

THE LAW COMMISSION

ADULT SOCIAL CARE: SCOPING REPORT

SUMMARY

INTRODUCTION

- 1.1 The Law Commission's Tenth Programme of Law Reform includes a project to review adult social care law in England and Wales. The Department of Health is the lead department for this project.
- 1.2 The first stage of the project is to undertake a scoping review of adult social care law and to publish a report setting out the proposed agenda for the substantive project. This summary provides a brief overview of the areas of reform identified in the Scoping Report and the direction of our review in each area.

THE NEED FOR REFORM

- 1.3 The legislative framework for adult residential care, community care and support for carers is inadequate, often incomprehensible and outdated. It remains a confusing patchwork of conflicting statutes enacted over a period of 60 years. There is no single, modern statute to which service providers and service users can look to understand whether services can or should be provided, and what kinds of services. For example, there are currently four different statutes covering carers' assessments, all of which differ in a number of respects. In addition to a number of different statutes, there is also a great deal of "soft law" in the form of guidance and departmental circulars.
- 1.4 Given that the law has developed piecemeal since 1948, it does not provide a clear and principled approach to assessment and service provision. Questions have been raised as to the compliance of certain aspects of the law with the European Convention on Human Rights. A further consequence of the piecemeal development of the law is the sheer volume of legislation. It is estimated that there are currently over 30 Acts of Parliament dealing with adult social care law.
- 1.5 The current state of the law leads, first, to inefficiency in the system – negotiating complex and outdated law takes longer and is less certain. Too much time and money are spent on understanding the law and on litigation. Difficult law may also stifle innovation. It is also likely to lead to arbitrary differences in legal rights and status between different service users and different kinds of service.
- 1.6 Secondly, and more fundamentally, the law tends to reflect the policy imperatives and understandings current at the time it was made. For example the core definition of disability in community care law, which can determine in some circumstances whether services must be provided, is contained in the National Assistance Act 1948, which uses outdated concepts such as "dumb and crippled persons", "handicapped" and "suffer[ing] from congenital deformity".
- 1.7 For these reasons, the Law Commission has identified adult social care law as in need of reform. The objectives of this reform are to simplify the law through reform and consolidation, with the ultimate aim of producing a consolidated, coherent adult social care statute which could work at any level of resources.

KEY AREAS UNDER REVIEW

- 1.8 The Scoping Report identifies a number of areas of adult social care law that are in need of reform and consolidation. These are set out below.

Statutory principles

- 1.9 One of the main criticisms of existing adult social care law is that the lack of a consolidated statute means there are no overarching principles to direct and assist local authorities, the courts, services users, carers and others in carrying out their functions or understanding their entitlements in these areas. This is in contrast to other recent pieces of social welfare legislation in England and Wales, including the Children Act 1989 and the Mental Capacity Act 2005.
- 1.10 Given these concerns, we recommend that our review should consider the desirability of introducing statutory principles into the consolidated statute. The content, status and application of any statutory principles would also be considered by the review.

Community care assessments

- 1.11 In the current legal framework, there are at least three separate duties to assess a person who may be in need of community care services. This causes duplication, unnecessary complexity and confusion. We recommend that our review should consider whether the various legal duties to assess should be consolidated into a single duty.

Carers' assessments

- 1.12 There are also several Acts that deal directly with carers' assessments. As with the duty to carry out a community care assessment, each subsequent Act builds on the earlier Act and does not repeal it. We believe the review should look at whether the various duties regarding carers' assessments should be consolidated into a central duty.

Hospital discharge

- 1.13 The Community Care (Delayed Discharges etc.) Act 2003 adds another level to the assessment process. This Act prescribes a separate assessment regime for NHS patients who need community care services in order to be discharged safely from hospital, with costs payable by the local authority for delays in undertaking the assessment or service provision. The review should consider this legal framework and assess whether the notification and assessment procedures could be refined or simplified.

Eligibility for services

- 1.14 The Fair Access to Care Services guidance in England and the Unified and Fair System for Assessment and Managing Care guidance in Wales, provides local authorities with a framework for setting their eligibility criteria for adult social care. We recommend that the review considers the eligibility criteria framework and whether some aspects could be clarified or refined.

- 1.15 We were specifically asked in June 2008, by the then Parliamentary Under Secretary of State for Care Services, to consider how the current legal framework, as opposed to practice by local authorities, contributes to the difficulties which people face when moving from one local authority area to another because they are unable to find out in advance what package of community care services will be made available to them in the new area.
- 1.16 Our review would also cover the provision of services to carers, with the aim of rationalising and clarifying the existing law, and considering its relationship with the regime for service users.

Ordinary residence

- 1.17 Ordinary residence rules establish which local authority is primarily responsible for a person in need of services, based on his or her residency in the area. Being ordinarily resident in an area can elevate a power for a local authority to provide a service to a duty and can be a crucial issue for service users, given the differences in eligibility criteria that can arise between local authorities.
- 1.18 We recommend the review address several concerns that have been expressed about the current ordinary residence rules, including that they can add to the difficulties which people face when moving from one local authority area to another, and do not apply consistently to all adult social care statutes. We will also consider the definition of ordinary residence, and whether this needs to be clarified or simplified.

Provision of services

- 1.19 The various powers and duties placed on local authorities to provide adult social care services are scattered across a range of statutes and secondary legislation. The broad categories of services that can be provided under the legislation are: care homes and residential accommodation; community and domiciliary services; carers' services; aftercare services; services for disabled children; and transition services.
- 1.20 The general approach of the main statutes has been to entitle similar but not identical groups of clients, to similar but not identical services. This has created much duplication and overlap.
- 1.21 We believe our review should look at whether the legal regime could be consolidated and simplified, such as by rolling the various duties to provide a particular service into a consolidated provision. We will also consider whether statute law should list the different types of services that can be provided, or whether such detail should be set out in subordinate legislation or directions from the Secretary of State. However, the review will need to consider the robust nature of many of the duties that exists in adult social care law and ensure that they are not diminished.
- 1.22 The review would also consider the interface between adult and children's care services and how this might be expressed in a future adult social care statute.

Service provision and client groups

- 1.23 Most of the main adult social care statutes which authorise the provision of services adopt the same approach of making eligibility for services dependent on whether the individual fits into one or more categories of client groups. However, the client groups that are used often vary between different statutes and there is considerable overlap between these groupings. In addition, the principle definition of disability in community care legislation is generally considered to be offensive and out of date. There are similar concerns about the model of ageing inferred by much of the legislation.
- 1.24 We believe the substantive review should consider the use of client groups to delineate eligibility for services. This will include consideration of whether a definition of disability, or indeed any categories, are necessary for the purposes of adult social care law.

Direct payments

- 1.25 Direct payments allow local authorities to make a payment to service users who have an eligible need so that the service users can purchase their own services directly in order to meet that need. The Government is consulting on further extending the regime to some categories of people who are currently excluded.
- 1.26 We recommend that our review consider whether the legal framework for direct payments can be refined or simplified, taking into account any changes that are made by the consultation underway in this area. We would also consider the legal framework for individual budgets, which combine a series of different funding streams into a single transparent sum, held on the service user's behalf.

Charging for services

- 1.27 Local authorities have a duty to recover payments in relation to residential accommodation and discretion whether to charge for domiciliary and community services; certain other services they have to provide free. Our review would consider whether this charging regime could be simplified, such as by rolling the different provisions on charging for services into a single legal provision.

Health/social care divide

- 1.28 The divide between what is health care and what is social care is highly complex and often difficult to discern. We propose that the review considers the interface between health and social services, and how this might be expressed in any future consolidated adult social care statute. We would also consider whether there should be a statutory duty to co-operate placed on local authorities and health authorities, as well as other bodies.

Safeguarding adults from abuse and neglect

- 1.29 The legal framework for safeguarding adults is an important aspect of our review of adult social care law, given the inherent link between safeguarding adults and local authorities' social care responsibilities.

- 1.30 We propose that our review should consider the legal framework for safeguarding adults to the extent that it can helpfully add to the Government reviews currently underway. This would include consideration of powers to remove people from their homes under section 47 of the National Assistance Act 1948 and powers to enter premises.

Strategic planning and information to the public

- 1.31 There are a number of planning obligations on local authorities to ensure that social service departments meet the needs of the local population. These include preparing strategic plans, maintaining registers of disabled people and providing information to the public on available services. We believe the review should consider whether this area could be streamlined and reformed, such as by consolidating the various strategic plans and planning mechanisms into a single provision. We would also consider whether the requirement to compile and maintain a register of disabled people and a duty to provide information about available services should continue.

Care standards and regulation

- 1.32 Since this area has been subject to recent and ongoing reform, we do not believe that it should be considered as part of the review.

Complaints and redress

- 1.33 Adopting a holistic approach to reviewing adult social care law, the final area we hope to consider are the mechanisms available for complaining about, or seeking redress for, failures in decision-making and service provision by local authorities. This review would link into the proposed reforms to the health and social care complaints systems, and would consider, amongst other things, whether there is a case for establishing a community care tribunal.

CO-ORDINATION WITH THE DEPARTMENT OF HEALTH

- 1.34 The Government is currently undertaking a broad reform of the system of care and support in England and Wales. We will endeavour to co-ordinate with all government reviews, including the *No Secrets* consultation, FACS review, and upcoming Care and Support Green Paper, and take any recommendations made in such reviews into account in our project.

THE NEXT STEPS

- 1.35 The substantive law reform project on adult social care will commence immediately if the Government gives approval following publication of the Scoping Report.
- 1.36 Once the substantive project commences, the Law Commission will undertake its usual practice in law reform projects, including the publication of a consultation paper, undertaking a broad consultation process followed by a report containing final recommendations for reform. The Law Commission and Department of Health would then have the opportunity to decide whether to proceed to the final stage in the project, which is drafting the bill.

November 2008