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Commission**  
Reforming the law

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## **Adult Social Care Summary of Consultation Paper No 192**

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**24 February 2010**

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# ADULT SOCIAL CARE: A CONSULTATION PAPER

## SUMMARY

### INTRODUCTION

1. This is a summary of the Law Commission's consultation paper on adult social care. It sets out all of the provisional proposals and questions, and provides a brief outline of our main arguments. More information and detail is included in the main consultation paper at <http://www.lawcom.gov.uk/docs/cp192.pdf>.
2. We emphasise that the provisional proposals put forward represent our preliminary view about how the law should be reformed. We welcome comments and feedback on the proposals and questions put forward. We will be reviewing every proposal on the basis of responses made to the consultation paper.

### Politics and law reform

3. It is important to distinguish the respective roles of the Law Commission and the Government in this project. The Law Commission has a statutory function to review the law with a view to its systematic development and reform. Political policy, such as the setting of spending priorities and the making of value judgements about rights and responsibilities, is a matter for Government. In certain areas, however, this is not a bright-line distinction. In this project, we have tried to distinguish areas for political policy and areas for law reform on a case by case basis. We welcome views on whether we have taken the correct approach.
4. While politics is not a matter for the Law Commission, law reform must operate within the broader context of Government policy, such as personalisation. The policy environment for adult social care is in a state of development, and there are divergences in policy between England and Wales in some areas. Our proposed statute must be capable of accommodating both existing and future policy developments. The approach that we have adopted in our proposals is to create, as far as possible, a neutral legal framework that is not wedded to any particular policy and is capable of accommodating different policies and practices in the future. Underpinning this framework are the core entitlements and rights that are crucial to the existing community care legal framework.

### OUR APPROACH TO LAW REFORM (PART 2 OF THE CONSULTATION PAPER)

5. Our central goal is to achieve a coherent, effective and modern legal framework for adult social care. Our preliminary view is that this would be best achieved by consolidating and reforming the existing provisions in adult social care law into a unified adult social care statute. While there are differences in the law that applies in England and Wales, we believe that they are not currently such as to require separate statutes for each country. However, we will continue to monitor any divergence in policy between England and Wales throughout this inquiry.

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.
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6. In general we have tried to adopt a straightforward approach to the hierarchy of rules in our proposed reforms. As a first level, we believe that our proposed statute, as primary legislation, should set out the duties imposed and powers conferred on local authorities. In doing so, we have avoided the use of directions and approvals. As a second level, where more detail is required or more prescription is considered appropriate, this may appropriately be placed in statutory instruments such as regulations. As a third level, we have proposed that statutory guidance continues to be used when the Department of Health and Welsh Assembly Government want to guide the exercise of social services functions and discretions by local authorities.

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?

7. While we have not made any proposals in relation to consolidating the guidance, we are interested in views on whether there should be a statutory code of practice for adult social care, which would sit alongside the unified statute and would bring the existing statutory guidance together into one place.

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?

8. We believe that the most effective way of providing a coherent legal framework for adult social care is by establishing tightly defined processes for determining the scope of adult social care. At the centre of our statute are the community care assessment, the eligibility decision and the formation of a care plan. In addition, there are a number of other aspects of our proposed legal structure that would help to determine, in a more general sense, the scope of adult social care. These are the statutory prohibitions on the services that can be provided by social services authorities, a broad list of community care services, and the use of statutory principles to guide decision-making.
9. In summary, our general approach is that adult social care should be understood as those community care services (broadly described and subject to statutory prohibitions) provided or arranged by social services authorities to those individuals, whose identity is determined through an assessment and eligibility decision (and recognised in a care plan), in a process which is prescribed in legislation and guided by statutory principles.

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?

### **STATUTORY PRINCIPLES (PART 3 OF THE CONSULTATION PAPER)**

10. In contrast to other social welfare statutes, community care legislation contains no statement of fundamental principles. Instead, the principles must be discerned from numerous sets of guidance and other supporting documents. Our provisional view is that there is a compelling case for principles on the face of our proposed adult social care statute. Statutory principles can help guide decision-making under legislation, promote the consistent application of the legislation, and bring together various

provisions in the legislation to provide a coherent framework. Statutory principles can also give prominence to existing principles and have greater strength than principles contained in guidance.

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

11. At this stage of the project, we are not considering the precise wording of the statutory principles. Instead, we are looking at general concepts with a view to considering whether they are capable of forming the basis of statutory principles.

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?

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?

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?

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?

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

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

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

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?

12. The relative strength and relationship of the principles in our proposed statute will depend on which principles are eventually recommended and what they are trying to achieve. It would, therefore, be premature to consider the relative strength of the principles. However, we are interested in views on whether any principles of adult social care are capable of being *the primary principle of the legislation*; which means that it must be the *first* and *paramount consideration* whenever social services makes a decision or takes an action.

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

#### **COMMUNITY CARE ASSESSMENTS (PART 4 OF THE CONSULTATION PAPER)**

13. The duty to assess is a crucial feature of adult social care law. An assessment by a local authority can be a service in its own right. However, the current legal framework for assessments is overlapping, complex and confusing and in urgent need of reform.

We consider that the law should provide for a single gateway into the provision of community care services and there should be a low threshold for qualifying for an assessment, which does not distinguish between user groups.

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.

14. We are also considering whether individuals should have a right to have an assessment on request. In our view, a request mechanism is only necessary if the duty to assess, which is triggered by the appearance of need, is not working; for example, if certain people are being excluded from assessments.

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

15. Statutory guidance emphasises that an assessment should not focus on a person's suitability for a particular service but their needs more generally. Recent guidance from the Department of Health also emphasises the importance of considering outcomes in an assessment. We believe that our proposed statute should clarify these points.

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.

16. A key aspect of developing policy in England is the use of self-assessment. The term "self-assessment" can indicate a range of options giving individuals a varying degree of control over their assessment. Self-assessments can be co-produced with the local authority or they can be "pure", in the sense that the entire assessment process is carried out by the individual without any involvement by the local authority. We consider that a co-produced self-assessment is consistent with the legal requirement that a local authority retains overall control of the process, but a pure self-assessment is currently unlawful. We are interested in views on whether, and if so how, self-assessments should be accommodated in our future statute.

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

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

17. While the core duty to assess a person is set out in statute law, the detail about how an assessment should be conducted is set out in directions and a range of guidance. This means that details of the assessment process are spread over multiple documents and may also mean that they are seen as optional or best practice. Given that the assessment process will play a key role in determining the scope of adult

social care in our proposed legal structure, our preliminary view is that regulations should prescribe how an assessment is to be undertaken. This could include who is to be consulted in an assessment; the way an assessment is to be carried out; who can carry out the assessment; and the considerations to which the local authority must have regard in carrying out an assessment.

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.

18. Local authorities currently have a power to provide services without having carried out an assessment, in cases of urgency. We propose this power remains in our future adult social care statute.

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

### **CARERS' ASSESSMENTS (PART 5 OF THE CONSULTATION PAPER)**

19. The current legal framework for carers' assessments is fragmented, multi-layered and internally inconsistent. We propose that our statute should set out a single duty to assess a carer, consolidating the requirements of existing legislation.

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.

20. Only carers who are providing a "substantial amount of care on a regular basis" and request an assessment are currently entitled to one. The test of "substantial and regular" is not defined and appears to be interpreted differently by local authorities. It is also a complex definition, requiring local authorities to ascertain the impact of caring on an individual before undertaking an assessment. Our provisional view is that this test should be removed so that a carer's assessment is available for all carers who are providing care. We also propose that the request mechanism should be removed, and instead, an assessment should be triggered where the carer appears to have needs that could be met with the provision of services.

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.

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.

21. Paid and volunteer care workers are currently excluded from the definition of a carer under the various pieces of carers' legislation. This exclusion may also capture carers who previously performed their role on an unpaid basis but are now paid for the care they provide through the cared-for person's direct payment. Our provisional view is

that such carers are in a different position to employed or volunteer care workers, and should not be excluded automatically.

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.

22. Guidance issued by the Department of Health emphasises the importance of a holistic assessment of the needs of the cared-for person and the carer. We welcome views on whether legislation should encourage a unified assessment process where appropriate or whether this is a matter best left to guidance.

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

23. While we recognise that a merged duty to assess a service user and a carer may be considered desirable, we do not see it as being practicable. However, we welcome views on this issue.

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?

#### **ELIGIBILITY FOR SERVICES (PART 6 OF THE CONSULTATION PAPER)**

24. Once a local authority has undertaken an assessment, it must decide whether a person's needs call for the provision of services. The statutory guidance, *Fair Access to Care Services* in England, and *Unified and Fair System for Assessing and Managing Care*, in Wales, sets out an eligibility framework which local authorities must use to specify their eligibility criteria. If a person's needs fall within the local authority's eligibility criteria, then the authority must meet those needs with the provision of services.
25. However, the relationship between the statutory guidance and the underlying community care legislation is complex. Some statutes only provide a power and not a duty to provide a service, while others include their own internal criteria for services. We consider that it would be clearer, less complex and more effective to adopt the lead of the statutory guidance and make assessment of social care need and the application of eligibility criteria the sole means by which a person's eligibility for community care services is determined. The duty to meet eligible needs would be strong and individually enforceable.

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.

26. Under our proposals, the eligibility criteria would become the key means of establishing eligibility for services. We therefore consider that the eligibility framework, which a local authority must use to set its eligibility criteria, should not be left to statutory guidance and instead should be set out in regulations issued by the Secretary of State or Welsh Ministers.

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.

27. In the 2009 Green Paper in England, *Shaping the Future of Care Together*, the Government put forward the options of introducing a right to re-ablement services and national eligibility criteria. If these policy options are implemented, we believe they should be accommodated in our future statute.

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.

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.

28. In England the Government has made a commitment to introducing personal budgets for everyone who is eligible for publicly funded adult social care. However, at this stage there have been no changes made to the legislative framework to accommodate personal budgets, and in some instances, they do not sit easily with the existing community care legislation. We consider that the law and personal budgets should be more closely aligned. However, our statute also needs to accommodate the different policy position in Wales, where the Welsh Assembly Government has not committed to rolling out personal budgets.

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.

29. Local authorities currently have a power to provide services to carers. In exercising this power, authorities can, but are not required to, apply an eligibility framework. In practice, however, it appears that many local authorities are using an eligibility framework to decide whether to provide services to carers, and are providing services to meet eligible needs.

30. We consider that local authorities should be required to use a national eligibility framework. This would remove the current ambiguity about how decisions are made regarding the provision of services to carers, and would mean that a carer's eligibility for support is assessed against the same framework throughout England and throughout Wales. In effect, this would mean the introduction of a duty to provide carers' services. However, in our view this would not change the existing legal position. Local authorities already have a duty to meet the critical needs of carers in

some circumstances and this would continue. Local authorities would retain their discretion to meet critical needs only, or set their eligibility criteria for carers' services at a lower threshold.

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.

**SECTION 21 OF THE NATIONAL ASSISTANCE ACT 1948 AND SECTION 2(1) OF THE CHRONICALLY SICK AND DISABLED PERSONS ACT 1970 (PART 7 OF THE CONSULTATION PAPER)**

31. Section 21 of the National Assistance Act 1948 and section 2 of the Chronically Sick and Disabled Persons Act 1970 place strong duties on local authorities to provide certain services. In Part 6 of the consultation paper, we propose that an assessment of need and application of eligibility criteria should be the sole means for determining a person's eligibility for services. In effect almost all of the existing community care statutes would be repealed, including section 21 and section 2.
32. The aim of our review is not to remove any existing entitlements to services. In relation to section 21 of the 1948 Act, we do not believe that repeal of this duty would weaken the entitlement to residential accommodation. However, if any groups did lose their entitlement to services, we believe that section 21 should be retained for those groups. In relation to section 2 of the 1970 Act, we believe that the duty could be removed without undermining existing rights to services.

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.

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.

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?

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.

**ORDINARY RESIDENCE AND PORTABILITY (PART 8 OF THE CONSULTATION PAPER)**

33. The current legal framework for ordinary residence is complex and 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. In order to maximise clarity and consistency in our proposed statute, we consider that the concept of ordinary residence should apply to all community care services. A local authority would have a duty to provide services where the person is ordinarily resident in their area (and has assessed eligible needs) and a power where a person

is not ordinarily resident in their area (in the case of residential accommodation this would be with the permission of the local authority in which the person is resident) or of no settled residence. We also propose to maintain some of the other rules relating to ordinary residence.

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.

34. The responsibility for providing carers' services is given to the local authority where the cared-for person lives. The reasons for this are that the authority where the cared-for person lives benefits from the informal care being provided by the carer and carers' services are often delivered in the form of services to the cared-for person. We propose that our statute should reflect the existing rules.

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.

35. The term *portability of services* refers to the ability of service users to ensure continuity of support when they move between local authority areas. In our view, the following changes could be made to the legal framework to ensure a greater degree of portability in service provision. First, an enhanced duty to co-operate should include specific provision to promote co-operation when service users move areas. Second, if a national portable assessment and national eligibility criteria are implemented, our statute would facilitate this.

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.

#### **SCOPE OF ADULT SOCIAL CARE SERVICES (PART 9 OF THE CONSULTATION PAPER)**

36. Most community care statutes provide a list of services that can be provided by local authorities. A relatively straightforward approach to law reform would be to duplicate the existing lists of community care services in our future adult social care statute. However, there is much overlap and duplication between the services listed in the various pieces of legislation. Simply bringing all of these lists across to our proposed statute would perpetuate this duplication and provide little legal clarity. We therefore propose that there should be a short and broad list of community care services in our statute. This list could consist of residential accommodation; assistance and facilities in the home; social work service and support and advice; centres of other facilities in the community; and social, leisure, communication, education and training activities.

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

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.

37. While our preferred option is to define community care services through a short and broad list of services, we are interested in views on whether the term “community care services” should be left undefined in the statute. This approach is taken to carers’ services under the Carers and Disabled Children Act 2000.

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

38. Most community care statutes only allow services to be provided to certain categories of user groups. However, some of these categories are outdated and stigmatising and furthermore, many of the categories are too broad to serve any useful legal purpose. It would also be difficult to consolidate the existing categories without the definition becoming so broad as to be almost meaningless. We consider that in principle a person should be eligible for community care services if they have an assessed eligible need and that to provide an additional hurdle based on a legal category, such as “a disabled person”, is unnecessary.

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.

39. Carers’ services are currently undefined in statute law, and local authorities have discretion to provide a wide range of services. Our provisional view is that our statute should continue to not define carers’ services.

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

40. Shared Lives is a service that often involves placements of service users in family homes. However, the Shared Lives scheme does not sit easily in the legal framework and there is some confusion about whether it is a residential or non-residential service. How Shared Lives is categorised has consequences for charging, whether direct payments are available to fund it, and the application of the ordinary residence rules. We consider our future statute should provide clarity about the legal status of Shared Lives.

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.

41. Statute law provides a number of prohibitions on the provision of adult social care services, which help establish the interface between adult social care and NHS care; housing; and immigration and asylum law. Our provisional proposals in this area are limited to examining how the existing prohibitions would operate in the context of a single statute and do not attempt to alter the responsibilities of social services or other authorities in any significant way.

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.

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.

42. Our review does not extend to considering the merits of Government policy in relation to the interface between adult social care and immigration and asylum law. Accordingly, our statute will continue the existing prohibitions on providing services to a person subject to immigration control solely because they are destitute or because of the physical or anticipated physical effects of being destitute. However, we welcome views on the impact of this policy.

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?

#### **DELIVERY OF SERVICES (PART 10 OF THE CONSULTATION PAPER)**

43. Once a local authority has carried out an assessment and identified eligible needs, statutory guidance advises that a care plan must be drawn up. Although failure to draw up a care plan in accordance with the guidance has been found to be unlawful, care plans are not provided for in statute law. In our view, the clarity of the law would be improved by the introduction of a statutory duty on local authorities to provide a care plan for people with eligible needs (including carers).

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.

44. There are two parallel legal mechanisms for promoting choice and control. First, direct payments, which can be provided to enable service users to purchase non-residential services. Second, the choice of accommodation directions require local authorities to accommodate service users at a place of his or her choice within England and Wales. The main difference between these mechanisms is that direct payments allow the person to arrange the services themselves, whereas the choice of accommodation directions only enable a local authority to do this on behalf of the person. Arguably, this gives service users who need residential accommodation less choice and control over service provision than those who need non-residential services. We provisionally consider that the most effective way of securing the policy of choice and control would be to extend direct payments to cover residential

accommodation. However, Government policy is that direct payments are not an option for people going into residential care. We welcome views on this issue.

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

45. Unlike direct payments, the choice of accommodation directions are not set out in statute law. We consider that doing so would help to ensure legal clarity and emphasise their importance. We also consider that the additional payments regulations, which allow top-up payments to be made where a resident chooses more expensive accommodation than the authority would normally provide, should be retained in secondary legislation.

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.

46. We provisionally propose to retain the existing content of the direct payments provisions in the Health and Social Care Act 2001. We do not propose to alter the existing balance between statute law and regulation. Thus, we envisage that our future adult social care statute would set out the duty to provide direct payments, but most of the detail would be set out in regulations.

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.

47. Local authorities have a general duty to charge for residential accommodation, but a discretion to charge for non-residential services. Charges can also be made for carers' services, direct payments and personal budgets. The remit of our review does not extend to altering the rules on charging for services and is limited to determining how best to express the existing statutory provisions. Our proposed statute must also be able to cater for any future changes in policy, or policy divergences between England and Wales. Therefore, we propose that a regulation-making power should be introduced to require or authorise local authorities to charge for residential and non-residential services.

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.

48. The Secretary of State has a power to issue regulations which require that certain services must be provided free of charge. Elsewhere, the law provides that local authorities cannot charge for certain services, such as after-care services under section 117 of the Mental Health Act 1983. We propose that the existing regulation-making power should be maintained in our future statute, as should the current list of services that must be provided free of charge. In addition, the law should be made clearer, by setting out in the regulations all services that must be provided free of charge.

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.

### **JOINT WORKING (PART 11 OF THE CONSULTATION PAPER)**

49. Most community care law applies to adults over 18 years of age. However, some provisions apply to children, including section 2(1) of the Chronically Sick and Disabled Persons Act 1970 and carers' legislation. This can produce a complex legal structure. We propose that our future statute should apply to those aged 18 and above. In general terms, this would mean that children's services would be provided primarily under the Children Act 1989, and adults' services under our proposed statute. To ensure that children did not lose their existing enforceable rights to services, it would be necessary to retain and amend the 1970 Act, so that it would apply only to those under 18 (or the Children Act could be amended to include similar rights to services). Our proposals would not affect the children leaving care provisions under the Children Act or transitional arrangements under the Education Act 1996.

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.

50. We also believe that the law should encourage a smooth transition for young people into adult life. This could be achieved by giving local authorities a power to assess and provide services to young people aged 16 and 17 under our proposed statute. For example, in cases where a young disabled person is likely to need services beyond the age of 18, the authority could decide that it would be preferable to assess that person under adult social care legislation rather than the Children Act 1989. Young people aged 16 and 17 (and their parents on their behalf) would be given a right to request that they be assessed under adult social care legislation rather than the Children Act 1989 and the local authority would then be required to give written reasons if it refuses to carry out the assessment.

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.

51. The Carers (Recognition and Services) Act 1995 and the Carers and Disabled Children Act 2000 give carers under the age of 18 a right to request an assessment in certain circumstances. We propose above that our statute should only apply to those aged 18 and above, which would mean that carers under the age of 18 who are caring for someone who is 18 or above would be excluded. To ensure that young carers did not lose their existing rights, it would be necessary to retain and amend both the 1995 Act and the 2000 Act so that they would apply only to those under 18 and to include a requirement in our proposed statute that any community care assessment must have regard to the results of any assessment of a young carer under the 1995 Act, the 2000 Act and the Children Act. In addition, Provisional Proposal 11-2 would apply to young carers.

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.

52. We propose that parent carers should continue to have a right to a separate carer's assessment under the 1995 Act and the 2000 Act. In addition, parent carers who are looking after a young person aged 16 and 17 would be able to request that the young person is assessed under our proposed adult social care statute. If the authority agrees to this request, then the parent carer would be eligible for a carer's assessment under our proposed statute.

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.

53. Section 2(1) of the Local Government Act 2000 gives local authorities in England and Wales a wide-ranging power to do anything that is likely to promote the well-being of their area. There is potentially a good deal of overlap between the provision of adult social care services under community care legislation and the use of the well-being power. We welcome further evidence on this.

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

54. The Community Care (Delayed Discharges) Act 2003 established separate procedures for community care and carers' assessments in relation to NHS patients who are being discharged from acute medical care. We do not propose to amend the content of the 2003 Act nor the relevant regulations. We propose that this legislation should be incorporated in our future adult social care statute, rather than remaining a stand alone statute. We welcome views on the delayed discharge provisions and whether they could be refined or simplified.

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.

55. We consider that, as a matter of law, prisoners are not excluded from receiving community care services. However, this situation does not arise by design or as a result of a clear policy decision, but by oversight. In our view, the law cannot operate effectively unless a policy decision is made by the Government about whether prisons should be included or excluded from adult social care. Our future adult social care statute would need to facilitate and reflect whatever policy is decided on this issue.

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

56. Section 117 of the Mental Health Act 1983 will remain a standalone duty, but it will be integrated more fully within the community care legal framework. We propose to extend the choice of accommodation directions, the additional payment regulations and ordinary residence to cover section 117 after-care services.

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.

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.

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.

57. We also propose that section 117 should be amended to state expressly that the duty falls on health authorities to provide *health care after-care*, and on social services authorities to provide *social care after-care*. If this proposal were implemented, it would be necessary to be clear when the section 117 duty is to end. We also propose that section 117 should be amended to clarify that health and social services can commission services from other providers.

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.

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?

58. We welcome views on whether section 117 should continue to be a “free-standing duty” or whether it should be a “gateway duty” which enables the provision of services that health and social services already have a power to provide under other legislation. Section 117 would continue to be an enforceable individual duty and the power to charge for section 117 services would be disapplied.

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

59. Statute law has been used as a vehicle to encourage local social services authorities, the NHS and other organisations to work together. In addition, an important aspect of Government adult social care policy in both England and Wales is to encourage joined-up assessment and services. We consider that our proposed statute could facilitate this policy by setting out two duties to co-operate. First, we propose that a general duty should be imposed on each social services authority to make arrangements to promote co-operation with other relevant organisations, such as housing, education and health authorities. Second, we propose that there should be an enhanced duty to co-operate, whereby a local authority can request another authority to assist in specific circumstances, such as when an assessment is taking place. This duty would apply to education, housing, health and other local authorities. A requested authority would be required to give due consideration to the request.

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.

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.

## **SAFEGUARDING ADULTS AT RISK (PART 12 OF THE CONSULTATION PAPER)**

60. In certain circumstances, local authorities are already under a duty to investigate an *adult at risk* and consider whether services are necessary and what, if any, further action should be taken. This duty arises from the existing statutory duties and powers to assess and provide community care services, and by taking into account the statutory guidance *No Secrets* and *In Safe Hands*. However, this only takes the argument so far. Once account is taken of the other elements of the current legal framework – such as the compulsory and other powers available under the Mental Health Act 1983 and the Mental Capacity Act 2005, the requirements of the common law, and the European Convention on Human Rights – then it becomes clear that a different context often applies when an adult is at risk of abuse and neglect, to which an express investigation duty is appropriate.
61. We propose that our future adult social care statute should clarify the existing legal position and establish a duty to make enquiries and take appropriate action in adult protection cases. This proposal is made in the context of the *existing* powers of social services authorities to take action.

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.

62. If a duty to investigate was introduced, it is important that statute law should define who it should apply to. The statutory guidance in England and Wales (*No Secrets* and *In Safe Hands*, respectively) currently use and define the term “vulnerable adults”. In the Adult Support and Protection (Scotland) Act, the term “adult at risk” is used.
63. In our view, the term *vulnerable adults* should be replaced by *adults at risk* to reflect the need to focus on the risks that a person faces rather than the characteristics of the person concerned. In our view, an *adult at risk* should be defined by adopting a two-limbed approach. The first limb needs to describe in general terms who would fall within the remit of the definition. In our view, the first limb should be based on a person’s *social care needs*, rather than having eligible needs, being in receipt of services or diagnosed with a particular condition or disability. This would ensure that the duty to investigate would be wide ranging (and would include self-funders), while also ensuring that local social services responsibilities do not extend to, for example,

those with health needs. We also consider that there should be an ability for the Secretary of State or Welsh Ministers to extend the definition to include other groups of people in the future.

64. The second limb of the definition would need to set out what the person is at risk from. Our view is that the threshold *significant harm*, which is currently used in *No Secrets, In Safe Hands* and the Children Act 1989, should be retained. *Harm* could be defined as ill-treatment or the impairment of health or development, or unlawful conduct, including specifically financial abuse. *Significant* should continue to be left undefined and left to interpretation.

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.

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.

65. Local authorities have a number of existing emergency and compulsory powers, most of which are contained in the Mental Health Act 1983 and the Mental Capacity Act 2005. It is for the Government to determine policy and consequently our proposed statute will only include new compulsory or emergency orders if they are proposed by the Government. If policy in this area diverges between England and Wales, this may require our statute to include a separate part that applies to England only or to Wales only, and contains compulsory and emergency powers.

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.

66. Section 47 of the National Assistance Act 1948 enables a local authority to remove people from their home into a hospital, or other place of safety. We believe that several aspects of section 47 are incompatible with human rights law, specifically article 5 of the European Convention on Human Rights. There are also a number of operational concerns associated with the power and most people who potentially come under it could be dealt with under alternative powers. Therefore, we propose that section 47 should be repealed.

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

67. Section 48 of the National Assistance Act 1948 places a duty on local authorities to prevent the loss or damage of a person's property when he or she is admitted to hospital, or moves into residential accommodation. Our provisional view is that the section 48 duty should be retained in our proposed adult social care statute.

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.

68. Local adult safeguarding boards are multi-agency partnerships, made up of a wide range of statutory, independent and voluntary agencies and organisations. The Department of Health has announced that new legislation will be introduced to put safeguarding boards on a statutory footing. We therefore propose that our future statute should place a duty on each social services authority to establish a safeguarding board, and set out the functions and membership of the board, requirements to share information, and a duty to contribute to serious case reviews. We welcome views on this proposal and whether there are other ways that adult safeguarding boards could be placed on a statutory footing.

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.

69. In Provisional Proposals 11-10 and 11-11, we proposed that our future adult social care statute should introduce a general duty and an enhanced duty to co-operate. Both of these duties would apply in adult protection cases.

Provisional Proposal 12-8: We provisionally propose that the enhanced duty to co-operate, 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.

70. Both *No Secrets* and *In Safe Hands* were issued under section 7 of the Local Authority and Social Services Act 1970. Any guidance issued under section 7 must be linked to a local authority's functions conferred by statute law. However, *No Secrets* and *In Safe Hands* cover an area of law where there is currently no specific statute. Thus, while the guidance will be effective in guiding local authorities in the exercise of their existing statutory functions, it cannot provide a free-standing justification for any act. We welcome further evidence on this issue. We believe that the legal basis of decisions taken in this area would be made clearer by the introduction of legislation setting out the duties and responsibilities of local authorities in relation to safeguarding 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.

### **STRATEGIC PLANNING (PART 13 OF THE CONSULTATION PAPER)**

71. Local authorities have a duty under the National Assistance Act 1948 to maintain registers of disabled people. However, it is unlikely that the registers provide an accurate record of disabled people and are of limited utility as a strategic planning tool. The register also fails to establish entitlement to most benefits. Consequently, we believe that it should be abolished. However, we recognise that for people who are blind or partially sighted the register may have some advantages and we welcome views on whether it could be retained for these groups.

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

72. The legal framework for local strategic plans is complex and often confusing. Moreover, the strategic planning responsibilities of local authorities are much wider than the planning of adult social care services. Accordingly, the issue of strategic planning goes beyond the remit of our review.

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.

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.

#### **HOW TO RESPOND**

The Law Commission would be grateful for comments on its provisional proposals before 1 July 2010.

Comments may be sent either –

**By email to:**       adultsocialcare@lawcommission.gsi.gov.uk

**By post to:**       Amanda Walker  
Law Commission  
Steel House  
11 Tothill Street  
London SW1H 9LJ  
Tel: 020-3334-0264 / Fax: 020-3334-0201

If you send your comments by post, it would be helpful if, whenever possible, you could send them to us electronically as well.

We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.

This summary is available in Welsh, easy read, audio format and large print.