

Response to Law Commission Consultation Paper on Adult Social Care

social care
institute for excellence



SCIE is pleased to have the opportunity to respond to the proposals for reform of adult social care legislation put forward by the Law Commission.

SCIE is an independent charity that identifies and disseminates the knowledge base for good practice in all aspects of social care for adults and children throughout the UK. Services can only be improved by understanding what works in practice – and what does not. We recognise the central role of people who use services and carers, and we aim to ensure that their experience and expertise is reflected in all aspects of our work.

We invited a range of people who use services and carers to a workshop with the Law Commission team to contribute their views on the proposals, and a diverse group of about 30 took part. Where appropriate we have incorporated these views into our response. References to the views of users and carers in this response are therefore drawn primarily from that event.

Summary

1. SCIE welcomes this initiative to consolidate the legal framework governing adult social care in England and Wales, to resolve uncertainties and inconsistencies in current law, and to offer clarity for the future. However, if it is to be relevant and workable, the new legal framework will have to reflect and underpin the emerging policy framework. Social care policy has shifted since the last major pieces of community care legislation were passed in the early 1990s: it is now driven by personalisation, co-production, early intervention, choice and control – concepts around which there is a high level of consensus but which are not currently enshrined in law.

2. We welcome the Government's decision to bring forward the timetable for drafting the new law to coincide with planned reform of long-term care funding. The two are interdependent. It is very important to link law reform to reform of the funding of the social care system. This is because how, and from whom, the money is raised, and

how priorities are set for its allocation, are critical to determining the appropriate legal framework. A radically new system of funding adult social care could fundamentally affect some of the key building blocks of the current system. This relies at present on substantial funding flows from central to local government that are then disbursed to individuals following assessment and the application of eligibility criteria. If a different funding model is put in place as a result of the work of the commission on funding long-term care, it is logical that the approach to law reform may need to change, and a new set of issues and questions may need to be considered.

3. It is the Government's role to determine what it wants public policy to achieve for people who use social care. With this as a starting point, the legal framework should follow, ensuring that policy is implemented as legislators intend it to be and that service users and carers benefit as a result. The law has a vital role to play in helping people who use services understand what they are entitled to, and what their responsibilities are.

4. SCIE's interest in this review lies chiefly in its implications for social care practice. We know that good practice 'on the ground' is less likely if the legal framework does not support the emerging policy direction. There is a risk that the proposed new law – based as it is on a different policy context – may quickly become obsolete. We would like to see a new adult social care law that puts entitlements and responsibilities at its heart, rather than simply clarifying the processes by which the needs of different individuals are compared and ranked and resources allocated. This review could be an opportunity to develop a single statute based on a new paradigm that puts the individual at the centre and sets out what people are entitled to and the responsibilities of the state, the family and the individual. This is at least partly a question of how the new law is phrased and worded.

5. We are concerned that the proposed new statute does not adequately reflect cross-government work to promote the wellbeing of individuals and families. Neither does it adopt a 'whole family' approach. SCIE builds evidence across both adults' and children's social care; we know that the family context of individual service users should be reflected in legislation, to avoid a situation where one set of needs is perceived to be in conflict with another. This review offers an opportunity to address this conflict, potential or actual.

6. Given the difficulties of bringing forward major new over-arching legislation in this area, the new law should be robust enough to remain relevant and workable for the foreseeable future. It should provide a flexible framework within which developments in policy, practice, economics, research and public expectations can be reflected and accommodated. It needs to be capable of functioning effectively in conditions where demographic change is increasing pressures on support services, and where social care resources are severely restricted

7. It also needs to be enforceable. People who use services and carers are unambiguous in their view on this: if the law states that local authorities, PCTs and other statutory or independent sector services are required to act in a particular way, they expect the law to be followed carefully. They are looking to the law to reflect their aspirations and to give them enforceable rights to challenge local authorities that are not meeting their obligations. If a new law is passed, service users and carers want social care, health, housing and other relevant professionals to be fully educated about what is in it and how it should work in practice. SCIE has an important role to play here. This could be along similar lines to the support and resources we offer professionals on the implications of the Mental Capacity Act (2005), which has played a vital role in bringing staff up-to-speed with a crucial development in the law.

Approach to law reform

8. The process-driven approach to law reform set out in the proposed statute risks missing a key opportunity to develop a new law based on clear entitlements and responsibilities.

9. If the law is to accept and reflect a person-centred approach to social care and empower people seeking support, there should be a clear, consolidated statement of the rights and entitlements of the individual. This would strengthen the position of people entering the social care system and enable them to act as equal partners with professionals in assessment, support planning and maintenance of wellbeing. Some entitlements are on the face of existing legislation, some are implied and others are the corollary of duties and responsibilities already placed on local authorities. Current entitlements include:

- An individual's entitlement to participative assessment of their circumstances, aspirations and risks to their wellbeing
- Carers' entitlement to assessment of the support they need to sustain their caring role
- Entitlement to services required to offset disadvantage and exclusion associated with disability
- Advocacy services under mental health and mental capacity legislation
- Protection from compulsory detention without assessment under mental health legislation
- Option of a direct payment in preference to direct provision of services
- Right to Control under the Welfare Reform Act (2009) of a range of service funding streams
- Rights under the Equality Act (2010) to freedom from discrimination in access to goods and services on grounds of disability, age and other factors

Statutory principles

10. The new law should affirm clearly under ‘statutory principles’ that social care is a core responsibility of the state, carried out in partnership with individuals, carers and families.

11. We suggest that the statute should be based on the single core principle that adult social care ‘should promote or contribute to the wellbeing of the individual’ and enable people to play a role as active citizens. Adults should be presumed to be the best judge of their own wellbeing. Key elements of wellbeing include personal identity, autonomy and self-determination, dignity, privacy and respect, physical and mental health, security and freedom from abuse, and economic and social inclusion.

12. The service users and carers we consulted were supportive of all the proposed statutory principles, although they noted that these are very broad principles and need to be more closely defined to make them meaningful. However, it was noted that there is potential for confusion if ‘home-based living’ and ‘choice and control’ are both included as principles on this list, as people may wish to choose residential care if they believe it best meets their needs. It is also important to be aware that some of these principles may mean different things to different people. For example, ‘independent living’ is seen by the disability movement as a manifestation of choice and control, while other sectors may interpret it as people doing as much as they can for themselves.

Community care assessments

13. People who use services support the right to receive an assessment on request, and want the right to request a new assessment if and when their circumstances change. This is consistent with a law based on entitlements. It would also address the apparent anomaly whereby carers currently have a right to assessment on request while the individuals they are caring for do not currently have this right.

14. The proposed statute makes the assumption that assessment is the first stage of a process leading to decisions on eligibility for services or resources. It could instead be seen as a service in its own right, focused on assisting individuals to achieve wellbeing within the framework of their rights and entitlements. Under this model of assessment, problems would be defined not in terms of existing services but in terms of people’s aspirations and preferred outcomes, and the process would include the provision of information, advice, sign-posting and advocacy to enable people to find their own solutions. Councils also have a responsibility to carry out regular reviews, to ensure that these outcomes are being achieved.

15. Professionally-led needs assessment can be experienced as negative and disempowering by individuals being assessed and by carers, who may feel they have little say. We know that it also has a tendency to focus too much on people's deficiencies and impairments, rather than on their remaining abilities, aspirations and preferred modes of support.

16. A further disadvantage of traditional needs-based assessment is that people's needs are often defined to fit in with existing and available services, with weak incentives for these services to adapt or innovate to meet the real and changing needs of individuals.

17. The boundary between assessment of needs and determination of eligibility for services too easily become blurred, shifting the emphasis from meeting needs to restricting access. In addition, the focus on eligibility for community care services can divert attention from the potential contribution of other services, such as housing and employment, which may have an important role to play in ensuring an individual's overall needs are met.

18. Some service users and carers question the use of the term 'assessment', which they believe puts them in a position of 'being done to' rather than being partners in their own care and support. In places, the consultation paper talks about 'assessing people' or 'assessing carers', confirming the impression it is the individual or carer himself or herself who is being assessed. They make the point that, as people who may need social care, they have the best knowledge of their own needs, abilities and aspirations. They see the role of the social worker in the traditional assessment model as a 'gatekeeper' to the system, controlling (and in some cases denying) access to services and support. Instead, local authorities should be required to help people access the information, advice and advocacy they need to enable them to make their own choices.

19. Service users suggested that 'support plan' is a better term than care plan. A support plan would establish what an individual's needs are and how these could best be met.

20. There is support among service users for self-assessment, plus calls for independent advocacy or brokerage to help people express their needs and desired outcomes as fully as possible.

Carers' assessments

21. We suggest broadening provisional proposal 5-2 so that it reads: 'We provisionally propose that the duty to assess a carer's *needs* should apply to all carers who are providing or intend to provide care to another person, not just those

providing a substantial amount of care on a regular basis *and not just on the basis that the person cared for is eligible for social care*'.

22. Paragraph 5.9 states that 'a local authority would have a duty to carry out an assessment of the carer's ability to provide and to continue to provide care...' We suggest that this is amended to read 'an assessment of the carer's ability *and willingness* to provide and to continue to provide care...'

23. With regard to paragraph 5.26, we agree that local authorities should have a duty to offer an assessment, but individual carers should have the right to refuse this assessment unless there are concerns about their capacity to make decisions or the safety of the carer or the person being cared for.

24. There is support among service users and carers for a unified assessment process, setting out the needs of the individual service user and their family carer(s). This is consistent with the 'think family' approach, which aims to ensure that the support provided by children's, adults' and family services is coordinated and takes account of how individual problems affect the whole family. However, there are reservations about merging the carers' assessment duty and the community care assessment duty. Service users and their carers may not necessarily have a good relationship or want to share all information with each other.

Eligibility for services

25. It is worth noting that both 'needs' and 'eligibility' are concepts rooted in the Poor Law, casting people who may need social care as supplicants, rather than individuals in control of their own lives who may require care and support to help them live their lives as they wish.

26. Service users and carers are supportive of a mandatory national eligibility framework, as set out in provisional proposal 6-6. They would welcome clarity about what they are entitled to and what local authorities are required to offer. They also believe that a national framework would improve consistency and increase the chances of being offered a similar care package if they moved to a new area.

Ordinary residence and portability

27. Service users and carers are strongly supportive of proposals to enable the portability of assessments and services, to ensure stability for people who use services.

28. There is strong support for an enforceable duty on local authorities to cooperate when service users move areas.

Scope of adult social care services

29. It is hard to produce a neat definition of what constitutes community care services. Limiting services to a set list does not appear consistent with a personalised approach, which should be focused on needs. People who use services want to make their own decisions and create their own solutions based on a mix of specialist and mainstream services. There is little support for defining – and limiting – services in this way. Personalisation and self-directed support imply that individuals can put forward imaginative support packages that may go well beyond what is usually thought of as a mainstream or specialised care or support service. The key is that it should be possible to make a direct connection between an individual's needs and their desired outcomes.

30. Service users and carers agree with the proposal that the new statute should not include a central definition of a disabled person or service user.

Joint working

31. The statute should place explicit leadership and management responsibility on local authorities and other local statutory players to ensure effective, integrated, multi-agency working as key to maintaining the health and wellbeing of people with multiple, complex and long-term problems. Formal mutual duties to collaborate may also be required. Partnerships will need to extend beyond local government and the NHS, to include employment and training services, benefits systems, and private and commercial service providers.,

32. The types of people who might particularly benefit from such an approach include those whose wellbeing is at critical or substantial risk in their own homes; people requiring the level of care and support available in a residential or nursing home; people entitled to safeguarding from serious harm caused by abuse, neglect, exploitation or harassment; carers whose health and wellbeing is at risk from the demands of their caring role.

Safeguarding adults at risk

33. The proposals on safeguarding are broadly welcome. While we agree with the definition of an 'adult at risk' given in provisional proposal 12-3, the term itself is likely to be problematic for some people seeking or using support'. Risk is an inherent part of adult life, and increasing people's ability to control their own lives means enabling,

and if necessary supporting, them to take, assess and manage their own risks. Further thought needs to be given to the terminology. In the context of adult safeguarding, the criterion 'significant harm' places the threshold too high. It would be clearer simply to use the word 'harm'.

34. We agree with the proposal to repeal section 47 of the National Assistance Act (1948), on the grounds of protecting human rights.

35. We agree with the Commission that there is a need to strengthen arrangements for local authority coordination of adult safeguarding strategies and services, secure greater consistency around the country, and raise public awareness of adult safeguarding measures and procedures. We are not, however, persuaded that children's safeguarding boards are the best model for coordinating adult protection, and consider this needs further investigation.

36. On provisional proposal 12-8, we suggest that there should be not only a duty on local authorities to cooperate with other agencies and to request their assistance, but also mutually binding obligations on the statutory agencies to collaborate with one another in applying agreed strategies, priorities, procedures and information-sharing protocols.

Strategic planning

37. The proposals in this section are generally sensible. The proposal to abolish the disabled persons register needs further clarification. Some service users and carers have suggested that individuals could be automatically registered as disabled at the time of assessment, and could then have the choice of whether to opt in or out of the register. Others believe that the register is not an effective tool, as it does not include everyone with a disability and people do not need to be registered in order to receive services.

38. The availability of a skilled, knowledgeable, flexible and diverse workforce is essential to the effective commissioning and provision of adult social care. The new statute needs to address this issue. In simpler times, the Local Authority Social Services Act 1970 placed a duty on local authorities to appoint a statutory Director of Social Services and ensure he or she was provided with the resources, including staff, to fulfil the responsibilities of the post. This requirement is still in place. Its current incarnation is the expectation that Directors of Adult Services will work jointly with providers to produce and implement local cross-sector workforce development strategies. The Law Commission will want to consider how this duty is carried forward into the new statute.

Wales

39. The general stance of the Commission's consultation paper involves an assumption that a single statute covering Wales as well as England is both desirable and achievable. These assumptions are open to challenge. The policy frameworks in the two countries have diverged significantly. England's approach to implementing personalisation policy differs from that of the Welsh Assembly Government in key respects, such as the greater use in England of direct payments and personal budgets to support choice, and greater reliance on the independent sector to provide the bulk of care services. Unlike England, Wales has chosen not to separate children's from adults' policy, commissioning, provision, regulation and training. Drafting a single statute with flexibility for Wales to do a growing number of things differently seems contrary to the spirit of devolution. On the face of it, there would be merit in exploring the alternative of a single integrated statute for Wales covering children's and adults' services. This would of course be subject to the views of the full range of stakeholders in Wales.

Next steps

40. SCIE would be pleased to undertake further work with, or at the request of, the Law Commission, to help develop a new adult social care law that clarifies the current legislative framework, reflects the existing and emerging policy context, enables individuals, families and the public to understand the balance of entitlements, responsibilities and safeguards, and puts the needs and experiences of people who use services and carers at its heart.

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