



The Law Society

**The Law Society response to the Law Commission
review of Adult Social Care**

July 2010

supporting
solicitors

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Introduction

The Law Society ('the Society') is the representative body for more than 100,000 solicitors in England and Wales. The Society negotiates on behalf of the profession, and lobbies regulators, government and others. This response has been prepared by the Society's Mental Health and Disability and Wills and Equity Committees, which are made up of senior and specialist lawyers from across England and Wales, who volunteer their time.

It is clear that the current framework (including guidance) is now so multifarious and outdated that reform for the benefit of service users and practitioners is urgent and crucial. Hence, the Society would like to commend the Law Commission for this review of the current legislative framework and the options for reform. With emerging policy changes including a greater duty to co-operate between health and social care (likely to be in the next Health Bill), the proposed local commissioning of health services by GP Consortia and a more integrated health and social care model with joint Local Authority and health commissioners and integrated providers under the Transforming Community Services Agenda, and the Personal Care at Home Act 2010 already on the statute books there is clearly a need for a legal framework which is simple and which sets National Minimum Standards with local flexibility. We now have a valuable opportunity to unify and amend existing legislation as well as to consolidate the extensive guidance that exists. We would urge the new coalition Government, as a matter of priority, to implement the formal recommendations and the draft bill that will shortly follow.

Please find below our response to the specific proposals and questions contained within the consultation paper below.

Part 2 – Law Commission approach to Law Reform

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

The Society believes that it is highly desirable for there to be a single adult social care statute for England and Wales. We express this view whilst bearing in mind due deference to the autonomy of the National Assembly for Wales to make its own decision on whether this is the appropriate course. To have two separate regimes would work against the prime driver of the Law Commission's proposals – simplicity. A single adult social care statute would also assist where practitioners from a variety of agencies, as well as legal professionals, are dealing with service issues with cross-border aspects as well as in respect of portability generally.

On a practical level we suggest that any issues that require accommodation of differences arising from devolution be dealt with by way of statutory guidance and possibly, regulations. Where there are differences between the two regimes, information to that effect should be clearly stated with links to the relevant guidance and regulations.

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

We agree that this is appropriate but also stress the need for a clearer and more consistent approach to guidance with a clear definition of terms used.

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

The present plethora of guidance requires consolidation and streamlining in order that practitioners may easily access comprehensive information on their duties and best practice. In this regard we commend the approach taken by those who developed the Mental Capacity Act 2005 Code of Practice, which deals well with regional differences. Streamlining the assessment process would also be widely welcomed. This will help service users and their families, those working in social services, partner agencies and lawyers.

We agree with the Law Commission's suggestion that a code of practice should be prepared to bring together statutory guidance. However, the progress of any draft bill to full implementation should not be delayed by the need to produce such a code.

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

The Society is of the view that this is the most logical and sensible way forward.

Part 3 – Statutory principles

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

We endorse the suggestion that the future adult social care statute should include a statement of principles. That said, we are mindful of the question of whether principles will in fact assist or disadvantage those who lack capacity, and are also concerned that any principles agreed upon do not conflict with those contained in existing legislation.

It is also our view that any statement of principles should be concise to avoid confusion. It is apparent that many principles that could be adopted within the statement can and do overlap in their purpose. Careful thought therefore needs to be given to the determination of which principles are of such significance and overarching importance so as to merit inclusion.

Question 3-1: Should there be a principle in our proposed adult social care statute which provides that decision makers must maximise the choice and control of service users?

Though we support the principle of maximising choice and control, there is a risk of placing a mandatory duty couched in the way set out in question 3-1 in conflict with the principles applicable to those who lack capacity as set out in the Mental Capacity Act. It is suggested instead that there could be a provision that decision makers should have due regard to the principle of respecting the choice and control of service users. This should take into account the fact that some people might prefer services to be arranged for them rather than a direct payment or personal budget. There could also be a provision that where it is identified that the service user lacks capacity, then the principles of the Mental Capacity Act would take priority over this principle.

Question 3-2: Should there be a principle in our proposed adult social care statute based on person-centred planning – or should this be incorporated into other provisions of the legislation?

In our view this principle necessarily overlaps with that contained in question 3-3 below. We agree that care planning should be person-centred and that a person's needs should be viewed broadly. Care planning should never be unduly restrictive and such a principle would help to embed this notion within the mind of those assessing service users.

Question 3-3: Should there be a principle in our future adult social care statute which provides that a person's needs should be viewed broadly?

Please see response to question 3-2 above.

Question 3-4: Should there be a principle in our proposed adult social care statute based on the need to remove or reduce future need?

We agree with the rationale for including this principle contained within paragraph 3.30 but are not presently satisfied that it is cogent enough to merit inclusion in the statement of principles.

Question 3-5: Should there be a principle in our proposed adult social care statute based on the concept of independent living?

We believe that the concept of independent living and the assumption of home-based living are inherently associated with the concept of person-centred planning. It may be more sensible to somehow incorporate these two similar principles within the latter. There is also the additional problem that there is little consensus as to what the term 'independent living' means.

Question 3-6: Should there be a principle in our proposed adult social care statute based on an assumption of home-based living?

Please see response to question 3-5 above. In addition, the principle should be that care is person-centred in all settings, whether in their own home, supported living or in an institutional setting, and it should help people take part as fully as possible in society and in the decisions that affect them.

Question 3-7: Should there be a principle in our proposed adult social care statute based on dignity in care?

Whilst we acknowledge the importance of this principle, we are concerned that in its present format it is open to wide interpretation. If it can be 'pinned' down we would support its inclusion within a statement of principles. This principle would also need to be carefully worded to ensure that the emphasis is on people being supported to develop their self worth.

Question 3-8: Should there be a principle in our proposed adult social care statute based on the need to safeguard adults at risk from abuse and neglect?

In order to firmly embed the concept of safeguarding against abuse and neglect we support its inclusion in a statement of principles. It needs to be clear that this provision includes acting pro-actively to reduce the likelihood of abuse.

Question 3-9: Should any one principle in adult social care be given primacy over all other principles?

The Society believes it is extremely difficult to identify any one principle as holding particular primacy.

Part 4 – Community Care Assessments

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

The Society believes that the proposed duty is desirable and would reflect the existing duty under Section 47 NHS and Community Care Act 1990. Above all, it is vital to bring to an end the present multilayered assessment powers/duties which have proliferated through different statutes. We therefore consider it essential that the assessment duty should be simple, direct and contained within in a single statute. Possible measures to prevent assessments being used as a resource-rationing tool should also be considered.

Importantly, in order to protect and inform service users, we believe that decision makers should have a corollary duty to provide reasons promptly in cases where an assessment is denied. It would be preferable to keep the current wording of s 47 –‘may be in need of services’ – as this makes it clear that authorities cannot decide if a person ‘has needs’ without first undertaking an assessment, and so should not screen people out.

In order for the system to work and for individuals not to be denied legitimate services, some obligation needs to be placed upon local authorities to clearly explain any refusal of an assessment. Service users should be aware from the outset of their rights in this regard and avenues of redress and/or review.

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

The right to have an assessment on request should not be necessary given the previous proposal. If a request provision is to be included it is important that local authorities are not burdened with inappropriate, repeated or vexatious requests for assessments. Such work can divert resources from frontline services. The suggestion in para 4.27 of the paper of a provision similar to Section 228 Mental Health (Care and Treatment) Scotland Act 2003, whereby if a local authority refuses an assessment on request it would need to give reasons, would seem to be an appropriate compromise.

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

We agree with this proposal. As the paper notes, ‘needs’ and ‘outcomes’ are intrinsically linked and should be the prime focus of the assessment. Suitability for a particular service is not in our view a factor that requires assessment at this stage of the process.

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

It is important to recognise that co-produced assessments are lawful. Whilst many local authorities refer to 'self assessment' this rarely means what it says but means a co-produced assessment. As a means of ensuring that the views of the service user are heard and recognised, this is a good tool. Presently pure 'self assessment' does not fulfil the local authority duty to assess under Section 47.

Importantly, safeguards should be placed within the legislation or statutory guidance to ensure that service users who mis-state or understate their needs do not go without the appropriate care. Conversely, some service users may overstate their needs and as such, there will need to be some measure of scrutiny in order to prevent the waste of scarce public resources.

Where assessments are self or jointly produced attention should also be paid to the need of carers who may not be identified by the service user.

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

There may be very limited circumstances in which pure 'self assessment' could satisfy the duty to assess. However, it is difficult to categorise what an appropriate group to be allowed self assessment would be. It might be possible to allow self assessment for a limited range of services either at a financial limit and/or for living aids to a financial ceiling. If this was to be a proposal then the detail should not be on the face of the statute but contained in regulations.

An argument against self-assessment which we acknowledge and requires consideration is that a service user might be denied access to the expertise of an assessor who would be able to signpost the service user to appropriate services of which the service user might be unaware.

Whether self-assessment is appropriate should therefore be considered on a case by case basis, taking into account the particular background and needs of the service user in question.

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

We agree with this proposal. Introducing, so far as possible, a single point of reference for what should be in an assessment would be beneficial, and limit the opportunity for different interpretation of requirements.

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

We agree with this proposal. The ability to provide temporary service in urgent cases should be retained although we are unaware how much local authorities presently need or utilise this power.

Part 5- Carers' Assessments

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

A single duty to provide a carer's assessment in a single piece of legislation is to be welcomed. As the paper states, the present duty is fragmented across a number of sources and this needs to be resolved.

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

We agree. We understand the concerns expressed in the consultation paper as to the potential number of recipients of assessments, but do not believe that such a duty will open the floodgates. Removal of the 'substantial' and 'regular' test is therefore appropriate unless a clear and practical definition of these terms can be agreed.

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

The proposal that there should be a duty to assess for any carer regardless of the nature or extent of the care and without a request seems to be too wide and unrealistic to practically implement. Carers should retain the right to be in control of whether or not they wish to be assessed, but equally there must be a duty for the local authority to inform and advise any carer that they have the right to an assessment.

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

This proposal produced conflicting views within the Society. On the one hand there was the view that a carer receiving a payment via direct payments from the person they care for places them on the same footing as any paid carer and they should not therefore also be entitled to an assessment for carers services. It was felt the proposals in this section could produce a lack of certainty. A better alternative might be to give a local authority an exceptional discretion to provide carer's services to persons providing care non-commercially to a relative (defined to include persons already living within the same household when the care commences) .

On the other hand there was concern that even when a family carer is being paid, it is different from a person who has chosen a career in caring. A family carer may take on the role and be paid via a direct payment- perhaps under some pressure from the person they care for. They may then find that they have difficulties in managing and their wellbeing may be affected – they may need to be assessed and reviewed to see if it is realistic to expect them to continue in their role as a paid carer, or if the service users package might need changing, as well as whether they would benefit from carers services.

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

A unified carer/cared for assessment could be too cumbersome for legislation and is best left to guidance which will deal with the assessment process. Whilst the needs of each party may be necessarily intertwined their needs should be met individually within a holistic framework rather than through a single assessment process. A unified assessment process may also lead to conflicts of interest especially where vulnerable persons are involved.

There also needs to be clarity that when a potential service user's needs are assessed, that this is done without reference to what any carer may be providing. The assessment should give a full picture of what help the person needs to achieve the outcomes they wish. The care plan, after establishing what aspects of care the carer is willing to provide, can then take into account what needs are being met by the carer. However it also needs to include contingency plans to deal with possible risks that might arise if the carer is unable or unwilling to continue to provide the care or there are temporary breakdowns in the care they can offer. The carer should have the opportunity to be able to be assessed on their own if they so wish as their views about the amount of care they can offer might not match those of the service user.

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

For all the reasons set out in the response to proposal 5.1 the carer's assessment should not be merged with the Community Care assessment.

Part 6 – Eligibility for Services

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

The Society is firmly of the opinion that any new statute should place a *duty* on a local authority to assess and determine whether a person has social care needs which are eligible for support. The local authority duty must be underpinned by a detailed regulatory framework which includes obligations on the local authority to carry out an assessment within a reasonable timeframe. Also, a national eligibility criteria framework should be supported by guidance and assessment tools to ensure there is consistency in decision making. Further, the new legislation should require the local authority to provide or arrange the community care services to meet all the eligible needs or set any personal budget/direct payment that meets all the eligible needs and any employment costs etc.

It is wholly desirable for there to be a single statute covering the provision of services. It is less clear whether all services should be provided as of right. This seems to be a point at which law reform and policy may clash. It is important that duties are clearly defined and easily identified, however the extent of those duties is a matter of policy. What may be wholly desirable as a duty in social policy terms may be unrealistic in the circumstances of the times e.g in the present climate of protracted recession. This also has to be set against the background and demands of the Human Rights Act. However, if resources allow, we would support a duty to provide or arrange community care services to meet all eligible needs.

Certainly we agree that all current duties that are in directions or guidance rather than statute should be put into statute. But it is suggested that a safer option is not to convert all powers to

duties within the statute, but to continue to rely on consistent regulations and guidance for those areas which are currently powers.

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

The eligibility criteria to be applied by service providers should be defined in regulations and accompany the statute, rather than be contained within the statute itself. A full scale review of current regulations and options for change should be undertaken prior to any regulations being settled and coming into force, and should be subject to parliamentary scrutiny.

Paragraph 6.20 canvasses that the eligibility criteria should be set out on the face of the statute due to their importance. However, ultimately the proposal is for this to be within Regulations. This seems to be a better proposal to enable the policy to be dictated through a more flexible route which is more amenable to change should the policy drivers change. Paragraph 6.22 proposes that the detail should be retained in statutory guidance and this is supported.

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

We agree.

A right to re-ablement services may benefit some service users but we are concerned at the possible risk that such a right may become an obligation upon a service user to participate in re-ablement services if future local authority support is to be provided. Re-ablement will need to be defined, which we consider should be in wide terms to include both improving or maintaining physical function and helping people to rebuild confidence and social networks.

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

We agree with this proposal in totality. If national eligibility criteria are introduced it should be done through regulations.

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

The Society is aware that the number of service users funded by way of Personal Budgets remains fairly small and the long term problems and implications of the scheme are yet to be identified. The consultation document at paragraph 6.38 correctly identifies the inherent tension between the RAS procedure which is used in the calculation of the Personal Budget, and the FACS and UFSAMC which is used to assess the service users' eligibility for local authority services. Any new legislation should enable the local authority to use Personal Budgets, but neither the statute nor the regulations should compel them to do so in all circumstances. This is especially so if the service user does not want this as this would restrict their choice.

It is indeed the case that legislation has not kept pace with government policy in relation to Personal Budgets. A future statute should make appropriate provision to make Personal Budgets a means of fulfilling the duties following a community care assessment. If it remains policy that Personal Budgets are continued this should be reflected in the statute and regulations.

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

We agree but resources will be a significant issue.

Currently there are discrepancies (as acknowledged in the consultation paper) in the way individual local authorities interpret their responsibilities to identify and support carers under existing legislation. A mandatory national eligibility framework should be linked to a *statutory duty* to meet the eligible needs of carers. Too often it is the case that families who “appear” to be “coping” with the care of a relative are then overlooked, when in reality they may be putting their own physical and mental health at risk of serious harm (e.g. back injuries, depression, stress etc.).

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

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

As we have already stated we strongly support the creation of a single unified Adult Social Care statute. We agree in principle that the Section 21 and Section 2(1) should be repealed in order to achieve this goal. However, we assert that repeal of these sections should only be carried out once new legislation is passed to ensure that those vulnerable groups (albeit a small class) who rely heavily on these sections for welfare support are not left unprotected and at risk of destitution. In order to resolve this issue, the government must enact legislation to guarantee this group is provided for by a proper scheme before these sections may be repealed.

We are aware that this group contains especially vulnerable individuals who include asylum seekers, those with personality disorders and learning disabilities.

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

We do not agree for the reasons set out above.

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

The consultation document identifies the small number whose services might be compromised by this repeal but for the reasons stated above it would be wholly unhelpful to maintain their entitlement through this proposed legislation. Ideally, the needs of this group should be addressed by amendment of the legislation governing housing and asylum seekers to provide them with corresponding rights to those contained in the NAA 1948.

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

We agree with this proposal for the reasons set out in paragraph 7.38 of the consultation paper, although we are aware there will be concerns that this might lead to a diminution of current rights. We consider that if the statute is robust in placing duties on local authorities to meet needs, then section 2(1) of CSDPA should no longer be necessary for people to obtain their rights.

Part 8 – Ordinary residence and portability

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

The Society agrees with this proposal. The duty to provide accommodation in cases of urgent need should include those who are homeless. We note that this class is not expressly mentioned in the current proposal and believe it deserves highlighted status.

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

We view this to be a sensible proposal as the majority of carers will live with or near the cared for person. However, since the proposal is likely to be enshrined in legislation, this mandatory proposal should make allowances for those carers living outside the relevant Local Authority boundary of the person cared for.

We note that paragraph 8.19 of the consultation paper refers to the Local Authority in which the cared for person lives as being given primary responsibility. This would imply that the Local Authority where the carer resides may have a secondary responsibility to assist in providing services to the carer even where the carer lives outside of the primary local authority boundary. The CDCA 2000 provides that a local authority must carry out a carer's assessment if it is satisfied that the cared for person is someone for whom it may provide or arrange community care services. This could be extended to cover a situation where it is impracticable for the Local Authority where the cared for person lives to provide services to the carer by requiring the carers' local authority to take responsibility to conduct an assessment and provide carers's services.

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

The proposal for an enhanced duty to co-operate is strongly supported. Our members are aware of much anecdotal evidence that some hard pressed local authorities are less than forthcoming with support or information to assist in assessing someone who has moved into or is proposing to move into their area.

In respect of a national portable assessment and national eligibility criteria we support the same. This has been the subject of much debate over recent years with a very strong lobby of people who rightly see portability as freeing up their lives.

Statutory guidance and/or regulations as to the assessment and eligibility criteria will also need to be formulated to ensure consistency of approach on a national level. We believe portability to be an essential priority for government consideration for a number of reasons.

Portability on a national level would provide significant benefits for practitioners and service users alike. Re-location can be extremely stressful not just for the most vulnerable. From a legal practitioners' perspective it would also prevent litigation that arises where local authorities are seemingly reluctant to take up their responsibilities decisively. Our members are aware of many cases where disagreements as to responsibility and funding cause extreme inconvenience and delay to service users and this situation requires attention and resolution. We are also aware of the difficulties that arise in cross border cases involving the Welsh and Scottish jurisdictions which could be resolved by a formal national framework.

In terms of existing models that could assist in formulating a national portability framework, we would positively endorse the special educational model that allows for transfer of responsibilities upon relocation and also for re-assessment if deemed necessary.

Part 9 – Scope of Adult Social Care Services

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

We agree with this proposal subject to the provision of clear guidance as to interpretation of the categories. It would need to be broad in order not to conflict with person-centred care which encourages people to be imaginative in how their care needs are met. We would not wish to see a prescriptive list that would mean that some people would not be able to meet their care needs in the way they consider to be most suitable to them.

Further, we would suggest that 9.13(2), assistance and facilities in the home, should include a reference to appropriate adaptations. We also note that no reference has been made to transport services which should be included within the list.

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

For clarity and certainty the list of community care services should be set out on the face of the statute.

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

Whilst we agree that leaving community care services undefined may provide more flexibility and innovation in the provision of services (as it does in the carers approach), it also has the real potential to produce confusion and litigation over what constitutes a social care service. On this basis we believe an element of prescription remains essential. A mechanism should also be included within the statute to enable the list to be amended, perhaps by secondary legislation in order to anticipate future changes which may be inevitable.

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

The Society believes that if the new statute is to resolve the complexity and confusion that pervades adult social care law, it is essential that no central definition of a disabled person or service user is set out. More importantly, to continue with an overly restrictive approach will only serve to exclude as many as it includes from accessing services.

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

The Society is in favour of the flexibility that is allowed by the present legislation governing the assessment of carers' needs. However, we are aware that that flexibility is not always practically exercised by local authorities and other service providers in the exercise of their discretion. On this basis we suggest that it may be more sensible to provide a broad list of services to mirror that already proposed for service users themselves. Greater consistency could be achieved by this approach.

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

Clarity as to the legal status of *Shared Lives* schemes is very much welcomed. Although the Society understands that the categorisation of this scheme is a matter of government policy we do consider it to be better and more correctly placed under the non-residential category by way of regulations.

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

It is agreed that the current distinction as between health and social care provision be maintained until such time that there is joint management and funding of care. However, we are concerned that the present proposal does not address any period in time when there may be a gap in service provision whilst a decision is made as to primary responsibility. We would suggest that the statute address this issue by directing that the agency who first became aware of an individual's need to be responsible for the provision of services until a formal decision is made without prejudice to their position that the agency may not be the appropriate long term agency to provide services.

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

We agree with this proposal subject to the qualification that the S21 NAA 1948 duty to provide accommodation is addressed in a new and proper scheme enacted by legislation.

In this regard we re-assert our comments as set out under proposal 7-1 above.

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

This is a matter for Government policy and it is speculative to try to predict the likely consequences. It is our view that as a matter of principle the Government should enact provisions outside of the adult social care statute to deal with this group.

Part 10 – Delivery of Services

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

We agree in principle with this proposal but wish to heavily emphasise the importance of regulations which will specify the form and content of a care plan. Regulations should also include an obligation to maintain, verify and where appropriate, update the care plan on a regular basis – otherwise the care plan could become obsolete or of very limited value. We consider that the care plan should also show the service user how any direct payment has been calculated so they can contest the amount if they consider it does not meet the needs in the care plan.

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

We do not believe that this is presently desirable. We support the policy that residential care should be an option of last resort. It is premature to consider providing for direct payments to be used to pay for residential accommodation while the issue of who pays for residential care in the future is the subject of separate policy consideration. It would be inappropriate to extend such payments to pay for long term residential care at a time when Government policy is in a state of flux.

The care home market has been subject to scrutiny by the Office of Fair Trading. History has shown that when residents did in fact get direct payments (from the then DHSS) it was routine for care homes to charge the individual more than they got from benefits – meaning they either were not able to keep any money for personal spending or had to run their capital down to nothing. Others had to rely on relatives to top up. People moving into care home have little negotiating power, and there is limited mechanism for ensuring that the market is fair.

We also voice our concern as to the extension of direct payments when at present no system to oversee and scrutinise payments is in place. At a time of finite resources this is a must and will be of benefit not just to the public purse but also to vulnerable service users who may be contributing to the cost of care or short changed in the level of care they receive.

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

We agree.

Although the Choice of Accommodation Directions were issued under Section 7A of the Local Authority Social Services Act 1970, and therefore must be followed by local authorities, because of

the importance and significance it would be sensible to include them within the new Act. It would be helpful if the statute could strengthen the provision to ensure that local authorities cannot routinely expect people to top-up inadequate fee levels and that there is a choice of homes at the price the local authority is prepared to pay. This is one of the areas that is routinely flouted by local authorities, in some cases because they are not aware that care homes are asking for top-ups in spite of the fact that they are liable for the cost if it fails to be paid. This is an area that is ripe for overhaul and improvement.

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

We agree.

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

We agree.

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

We agree subject to the proviso that the regulations should make it clear that just because a particular service does not appear on the list of free services does not mean that the local authority must make a charge for the service. It would also need to accommodate people with Creutzfeldt-Jakob disease who are entitled to free services in general and those on s 117.

Part 11 – Joint working

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

We support the proposal to create a clear legislative demarcation between adult social care legislation (applicable to those over 18) and legislation that governs the provision of services for children. Further, we support the proposal to provide more flexibility to local authorities in dealing with those of a transitional age.

Attention will also need to be given to other legislation which appears to apply to children (there are no age limits) such as services under the NHS Act 2006 Schedule 20 paragraph 3 (home help and laundry facilities).

In order to ensure that no rights to services for children are lost a careful review should be undertaken of existing legislation before this proposal can be positively endorsed.

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

The Society is of the view that there is a clear need for the improvement of transitional arrangements for 16 and 17 year olds. However, we are not sure whether this would address the problems with transition (which we suspect stem from lack of co-operation between agencies, different eligibility criteria etc). How effective the present proposal will be is debatable. Whilst it may provide local authorities with a power to assess individuals in this age range, we believe that this should in fact be a duty upon local authorities.

Many problems that arise upon the age of transition appear to stem from a lack of multi-agency co-operation; how the new legislation may assist in improving this situation should also be addressed.

It is suggested that there be a duty to assess younger people when there is evidence that they lack capacity to make decisions on their future care, treatment and accommodation arrangements and this lack of capacity is likely to persist into adulthood due to their mental and/or physical condition and the failure to assess would place the young people at risk of harm or neglect, or where harm or neglect is already occurring at that age. From a policy perspective we believe it is justified to change the power to a duty and to prioritise resources to this age group which could be said to be especially vulnerable.

In the case of young people with disabilities, where practitioners are aware that they will need adult services, their transition to adult services would be enhanced if they were assessed under adult community care legislation at a reasonable time before they reach their eighteenth birthday. This is especially so if they have been in care.

Local authorities are under a duty to carry out assessments for young people with learning difficulties so it is very important that all local authority departments work together to ease the transitional process.

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

This area raises complex and important issues.

We are concerned that if this proposal were implemented, a young carer would need to satisfy a higher threshold i.e. show that they are providing regular and substantial care, in order to obtain an assessment. This is in contrast to the presently proposed test for adult carers where an assessment is to be available for all who are providing care. In the Society's view this cannot be acceptable.

We also believe that there are likely to be problems with the suggestion at 11.17, that the assessment of young carers aged 16 and 17, is dealt with under adult social care legislation. This would mean that children's services would not be involved. As noted in 11.15, the current approach as emphasised in guidance is that young carers should be assessed routinely under the Children Act rather than adult legislation.

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

Presumably this would mean (as with young carers) that parent carers have to meet the 'regular and substantial' test. The Society believes that having a more stringent test for certain groups of carers would need to be justified.

More clarity is also required as to the question of who would or should make the request for an assessment. In our view it should be open to both the parent carer or the young person to make the request. Further guidance will also be necessary for different scenarios such as where the young person lacks capacity and it is in the young person's best interests to be assessed for adult social care rather than under the Children Act.

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

The Society does not have sufficient information to comment on this issue.

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

We agree, although we consider that the issue of the increase in emergency readmissions should be addressed.

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

We suggest that they should be included – as the consultation paper highlights, this would provide clarity from a policy perspective.

If specific consultation with organisations such as the Prison Reform Trust and the Howard League for Penal Reform has not been undertaken we recommend that it would be beneficial in order to ascertain the level of need. We suggest that the need for social care for certain prisoners is significant, especially in the pre-discharge period. This may also assist in preventing re-offending. There is also a considerable growth in the number of older prisoners and it seems right that they should be able to access the same services as non-prisoners to meet their care needs. There also need to be consideration about how the care services in prisons are monitored and whether this should be done via the Care Quality Commission.

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

The Society agrees with this proposal. However, an area that has not been considered by the Law Commission here is the impact of Community Treatment Orders (CTO). A condition of the CTO might be that the service user resides at a particular place. We are not sure how this would work alongside the Choice of Accommodation Directions (although under the current Directions one of the conditions that must be met before the local authority is under a duty to accommodate the person in a care home of their choice, is that the accommodation must be 'suitable').

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

The Society agrees with this proposal. However as expressed by the Local Government Ombudsman, it is particularly important for authorities to take account of the impact of family contact and that:

“In the absence of specific guidance or case law on the subject of ‘top-up’ payments related to Section 117 aftercare, local authorities need to take care when reaching decisions on individual cases. A council should be able to show that it has: considered all relevant factors including the particular circumstances of the individual case; reached a reasoned decision without undue delay; and considered any representations that it receives with an open mind. If this can be shown, I would be unlikely to criticise a council or find maladministration.” - Complaint against North Yorkshire CC, 2007

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

The rules should apply to all s117 patients.

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

We are concerned that highlighting a split between health and social care might undermine the important emphasis so far on joint working. We note there is a section of the relevant guidance that states health and social services ‘should establish jointly agreed protocols on providing services under this section’. The guidance (LAC(2000)3) states:

“3. Social services and health authorities should establish jointly agreed local policies on providing section 117 after-care. Policies should set out clearly the criteria for deciding which services fall under section 117 and which authorities should finance them. The section 117 after-care plan should indicate which services are provided as part of the plan.”

We agree to the proposal that s117 is amended to make clear that authorities can commission services.

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

We suggest that both authorities should be involved in the decision which will assist in reinforcing the concept of joint working. The guidance referred to above covers this issue succinctly:

“4. After-care provision under section 117 does not have to continue indefinitely. It is for the responsible health and social services authorities to decide in each case when after-care provided under section 117 should end, taking account of the patient’s needs at the time. It is for the authority responsible for providing particular services to take the lead in deciding when those services are no longer required. The patient, his/her carers, and other agencies should always be consulted.”

We would also suggest here that some mechanism for taking account of patients’ views before termination is important and necessary.

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

The Law Commission have made a strong argument for casting s117 as a gateway provision. Perhaps what needs to be considered is whether this change will have any detrimental impact on those under s18; that is, are the services that they are able to receive through the Children Act 1989, the CSDPA and the NHS Act 2006 equivalent to the services they would receive under s117?

If it became a gateway provision, the duty to provide s117 services free of charge would remain. However, this would need to be made clear in statute and equally clear that practitioners need to be aware that the person is subject to s117 provisions. For lengthy cases, one of the problems often encountered is that there is little awareness that s117 had been used in the original placement.

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

We agree with this proposal.

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

We do agree but also suggest that where an authority has received such a request more is required than 'due consideration' – the onus should be on the authority to respond to such a request and to provide reasons where the decision is a negative one. Compulsion to give reasons would positively support inter-agency co-operation and prevent authorities from evading their responsibilities, which we are aware occurs too frequently.

Part 12 – Safeguarding adults at risk

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

The Society is in agreement with this proposal but believes it could go further. It is apparent that a very real gap exists in the current legal framework whereby a local authority is under a duty to assess an adult at risk under the NHSCCA 1990, but is under no common law duty of care to protect an adult at risk against acts by a third party. This is notwithstanding the powers under the Mental Health Act 1983 and Mental Capacity Act 2005 and other positive duties under the Human Rights Act 1998. Such a duty should also apply to NHS Trusts when they are responsible for provision of care.

Thought should also be given to whether this duty should be placed upon all other agencies that have contact with adults at risk which would require the statute to give a broader definition as to applicability. This would have an inevitably positive impact on joint working and multi-agency co-operation. A prime candidate for inclusion under the duty is the Health Service.

There are resource implications to establishing a duty and there should be clarification as to whether it is intended to make this clearly mandatory with enforcement powers against local authorities. If a mandatory duty to investigate is to be imposed, then local authorities may raise the threshold for investigation to significant harm.

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

We agree.

The term 'adult at risk' is necessarily wider and more inclusive than the term 'vulnerable adults' thus preventing adults who require protection from falling through the net simply because of say, inherent characteristics or because they do not qualify for community care services.

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

The Society agrees with this proposal in principle, although we would express a preference for the definition of "harm" contained in The Adult Support and Protection (Scotland) Act 2007 to that contained in *No Secrets*.

The Society acknowledges that the definition of harm in the Scottish Act is multi-layered but believes that this more detailed and prescriptive guidance as to what constitutes harm may be of assistance to practitioners and may lead to greater consistency of interpretation rather than less. The Society notes that phrases used in the *No Secrets* statutory guidance such as "avoidable deterioration" and "impairment of behavioural development" are much more difficult for practitioners to interpret.

We are also of the view that the term 'significant harm' is more appropriate in the context of safeguarding adults at risk and believe that this term should not be defined but left to interpretation. Some of our members however have concerns that 'significant harm' may be too high a threshold for intervention.

There are concerns at paragraph (e) of the proposed definition of adult at risk set out at 12.41(2). The reduction in the definition to 'ill treatment' or 'impairment of health or development' does not capture the range of types of abuse, which was wider in the original Law Commission report of *Who Decides* which stated:

"'harm' should be taken to include not only ill treatment (including sexual abuse and forms of ill treatment which are not physical), but also the impairment of, or an avoidable deterioration in, physical or mental health; and the impairment of physical, intellectual, emotional, social or behavioural development'."

Using the term "unlawful" in the proposed definition of 'adult at risk' would require social workers to check with their legal advisers that certain action was unlawful before referring a matter to safeguarding. There are aspects of financial abuse where it is almost impossible to prove a financial crime but it still constitutes abuse. So deleting the word "unlawful" would extend the range of financial abuse that would be subject to safeguarding.

There is a concern is that if significant harm is not defined the courts will opt for the Children Act definition which is largely a dictionary definition. In practice, some Local Authorities have not insisted on a threshold of significant harm in dealing with safeguarding issues. Indeed there are

judgments that state that the threshold of significant harm does not exist for adults lacking capacity – see remarks of the then Mummery J in *Re MM (an Adult)* [2007] EWHC 2003 (Fam). The threshold set out for judicial intervention was when there was a demonstrated need to protect a vulnerable adult from abuse or the real possibility of abuse. The threshold issue was recently discussed in *G v E & Ors* [2010] EWHC 621 (Fam).

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

The Society agrees that any future adult social care statute should contain new compulsory or emergency powers to safeguard adults from abuse or neglect but this can only be introduced following a thorough review and consultation on proposed measures.

Clearly, any new measures which may provide for the loss of liberty in certain circumstances will necessarily require rigorous scrutiny.

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

The Society agrees with this proposal subject to the proviso that new legislation is enacted to protect that group of people for which this section is the only safety net and that it provides access to otherwise inaccessible care and support services.

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

Whilst we agree with this proposal in principle, we are uncertain to what extent it may be invoked and perhaps more importantly how it may be enforced. Further thought will need to be given to how individuals may enforce such rights and also to the extent of the duty upon local authorities to prevent loss. We do not suggest any amendment to the current provision, Section 48 of the NAA, which limits the LA to acting in certain situations only.

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

The Society supports in principle the mandatory statutory provision for the establishment of adult safeguarding boards. We are concerned however as to the resource implications of such a proposal. Putting safeguarding infrastructure in place will inevitably lead to extra costs and this issue will need to be resolved if the introduction of new legislation is to be successful. In this regard we note that local safeguarding children boards have faced funding difficulties since their establishment under the Children Act 2004.

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

The placement of multi-agency co-operation and information sharing on a statutory footing can only be positive in safeguarding adults at risk, and this should extend to non-local authority agencies such as NHS Trusts and the Police. Safeguarding is a shared responsibility, even if in reality, local authorities take the lead. The Society fully supports this proposal and understands that the introduction of such an enhanced duty is widely supported by many agencies and organisations who work with vulnerable adults.

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

We agree that formal guidance as contained in *No Secrets* and *In Safe Hands* should be clearly linked to a local authority's statutory functions but emphasise that it must be abundantly clear that it is the new legislation that local authorities should primarily rely upon even if such guidance becomes statutory guidance in due course.

Part 13 – Strategic planning

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

The register would seem to be outdated and an ineffective means of planning. Luke Clements notes that in many authorities it is seen as 'an administrative chore with little practical value' (2.7). Therefore we agree that it should be abolished. (The Law Commission notes that the register is seen as useful for blind and partially sighted people but there may be other means of providing the benefits currently enjoyed by this group of people through the register).

Provisional Proposal 13-2: Provisionally, we do not propose to include any strategic planning provisions in our future adult social care statute. 73. Local authorities have duties and powers to provide information through a combination of statute law and guidance. We believe there should be a single duty set out in our proposed statute to provide information about all adult social care services.

We agree with this proposal.

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

We strongly agree with this proposal.

The one area that we are disappointed was not accepted by the Department of Health as part of this major project to reform social care law is the question of the mechanisms for complaining and seeking redress. We agree with the Law Commission that it is part of the holistic approach to the review. We consider that it is vital that people whose lives can be transformed depending on the quality and type of care they receive (at times a matter of life and death) should have clear, easy and independent mechanisms to have any complaints addressed. At the moment, in spite of the recent reforms, the complaints system is cumbersome and too often individuals are daunted by the process at all stages. We hope the question of complaints and redress can be reconsidered and be included within the review.