i>Low</i>	<i>Best</i>	<i>High</i>
Costs met by public funds		£2,480,000	
Costs agreed and met by opponents		£746,000	
Social workers		£570,000	
Time savings	10%	15%	20%
<i>Annual savings</i>	<i>£379,600</i>	<i>£569,400</i>	<i>£759,200</i>
Present value	£3,195,059	£4,792,589	£6,390,119

3. Time savings in training

We received very little additional information or opinion on consultation in respect of the approach taken in the consultation impact assessment. Only one local authority mentioned the issue, agreeing with our approach. We conclude that our original approach was right, but do not feel we are able to reduce the original quantified range.

The broad point is that a simpler legal structure will take less time to teach to social workers than a more complicated one. This will be true for both initial training and continuous professional training. We consider each in turn.

Initial social work training

Since 2003, the professional qualifying award for social workers has been a degree in social work, the content of which is regulated by the General Social Care Council. A typical social work law course would cover an introduction to social work law, anti-discrimination law, the Children Act 1989, the criminal justice system, community care law and mental health and mental capacity law. Assignments need to be completed on most or all of these topics. This means that community care law will typically take up a quarter of all course work. In addition, there will be an exam, which will often focus more on the Children Act than community care law. The law course itself constitutes, we estimate, about 10% of the degree as a whole. Therefore, overall we estimate that community care takes up a third of social work law training, and 3.33% of the degree.

Teaching community care law by considering a single, comprehensive, rational statute will clearly be possible in less time than the current multiplicity of statutes and other sources of law. We estimate that our new system could be taught to the same level as the current community care law is taught in 60% of the time necessary to teach the current law. We therefore propose that the percentage time saving in relation to a whole degree would be about 1.33%.

It is dependent on policy makers whether the time savings we identify here are taken as monetary savings, or used to improve services. We recognise that it is hardly plausible in this context that there would be a 1.33% cut in the length of social work courses. While we could monetise the savings from shorter courses, this appears artificial. The additional free time is more likely to be "spent" on better training in community care or other aspects of the law, or other components of the degree.

In 2009-10, 6,113 students enrolled on regulated social work degrees in England. In Wales, 161 students gained social work qualifications in 2007. These students could benefit from more in-depth training allowed for by the time savings, but the monetised benefit is **£0**.

On-going training

The current requirement for continuing professional education for social workers is for a minimum of 90 hours of post registration training in every three year registration period.⁵⁴ Continuing education therefore comprises a little under 2% of social workers' time. There are 10,591 full time equivalent social workers in adult social care, and their average cost (salary plus employment on-costs) is £39,643. We

⁵⁴ General Social Care Council, *UK Post Qualification Matrix* (2009).

have assumed that community care law is 3.33% of total training, so there are time savings of 1.33% in the time spent on continuing education.

This would amount to an annual saving of **£111,962**, or a present value of **£931,147**.

4. Provision of information, advice and assistance

There is evidence to suggest that the provision of information, advice and assistance to help people maintain their health and well-being can prevent or delay the need for more costly interventions. This is supported by the evaluation of the Partnerships for Older People Projects ("POPP") programme.⁵⁵ This found that for every extra £1 spent on the POPP services, there has been approximately a £1.20 additional benefit in savings on emergency bed days (the range was between £0.80 to £1.60 saving).⁵⁶ Other benefits included:

- overnight hospital stays were reduced by 47%;
- use of Accident & Emergency departments reduced by 29%;
- reductions in physiotherapy/occupational therapy and clinic or outpatient appointments, with a total cost reduction of £2,166 per person.⁵⁷

Our recommended scheme creates a new duty to provide information, advice and assistance to people. This duty should support the policy priority of greater emphasis on prevention services, to help people maintain their health and well-being and delay or prevent entirely the need for future social care interventions. If the need for more intensive social care interventions is prevented, reduced or delayed, this would have positive benefits. We have not, however, monetised these benefits.

5. Carers

As summarised earlier, we have made two recommendations in relation to carers' assessments and eligibility which raised the issue of potential resource implications.

Carers' assessments

The first is the recommendation to remove the requirement that in order to qualify for a carer's assessment a carer must be providing a *substantial amount of care on a regular basis*. 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.

We have argued in the final report that this will not have resource implications for three main reasons. First, it would remove the requirement for local authorities to undertake pre-assessments to determine whether a carer is providing a substantial amount of care on a regular basis – instead they could proceed straight to an assessment. Second, any assessment undertaken would be proportionate to the needs presented by the carer – so for carers with low levels of needs, a contact or short assessment will be adequate. Third, it reflects existing best practice guidance by the Department of Health and the existing practice of local authorities.

On the third point, we conducted a small exploratory telephone survey of local authority practitioners working on carers' services in four different local authorities. Three out of four respondents said that they had not declined to assess a carer on the basis that they did not think the carer was providing substantial and regular care. Rather, they tried to assess all carers who are providing care to a disabled person or older person. For example, if a carer was providing care to a service user, then generally they were told about the availability of a carer's assessment during the service user's assessment, and assessment of the carer was then often carried out as part of the assessment of the cared-for person, or with a separate carer's assessment.

One respondent also noted that it was difficult to justify declining to assess a carer on the basis of not satisfying the substantial and regular test, given that the duty also applies to carers who are *intending* to provide substantial and regular care. This respondent also noted that it is difficult to determine whether a

⁵⁵ This programme was launched in 2005 to increase learning about how to promote older people's well-being and independence. See Department of Health, *Improving Care and Saving Money* (2010).

⁵⁶ Personal Social Services Research Unit, *National Evaluation of Partnerships for Older People Projects: Final Report* (2009) p vii.

⁵⁷ Personal Social Services Research Unit, *National Evaluation of Partnerships for Older People Projects: Final Report* (2009) p vii.

carer is providing substantial and regular care until an assessment is carried out; a comment that was also made by a number of local authorities during our consultation period.

In one local authority, carers were screened with a kind of pre-assessment to determine whether a full carer's assessment was needed. Our proposal for proportionate assessments would, we anticipate, have the same overall effect as this practice. In other local authorities, the same assessment was used for all carers, but the process was generally quicker if there were lower levels of needs. It is possible that the explicit requirement for proportionate assessments will help streamline this process.

In summary, three out of the four respondents felt that our recommendation reflected existing practice already and so would not have resource implications.

One respondent assumed that carers were declined an assessment if they did not provide substantial and regular care. Generally, if the assessment of a service user revealed a carer, then this would trigger the provision of information to the carer about the availability of a carer's assessment, if the carer provided substantial and regular care. Determining the last point is likely to require some form of contact or pre-assessment, which in our scheme could perform the role of the whole assessment if the needs of the carer were low.

These results were congruent with the general tenor of feedback received in consultation events. Therefore, we do not anticipate that our recommendation would have an impact on resources.

Carers' eligibility for services

We have also made recommendations in relation to carers' eligibility for services. In particular, we have recommended that both Governments prescribe an eligibility framework for carers' services in regulations and that local authorities are required to use that eligibility framework to set their eligibility criteria and would determine whether a carer's needs are eligible by applying those 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.

This recommendation would provide consistency and transparency in the process by which local authorities made decisions about providing services to carers. We did not believe it would have significant resource implications because it would reflect existing practice in local authorities.

First, local authorities already have to respond to certain needs of carers in some circumstances. For example, if a carer's needs gave rise to a critical risk to the sustainability of the caring role, then it is likely that existing community care legislation would require a response. Under our system, local authorities could continue to draw their threshold of eligibility at the critical level (presuming the eligibility framework prescribed by either Government is divided into banding like the existing eligibility frameworks).

Second, many local authorities already use eligibility criteria to decide upon services to carers and meet the eligible needs of carers. We conducted web-based research in 2009, where we found that 72 of 151 local authorities in England specified a criterion for determining whether or not services should be provided to carers and a further 17 local authorities indicated that they used eligibility criteria or provided services to "eligible" carers. In the remaining 57 authorities, we were not able to ascertain whether the authority used eligibility criteria or not. A similar picture emerged in Wales: of the 22 local authorities reviewed, seven applied eligibility criteria to determine carers' eligibility; a further six possibly applied criteria and the remaining nine local authorities did not specify.

These results were broadly reflected in our telephone survey of four respondents. Two of the four respondents said they used an adapted form of the FACS banding which included carer specific indicia, and would meet the eligible needs of carers. In one authority this was used to generate a personal budget. Another respondent said they used the substantial and regular test and the results of the assessment to determine whether to provide support to carers.

Under our system, as under the existing law, local authorities would be able to determine what level of spending they allocate to carers' services, by determining where to draw their eligibility criteria. It is therefore possible for the two Governments to produce a framework that allowed local authorities to calibrate their expenditure on services for carers in the same way as they do now. Equally, it would be possible for the Governments to create a system that *did* require the expenditure of greater or fewer resources on carers, but that would be a product of an independent policy choice. It is not a required outcome of our system.

6. Direct payments for residential care

Currently, direct payments cannot be used to purchase long-term residential accommodation. We recommended that this prohibition be removed, as the most effective way of securing the policy of choice and control would be to extend direct payments to cover residential accommodation.

We accept that there are two potential economic implications to this.

First, extending direct payments to residential care will alter the current situation in residential care purchasing, because instead of one local authority purchasing residential care, there will be many individuals using their direct payment to purchase their own care. However, we do not consider that this change will have a significant effect in practice. The local authority would still be exercising a high degree of market power in the local market for residential care. It would merely be doing so by different means. Rather than a centrally negotiated contract with the supplier (or a series of spot contracts), it would be setting a cap on the basis of the residential care direct payments it authorised.

Second, there may be a risk that the price of residential accommodation may go up if there is a greater risk of default in the direct payment system. This risk may arise if people routinely use their direct payment for an unauthorised purpose rather than using it to pay their residential care costs. We take the view that there is a very low risk of this happening. Direct payments have been in place for non-residential care services for over 15 years, and we are not aware of mis-spending being a significant problem in practice. Furthermore, there are several ways in which local authorities can control the use, and rectify the misuse, of direct payments; including suspending direct payments, recovering payments made and reverting to directly provided services. In this environment, we do not think that an increased danger of default will lead in practice to upward pressure on residential care provider costs.

We have considered two factors which might suggest substantial savings associated with the introduction of direct payments for residential care.

The first could be said to relate to the potential difference in transaction costs between the current system and a system based on direct payments. Under the present system, significant costs are imposed on both local authorities and care home providers in the negotiation of large scale block contracts (and, perhaps to a lesser extent, spot contracts). A change to a system in which individuals negotiated (to the extent possible) with providers and paid them directly, these costs may be saved. On the other hand, establishing systems for handling individual payments may increase costs for some providers. Whether these costs are greater or smaller than the transaction savings on negotiating block contracts would appear to depend on the nature of the provision concerned. Such indications we have had from providers suggest that these costs may be significant for providers of residential care for very high needs users, including younger disabled adults, where at present all users are publicly funded. For providers of more standard services, particularly for older people, there is already a significant market in self-funders, for whom such systems have already been developed, and providers would expect significant savings to accrue.⁵⁸

It is, however, difficult to disentangle the direct transaction costs of contracting with the broader issue of the use by local authorities of contracts with providers as a way of regulating the quality of service. Many local authorities include systems designed to ensure a specified standard of service in their contractual relations with residential providers. Providers report that such systems impose significant costs on them. If direct payments for residential care were to remove this form of regulation, then the change would certainly result in substantial savings for residential care homes in regulatory costs (we say this without expressing a view on whether it would also impose costs as a result of lower standards, for instance on service users and carers). However, we think that a decision about the desirability of this form of regulation is an independent policy matter for both Governments, and it is not an inevitable consequence of extending direct payments to residential care. Although currently accomplished through the contracting process, the same forms of regulation could be effectively imposed by local authorities by requiring direct payments to be spent on approved providers, and requiring the same standards for providers to be approved. We therefore do not consider it appropriate to attribute such savings as might be accomplished to the recommendations we make.

The second factor we considered was the extent to which competition driven by a change to direct payments would result in the replacement of what is left of direct provision of residential care by local authorities by private or charitable provision. It is suggested that local authority provision is more expensive than that provided by the private and charitable sectors. Again, however, we consider that

⁵⁸ Private communications from private and charitable providers, facilitated by their trade body, the English Community Care Association.

there may be policy, or indeed legal, impediments to closing local authority residential care, or indeed other justifications for the maintenance of apparently high cost provision. These are changes not required by a move to direct payments, and raise policy issues going beyond our remit. Similarly, therefore, we do not claim that any such savings are referable to our recommendations.

However, it is reasonable for us to claim as a non-monetisable benefit that the change to direct payments for residential care at least enable these policy issues to be addressed, and therefore any savings which are considered to be desirable in policy terms to be achieved.

Net present value

The net present value of option 1 is shown in the table below:

Table 7: Net present value of option 1

	<i>Low</i>	<i>Best</i>	<i>High</i>
Transitional costs	£2,131,206	£2,131,206	£2,799,518
Ongoing costs (annual)	£0	£0	£0
<i>Present value of costs</i>	<i>£2,131,206</i>	<i>£2,131,206</i>	<i>£2,799,518</i>
Transitional benefits	£0	£0	£0
Ongoing benefits (annual)	£5,152,045	£8,480,287	£11,808,529
<i>Present value of benefits</i>	<i>£42,885,600</i>	<i>£70,584,316</i>	<i>£98,283,031</i>
Net present value	£40,754,394	£68,453,109	£95,483,514

Risks and assumptions

Key assumptions

For the purposes of this cost benefit analysis we have made several assumptions.

1. In 2009-10 there are 10,591 adult social carers in England and Wales who would be affected by our proposals. In addition there were 25,695 children's social workers who will require training. We have assumed that these numbers remain constant over the next ten years.
2. The total average cost to the local authority of a social worker is £39,643 and includes the mean basic salary and on-costs.
3. We have calculated that there are 192 full time equivalent legal advisors working for local authorities in England and Wales. We assume that this number remains constant over the next ten years.
4. The total cost of a local authority lawyer, including on-costs is £46,400.
5. One day of external legal training costs £45 per social worker/student. In house training creates no additional cost.
6. We have calculated the cost of complaints to the Welsh local authorities by assuming that the ratio of spending in England and Wales on complaints was equal to the ratio of the total spend on adult social care, 89:11.
7. The level of service provision of adult social care services will remain the same.
8. Our provisional proposals largely reflect much of what is already done in practice by social workers and others.

Sensitivities

We have built a range of sensitivities into our analysis. These include:

1. There will be between 5% and 15% (best estimate 10%) fewer complaints to local authorities, and 2.5% to 7.5% (best estimate 5%) fewer to the Local Government Ombudsman.

2. We will save 10% to 20% (best estimate 15%) of the costs of local authority legal advisors and costs of litigation.
3. There will be a time savings in social workers' work of between 0.68% to 1.54% (best estimate 1.111%)
4. Between 50% and 66.67% of legal training is done by external trainers, best estimate 50%.

Risks

Risks to be considered include the risk that our assumptions are incorrect. In addition there is a risk that we have under-estimated the potential increase in costs associated with our recommended changes. We believe, however, that the risk of under-estimation is low because we have used conservative figures and ranges in our costing. We set out particular risks below:

1. We may have underestimated the number of social workers who require training. This is a low risk.
2. We may have underestimated transitional costs as in house training may attract additional costs. This is a low risk.
3. We have underestimated the savings to local authorities and the Public Service Ombudsman for Wales from a reduction in complaints about adult social care. This is a medium risk.
4. We may have overestimated savings associated with less legal advice required. This is a low risk.
5. We may have underestimated savings to local authorities from reduced litigation. We used figures from the Regional / Wales survey to calculate the costs of litigation and these may have been underestimates. This is a low risk.

Direct costs and benefits to business calculations (following OIOO methodology)

We do not anticipate any costs to business. Law Commission projects are out of scope of the one in, one out rules.

Part 3: Specific impact tests

An impact assessment must consider the specific impacts of a policy option upon various groups within society. These specific tests are carried out below and refer to the implementation of Option 1.

Statutory equality duty

Our recommendations are aimed at establishing a clear, coherent and effective system for adult social care in England and Wales. This will help clarify the rights of service users to receive an assessment of their care and support needs and the outcomes they wish to achieve, and their rights to receive community care services to meet their eligible needs.

We have also recommended the removal of discriminatory and outdated language in the future adult social care system, such as the definition of a disabled person under section 29 of the National Assistance Act 1948. We have recommended that an assessment and the application of eligibility criteria should be the sole mechanisms to determine whether a person is entitled to community care services.

As part of our consultation on our provisional proposals, we consulted with a wide range of service users and carers, including older people, people with learning disabilities, deafblind adults, people with physical disabilities, alcohol misusers, and people with mental health problems. We also participated in several events with representative organisations and user-led organisations to ensure we received a broad range of views on our proposals for reform.

We believe the recommendations set out in Option 1 will have no adverse impact in terms of gender, disability, or race.

Competition

According to Office of Fair Trading guidance, the competition assessment must consider whether in any affected market, the proposal would directly or indirectly limit the number or range of suppliers, limit the ability of suppliers to compete, or reduce suppliers' incentives to compete vigorously.⁵⁹

Having regard to these tests, we do not believe our recommendations will have any significant negative impact on competition. In general, any impact from our recommendations would have a positive impact on competition. In particular, we have recommended a duty on local authorities to stimulate and shape the market for services. This would encourage the development of service providers, social enterprises and mutuals.

Secondly, we have recommended the extension of direct payments to residential care. As we explain above, if accompanied by other policy approaches, this change may increase competition in the supply of residential care.

Small firms

Many small businesses operate in the market for social care services. However, we do not believe our recommendations will affect adversely small business, their customers or competitors. Our recommendations focus on the means by which local authorities provide adult social care services, including their functions of assessments, eligibility decisions and service provision.

In the case of the latter, the local authority may provide services directly; they may commission services from others; or they may provide direct payments so that service users can purchase their own services.

In order to stimulate the availability of choice for service users, local authorities would also have a duty to encourage and shape the growth of the market for universal services and social care to help people maintain their health and well-being. Given the emphasis on local services, this may benefit small businesses and local enterprises.

The broader policy and practice decisions about how much money people receive to spend on their social care services – and thus possibly use to buy services from small businesses – is not within our remit.

Environmental impact and wider environmental issues

We do not foresee any impact on carbon emissions or on wider environmental issues.

Health and well-being

Our recommendations are expected to have a significant positive impact on health and well-being. A key objective of the reforms is to build a clear, coherent legal framework for adult social care services, so that service users and carers can easily understand what they might be entitled to.

Human rights

We have recommended that section 47 of the National Assistance Act 1948 be repealed, as aspects of it can be incompatible with the European Convention on Human Rights, specifically Article 5.

We do not consider that any of our recommendations would be incompatible with human rights law.

Our recommended reforms would comply with the objectives of promoting and protecting human rights under the Human Rights Act 1998.

Justice system

The impact on the justice system of our proposals is considered throughout this impact assessment. In summary, our recommendations do not envisage any substantive new rights or duties, or any new sanctions that would lead to an increase in cases before the courts or tribunals. Rather, as we detail above, we expect there to be some moderate savings in the resources devoted to litigation on adult social care, including legal aid.

In general the duties recommended are consolidations of existing law and do not represent new duties. In those areas where we have put forward new duties, we have recommended that these be implemented through the introduction of regulations, if the Secretary of State and Welsh Ministers wish

⁵⁹ Office of Fair Trading, *Completing Competition Assessments in Impact Assessments: Draft Guideline for Policy Makers* (2007) p 7.

to do so. Therefore, it will be the decision of the relevant Government – following their own impact assessment – whether to introduce new duties.

The one exception to this is our recommendation for a duty to meet carers' eligible needs. However, as discussed above, many local authorities are already accepting a duty to provide carers' services in practice. Furthermore, local authorities will be able to control when the duty arises by setting their eligibility criteria. Therefore, we do not think this recommendation will have a significant impact on the justice system.

Rural proofing

We do not foresee any differential impact on rural areas.

Sustainable development

We do not foresee any implications for sustainable development.