Law Commission
Reforming the law

Disabled Children's Social Care: Final Report

HC 1287

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Commission
Reforming the law

Disabled Children's Social Care: Final Report

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GLOSSARY

We use the following terms within this final report.

Adult social care: services provided by local authorities to adults in need of care and support. In England, the rules setting out when those services are available, and what services are provided, are set out in the Care Act 2014.

Child: any person under the age of 18.

Child in need: a child falling within one of the three categories provided for in section 17(10) of the Children Act 1989. The first is that they are unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision of services by a local authority under Part 3 of the Children Act 1989. The second is that their health or development is likely to be significantly impaired, or further impaired, without the provision for them of such services. The third is that they are disabled.

Children's social care: services provided by social services to children and their families, to safeguard or promote their welfare.

Court of Appeal: appeals from the High Court and Upper Tribunal (see below) are heard by the Court of Appeal.

Court of Protection: the court which has oversight over matters falling within the scope of the Mental Capacity Act 2005.

Deprivation of liberty: a situation for which the state is either directly or indirectly responsible, where a person is confined, and either does not or cannot consent to their confinement.

Direct payments: monetary payments made by local authorities directly to individuals who have been assessed as needing certain services, so that they can buy their own services directly.

Disabled children's social care: care and support provided by social services to meet the needs of disabled children and their families.

Disabled facilities grants: grants made by local housing authorities to carry out adaptations to the homes of disabled persons.

Early Help: a policy, under which local authorities aim to provide support to children and families as soon as problems emerge. We discuss Early Help in Chapter 5.

Education, health and care plan (EHC plan): a plan made under the Children and Families Act 2014 setting out a child or young person's special educational needs, together with related social care and health care needs.

Family Help: a Government policy that aims to bring "closer alignment between targeted early help and child in need support and services, to create a seamless support system that promotes early intervention".[1]

High Court: the High Court of Justice is divided into three sections ("Divisions"). For present purposes, the most important are the King's Bench Division (which includes the Administrative Court) and the Family Division.

Judicial review: a legal challenge, brought in the Administrative Court, against the lawfulness of a decision taken by a public body. Judicial review challenges usually address the process by which a decision was reached, rather than the merits of the decision itself.

Legal aid: public money made available to fund legal advice and support people to bring or defend certain types of legal case.

Ofsted: the Office for Standards in Education, Children's Services and Skills. Ofsted is the lead body for monitoring the performance by local authorities of their social services functions.

Ombudsman: a person (supported by an office) who has the power to investigate complaints against companies, organisations or public bodies.

Parents and carers: we explain why we use this term in paragraph 1.9. In the context of disabled children, most parents are carers, but not all carers are parents.

Parental responsibility: this is defined in section 3(1) of Children Act 1989 as being "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". The courts have made clear that the important aspect of parental responsibility are the duties that the parent owes to their child, rather than any rights that they might enjoy over them.

Personal budget: a sum of money allocated to a person receiving social care services by the local social services authority in order to meet their assessed eligible needs.

Safeguarding: measures taken to protect a child and keep them safe from harm. We explain in Chapter 1 why we use this term in this way, rather than the broader sense of protecting and promoting the welfare of children.

SEND Tribunal: the common name for the First-tier Tribunal (Special Educational Needs and Disability).

Short breaks: services to provide breaks for the benefit of disabled children and / or to assist individuals who provide care for disabled children to do so, or to do so more effectively, by giving them breaks from caring.

Social services: the part of the local authority children's services directorate that exercises its children's social care functions, as opposed to its education functions.

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[1] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 18.

Special educational needs: section 20(1) of the Children and Families Act 2014 provides that a child has “special educational needs” if they have a “learning difficulty or disability” which requires “special educational provision” to be made for them.

Statutory guidance: guidance issued by the Secretary of State and the Welsh Ministers under section 7(1) of the Local Authority and Social Services Act 1970, or other legislation with similar effect. This guidance must be complied with unless there are good reasons for not doing so.

Statutory principles: these are legislative provisions which set out how the legislation is to be applied to specific situations. We discuss statutory principles in Chapter 4.

Supreme Court: appeals from the Court of Appeal are heard by the Supreme Court.

Working Together guidance: Working Together to Safeguard Children (which we refer to in this paper as the Working Together guidance) is statutory guidance for those working with children and their families, such as social workers or healthcare professionals. Such people must have regard to this guidance and can only depart from it if they have good reasons to do so. The Government have published several versions of this guidance, the most recent being the 2023 version.

Young carer: defined in sections 17ZA and 17ZB of the Children Act 1989 as a person under 18 who provides or intends to provide care for another person and is not doing so under a contract or as voluntary work. We discuss young carers in Chapter 6.

Chapter 1: Introduction

OVERVIEW

The purpose of this report

1.1 This report marks the conclusion of the Law Commission's review of disabled children's social care law in England. When we talk about "disabled children's social care law" we are referring to the body of rules which determine:

(1) whether a disabled child can obtain help from social services to meet their needs;

(2) what help they can obtain; and

(3) how they go about obtaining it.

1.2 In this review we were asked by the Department for Education to look at disabled children's social care law and make recommendations with a view to:[1]

(1) simplifying and modernising the law;

(2) promoting clarity and consistency;

(3) better aligning disabled children's social care law with other areas of social care law and special educational needs and disability (SEND) law; and

(4) ensuring the law and accompanying guidance sufficiently meet the specific needs of disabled children and their families.

This report contains our final recommendations for reform.[2]

The current law

1.3 The most important parts of disabled children's social care law are section 2 of the Chronically Sick and Disabled Persons Act 1970 and section 17 of the Children Act 1989. Both of these legal provisions were ground-breaking. The Chronically Sick and Disabled Persons Act 1970 was one of the first ever pieces of legislation to focus on helping disabled people. It did so by creating, for the first time, a duty to meet the needs of disabled children and adults. In the words of Alf Morris MP[3], the driving force behind the Act and the first Minister for Disabled People, "we were determined to make mandatory what was then permissive" and, in doing so, "ensure that everything humanly possible is done to normalise the lives of the long-term sick and disabled".

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[1] Our full terms of reference are set out in the Appendix to this report.

[2] See para 1.18 for a summary of our recommendations. Although the focus of the review has been on children in family-based care, our recommendations are intended to apply to and benefit disabled children throughout the social care system.

[3] He later became Lord Morris of Manchester.

Section 17 of the Children Act 1989 was meant to bring the scattered legal provisions relating to services for disabled children and children in need of protection from harm, under the umbrella of a general power to provide services to promote the care and upbringing of children within their families. In the words of Baroness Hale, one of the architects of the Act, "the hope was that all would be seen simply as children in need of help".

The problems with the current law

1.4 Over time this area of law has become more complex. It is now spread across numerous statutes dating from 1970 onwards. These have to be read alongside an extensive body of regulations, case law and guidance. The Court of Appeal has described it as "a maze of interacting statutory provisions, which have been subject to frequent amendment".[4] The authors of the leading legal textbook on disabled children describe it as "a system of baffling complexity" the navigation of which amounts to "additional tiring and frustrating work".[5]

1.5 Elements of the law are also now out of date. For example, the definition of disability in section 17(11) of the Children Act 1989 refers to any child who is "blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity".[6] This definition can be traced back to the creation of the welfare state[7] and its roots are found in legislation intended to boost the employment prospects of those injured during the Second World War.[8] It was drafted at a time when our awareness of neurological conditions such as autism was in its infancy. The language used then is offensive now and is very different to the more modern approaches contained in the Equality Act 2010 or the United Nations Convention on the Rights of Persons with Disabilities.

1.6 The law is also – potentially – unfair. It has been interpreted so as to allow local authorities to draw up their own local eligibility criteria, to determine which disabled children qualify for services and which do not. This means that disabled children with the same needs get treated differently depending on where they live in the country. That was not the intention of the legislation.

1.7 In addition to these problems, throughout this review, families have told us that the law is applied in a way which makes it difficult for their children to access the services they need. The most prevalent concerns we heard were that:

(1) there is too much focus on safeguarding disabled children from harm at the expense of meeting their needs – they are often viewed as children in need of *protection*, rather than children in need of *help*;

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[4] *R (Spink) v Wandsworth London Borough Council* [2005] 1 WLR 2884, [2005] 1 WLR 2884 at [1] by Lord Phillips MR.

[5] S Broach and L Clements, *Disabled Children: A Legal Handbook* (3rd ed 2020) p 84, para 3.3.

[6] See ch 19 for the definition of disability.

[7] National Assistance Act 1948, s 29(1).

[8] Disabled Persons (Employment) Act 1944, s 1(1).

(2) those assessing the needs of disabled children do not always have expertise in disability;

(3) the eligibility criteria for accessing services are often too high;

(4) the needs of parents, carers and siblings are often overlooked; and

(5) the different teams, departments, and organisations responsible for a child operate in silos and do not always talk to each other.

The solutions we recommend and how we have arrived at them

1.8 It is these problems, and others, that we have considered and – in so far as we can – tried to address in making our recommendations for reform. We summarise these recommendations at paragraph 1.18 below. We cannot solve all of the problems we have heard about during this review through law reform. Some problems come down to culture or training and will not be resolved by changing the law. Other issues are exclusively political and lie outside of our remit as a law reform body. In particular, issues about funding are for elected representatives in Government. As we said in the context of our previous work on adult social care "the big decisions about how much of a welfare state we should have and how it should be funded are not decisions for us".[9]

1.9 In forming our recommendations, we have been assisted by contributions from disabled children and young people, parents and carers,[10] social workers, managers and directors at local authorities, charities, academics, lawyers and judges. We carried out a full public consultation on our provisional proposals for reform between 8 October 2024 and 31 January 2025.[11] We received 176 responses, many of which were from organisations representing multiple people or groups.[12] In addition, both before and during the consultation we were fortunate to meet with around 1,000 stakeholders at approximately 150 meetings and events.

1.10 The majority of those whom we met were the parents and carers of disabled children and representatives of local authorities who work with those children. The parents and carers we heard from had, invariably, worked extremely hard to provide the best possible care for their children, but many had experienced real difficulties in trying to access social care. They reported a wide range of significant adverse consequences arising from the current regime. The local authority representatives, for their part, were dedicated to trying to help these families but often operating with significant limitations. We are most grateful for the time and expertise which all of these

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[9] Adult Social Care (2010) Law Commission Consultation Paper No 192 pp 2 and 3. For a more comprehensive discussion of the boundary between law reform and politics see Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 1.29 to 1.31.

[10] We use the phrase "parents and carers" in this report rather than "parent carers" to reflect the fact that nearly all parents of disabled children are carers, but not all carers are parents. See Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 1.16 for a detailed discussion of the language we have used in this review.

[11] A comprehensive analysis of those responses will be published on our web page. We do not analyse the responses to all consultation questions in this document; only those that have formed the basis of our recommendations.

[12] All quotations from and references to consultation responses from parents and carers have been anonymised. Quotations from and references to other consultees have been anonymised where requested.

individuals and groups have given to this review, alongside their day-to-day responsibilities and have taken careful note of how the existing and, in our view, unsatisfactory law increases their difficulties.

1.11 This is an area where, for understandable reasons, emotions run high. Parents want the best for their child and are frustrated when services are not forthcoming or delayed, or where they are not listened to or feel that they have been judged. Local authorities want to do their best to help, but may have to balance the needs of a particular child against the wider needs of children in the area, as well as the twin statutory obligations that they owe to promote the welfare of disabled children and safeguard them from harm.[13] They have finite resources to strike this balance and in doing so may err on the side of caution to avoid a safeguarding failure. Against this backdrop there can sometimes be significant differences in opinions between families and local authorities about the appropriate way to help a disabled child. In this report we have tried to balance these views to identify workable recommendations to simplify, clarify and modernise disabled children's social care law, and ensure it is fit for purpose.

1.12 We emphasise the word "workable". As we observe above, we do not in this report make recommendations about funding for disabled children's social care, which is outside our remit. But this does not mean we can ignore the potential resource implications if we are to identify changes to the law that will work in practice. Throughout the course of this review, we have been urged by families, local authorities and third sector organisations to "learn the lessons of the Children and Families Act 2014": the main legislation in SEND law. We were told that not enough consideration was given to the implementation of the legislation, and the rights guaranteed to children under the legislation to children with SEND have been difficult to achieve owing to the limited resources of schools and local authorities. By way of context, in March 2025 the County Councils Network, following a survey of its members, warned that 18 county and unitary councils could face "insolvency" in March 2026 when a £5.9 billion deficit in funding for SEND appears on their balance sheets.[14] The March 2026 deadline has since been extended, but the underlying financial issue remains. If we disregard this context and these concerns we risk making recommendations that do not work or that have unintended consequences. Accordingly, we have tried to take this into account in developing our recommendations and in making suggestions about further work that may need to be carried out before they can be implemented. We will also be publishing an impact assessment alongside our report.

The relationship between our recommendations and current policy

1.13 In making our recommendations, our terms of reference[15] require us to have regard to the Government's wider work on social care. Chief among these, at the time of writing, is the Department for Education's policy on Family Help. The aim of Family Help is to bring "closer alignment between targeted early help and child in need support and

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[13] Children Act 1989, s 17(1).

[14] County Councils Network, *Councils warn of financial catastrophe in 12 months time, with 'unmanageable' SEND deficits risking bankruptcy* (March 2025). See further, para 7.38.

[15] See Appendix.

services, to create a seamless support system that promotes early intervention".[16] At the time we published our consultation paper, the Family Help reforms were being trialled in a number of local authorities as part of the "Families first for children pathfinder programme". These reforms are now being implemented nationally.[17] We refer to Family Help throughout this report in the context of specific recommendations that overlap with the Family Help reforms. In broad terms, our view is that there is much common ground between the Family Help reforms and our recommendations and that the legal changes we recommend are consistent with, and could be used to help provide, Family Help.

The potential application of our recommendations to other children in need

1.14 Finally, there are a number of recommendations that we make in this report that could be applied to all children in need within the social care system, and not solely disabled children.[18] This tends to be the case where the legal provisions we are considering and the problem with them – for example, lack of clarity – apply to all children in need. In those cases (with one exception)[19], in line with our terms of reference, we recommend a solution for disabled children only. However, where relevant, we highlight both the problem and solution as being ones that could potentially apply to children in need more generally, for the Department for Education to consider when deciding whether and how to implement our recommendations.

WEB LINKS AND REFERENCES

1.15 All web link and references to documents have been checked and are accurate as of 29 August 2025.

THANKS AND ACKNOWLEDGEMENTS

1.16 Throughout this review we have heard from disabled children and young people, parents and carers, social workers, managers and directors at local authorities, charities and third sector organisations, academics, lawyers and judges. Some have responded to our consultation paper. Others have attended meetings, events or discussion groups with us. Some have done both. We are most grateful to all of those who have taken the time to contribute to the review.

THE TEAM WORKING ON THIS PROJECT

1.17 The following members of the Public Law and Law in Wales Team have contributed to this project: Henni Ouahes (team manager); Connor Johnston (senior lawyer); Professor Alex Ruck Keene KC (Hon) (consultant lawyer); Efa Jones (legal assistant); and Ethan George (research assistant). We have also been assisted by Iona Holmes (legal officer) at the Government Legal Department.

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[16] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 18.

[17] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 5.

[18] Under the Children Act 1989, s 17(10) disabled children are one category of child in need.

[19] See paras 14.21 to 14.44.

SUMMARY OF RECOMMENDATIONS

1.18 The changes that we recommend to disabled children's social care law are set out below. A number of these recommendations relate to the need for, and content of, statutory guidance (issued under section 7 of the Local Authority Social Services Act 1970). When we make recommendations about guidance, we sometimes use language such as "guidance should direct…" or "guidance should require…". In using this language, we are not suggesting that guidance has the force of law. It does not; the type of guidance we recommend should be followed by local authorities unless there is a good reason to deviate from it.[20] Rather, in using language such as "guidance should direct" our intention is to make clear that the guidance should phrase the recommendation in mandatory and not discretionary terms. With this in mind, our recommendations are as follows.

A new legal framework for disabled children's social care law[21]

(1) Disabled children should remain within the scope of section 17 of the Children Act 1989 and a disabled child should continue to be classed as a "child in need". This recommendation reflects the fact that disabled children may have needs in addition to those that arise from their disability, for example needs arising from poverty, and section 17 allows those needs to be identified and met holistically.

A discrete set of provisions should be introduced into the Children Act 1989, to implement the various recommendations we make in this report, thereby providing a simpler, largely unified framework for disabled children's social care. This new legal framework would apply solely to children who are disabled within the meaning of section 17.

This new legal framework should be accompanied by dedicated statutory guidance. This guidance should include material which helps local authorities to ensure that there is an appropriate balance struck between identifying and meeting the needs of disabled children and their families in a non-stigmatising way and safeguarding them from harm and abuse. The purpose of this is to avoid inappropriate stigmatisation of parents and carers.

(2) There should be a single, comprehensive piece of statutory guidance on disabled children's social care law. That guidance should set out the respective rights and responsibilities of disabled children, families, and local authorities.

The guidance should be published in a variety of formats, to ensure that it is accessible for all of the various groups and individuals who need to rely on it.

The guidance should be produced with input from disabled children and young people, families, and local authorities.

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[20] *R (Rixon) v Islington London Borough Council* (1997–98) 1 CCLR 119, 128D by Sedley J.

[21] See ch 2.

The definition of disability[22]

(3) For the purposes of disabled children's social care law, a child should be regarded as having a disability if:

(a) they have a physical or mental impairment; and

(b) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

The modified definition of "substantial and long-term" contained in regulation 6 of the Equality Act 2010 (Disability) Regulations 2010,[23] that relates to younger children, should apply to this definition of disability. This provides that where a child under six years of age has an impairment which does not have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, the impairment is to be taken to have such an effect if it would normally have that effect on a person over the age of six.

The exclusions contained in regulations 3 and 4 of the Equality Act 2010 (Disability) Regulations 2010 should not be applied to this definition of disability.

The statutory guidance we recommend should:

(c) clarify that a recognised medical diagnosis is not necessary to satisfy this definition of disability;

(d) clarify that the definition can encompass the diverse range of conditions which can affect a child's ability to perform daily activities; and

(e) address the particular circumstances of disabled children in adoptive families.

Statutory principles[24]

(4) Decision-making in relation to the social care needs of disabled children should be based upon:

(a) an overarching principle that the best interests of the child should be a primary consideration;

(b) a set of considerations to which decision-makers must have regard in applying that principle; and

(c) a final check, as to whether the purpose being served by the proposed decision or action can be as effectively achieved in a way which is less restrictive of the child's rights and freedom of action.

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[22] See ch 3.

[23] SI 2010 No 2128.

[24] See ch 4.

The set of considerations which decision-makers must have regard to consists of:

(d) the importance of promoting the upbringing of the child by the child's family, in so far as doing so is consistent with promoting the best interests of the child;

(e) the importance of the child participating as fully as possible in decisions relating to the exercise of the function concerned;

(f) the importance of the child being provided with the information and support necessary to enable participation in those decisions, having regard to their particular needs;

(g) the views, wishes and feelings of the child;

(h) the views, wishes and feelings of the child's parents or carers;

(i) the parents' or carers' knowledge of their child's condition and needs;

(j) the need to support the child and their parents or carers in order to facilitate the development of the child and to help them achieve the best possible outcomes at each stage of their life;

(k) the importance of preventing or delaying the development of the needs for care and support;

(l) the need to prepare the child for adulthood and independent living; and

(m) the characteristics, culture and beliefs of the child (including, for example, language).

Assessing the needs of disabled children[25]

(5) There should be a single statutory duty to assess the social care needs of disabled children.

(6) The duty to assess should arise if it appears to the local authority that a child in the area:

(a) is disabled; and

(b) may have needs for care and support arising from their disability.

The need for care and support should be judged without reference to the support the child is currently receiving.

The statutory guidance we recommend should clarify that a diagnosis is not necessary to meet this threshold.

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[25] See ch 5.

(7) There should be a rebuttable presumption that assessments should be combined unless there is a good reason not to.

The statutory guidance we recommend should provide examples of situations in which combining assessments may not be appropriate.

(8) The statutory guidance we recommend should explain the relationship between the duty we recommend to assess the social care needs of a disabled child and assessments carried out under Early Help and Family Help.

(9) There should be a requirement that assessments are proportionate and appropriate to the circumstances of the child and their family.

The statutory guidance we recommend should provide a framework for assessment and include examples of appropriate and proportionate assessments.

(10) A person assessing the social care needs of a disabled child should be required to have the skills, knowledge and competence to carry out the assessment in question and be appropriately trained.

The assessor should consult a person who has expertise in the child's condition, or other aspects of the child's circumstances, where they consider that the child's needs require it.

(11) Local authorities should provide disabled children and their families with a written copy of the child's social care assessment.

(12) The statutory guidance we recommend should clarify the legal position in relation to delegating assessments in disabled children's social care and provide examples of when it is likely to be appropriate to delegate.

Assessing the needs of parents, carers and siblings[26]

(13) There should be a single duty to assess the social care needs of the parent or carer for a disabled child, which should arise upon:

(a) request by the parent or carer; or

(b) it appearing to the local authority that the parent or carer may have needs for support.

In assessing the needs of a parent or carer, the local authority should be required to:

(c) have regard to the well-being of the parent or carer; and

(d) provide the parent or carer with a written copy of their assessment.

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[26] See ch 6.

The statutory guidance we recommend should:

(e) clarify the rights of parents and carers to have their needs assessed and the requirements of such assessment; and

(f) clarify that assessments of parents and carers can be combined with the assessment of their child's needs, and that of their siblings if applicable.

(14) The assessment of the social care needs of the parent or carer of a disabled child should be proportionate and appropriate to their circumstances.

(15) The statutory guidance we recommend should direct local authorities to consider the relevant needs of any siblings as part of the assessment of the needs of a disabled child.

This statutory guidance should also direct local authorities to consider whether the sibling is a child in need, or a young carer[27] for the disabled child.

Siblings who are young carers of disabled children should continue to have their needs assessed under the existing legal framework for young carers. The duties owed to young carers should not be subsumed within the legal framework that applies to other carers.

The powers and duties to meet the needs of disabled children and their families[28]

(16) There should be a single duty to meet the social care needs of disabled children, subject to national eligibility criteria.

As a necessary precursor to this, further work will need to be carried out by the Government to evaluate the prospective impact of the recommendation, to inform the decisions as to how and when the recommendation is implemented, and precisely what the eligibility criteria should be.

This work should involve local authorities, the families of disabled children and those representing their interests.

As an interim measure while this work is carried out, we recommend that statutory guidance on eligibility criteria is published to which local authorities should have regard when drafting their own local criteria.

(17) One of the ways in which local authorities should be able to discharge the duty to meet the social care needs of a disabled child who meets the national eligibility criteria, should be by providing short breaks.

Short breaks should be defined as services to:

(a) provide breaks for the benefit of disabled children; and/or

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[27] See the Glossary and para 6.32 for the definition of a "young carer".

[28] See ch 7.

(b) assist individuals who provide care for disabled children to continue to do so, or to do so more effectively, by giving them breaks from caring.

These services should include:

(a) accommodation;

(b) the provision of care and support at home or elsewhere;

(c) educational or leisure activities; and

(d) services to assist parents and carers.

(18) Disabled facilities grants should continue to be administered by local housing authorities under the separate legal framework in the Housing Grants, Construction and Regeneration Act 1996.

(19) The single duty to meet the social care needs of a disabled child should operate in the same way as section 2 of the Chronically Sick and Disabled Persons Act 1970, as a duty that requires a local authority to exercise its functions under Part 3 of the Children Act 1989 to ensure that the child's social care needs are met, rather than a freestanding duty to provide services.

(20) The single duty to meet the social care needs of a disabled child should apply to any child who is in the area of the local authority. But if the child is ordinarily resident in the area of a different local authority, the local authority meeting the child's needs should be able to recover the costs of doing so from the authority where the child ordinarily resides.

(21) Local authorities should continue to have powers to:

(a) meet the social care needs of a disabled child that do not satisfy the national eligibility criteria;

(b) meet the social care needs of a disabled child pending an assessment of whether they satisfy the national eligibility criteria;

(c) provide services to parents, carers and family members, with a view to safeguarding or promoting the disabled child's welfare.

The range of services that should be available[29]

(22) The legal framework should include a non-exhaustive list of services that local authorities can provide to meet the social care needs of disabled children.

This list should cover:

(a) accommodation;

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[29] See ch 8.

(b) the provision of care and support at home or elsewhere;

(c) educational or leisure activities;

(d) services to assist families;

(e) adaptations to the home;

(f) counselling and other types of social work;

(g) goods and facilities;

(h) specialist equipment;

(i) assistance with travel arrangements;

(j) information, advice and advocacy.

The methods for providing services to disabled children and their families[30]

(23) The direct payment regime should be adapted so that the amount of the payment is sufficient to cover the actual cost of the provision necessary to meet the disabled child's assessed social care needs.

Local authorities should not be required to make a direct payment if:

(a) the direct payment would have an adverse impact on other services which the local authority provides or arranges for disabled children; or

(b) securing the proposed agreed provision by direct payments would not be an efficient use of the authority's resources.

Local authorities should be required to keep direct payments under review so that their sufficiency can be monitored and alternative arrangements made if the payment is insufficient or the family have not been able to secure the services required. This review process should be aligned with the review of the disabled child's care plan that we recommend below.

The statutory guidance we recommend should clarify that direct payments can only be made with the consent of the person to whom the payment will be made.

(24) There should be a right to a personal budget in disabled children's social care, on request by any disabled child aged 16 or 17, or their parent or carer, who has capacity within the meaning of the Mental Capacity Act 2005.

A local authority should not be required to prepare a personal budget in disabled children's social care where disaggregation of the funds for the personal budget would:

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[30] See ch 9.

(a) have an adverse impact on other services provided or arranged by the local authority for disabled children; or

(b) not be an efficient use of the local authority's resources.

The plan to meet the needs of a disabled child[31]

(25) Disabled children who are eligible to have their needs met by social services should have a statutory entitlement to a plan setting out what services they are to receive, and where, when, how and by whom those services will be provided.

Local authorities must provide disabled children and their parents or carers with a copy of their plan.

Local authorities must keep these plans under review.

(26) The statutory guidance we recommend should set out requirements as to the process and content of the plan to meet the needs of a disabled child.

(27) The plan to meet the needs of a disabled child should be combined with other plans for the child if it is appropriate and practical to do so.

The statutory guidance we recommend should provide examples of when it may be appropriate and practical to combine plans, and how this can be done effectively for each of the different plans a disabled child may have.

The statutory guidance we recommend should set out who has oversight of a combined plan and who is required to contribute to a combined plan.

Decision-making by disabled children[32]

(28) Any disabled child who has the ability to take the relevant action or make the relevant decision should be entitled to:

(a) request an assessment of their social care needs;

(b) make representations in the course of that assessment;

(c) make representations about the content of any plan to meet their needs;

(d) opt out of advocacy support, where a duty to provide such advocacy is otherwise owed;

(e) request that services are provided by way of direct payments; and

(f) make use of relevant remedies.

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[31] See ch 10.

[32] See ch 11.

(29) In deciding whether a child aged 16 or 17 has the ability to make a decision or take an action of the type described above, a local authority should apply the capacity test in sections 2 and 3 of the Mental Capacity Act 2005.

For children under the age of 16, the local authority should apply a test based on the functional element of the capacity test in section 3 of the Mental Capacity Act 2005, and should regard the child as able to make the decision if they are able to understand, retain, use and weigh the relevant information, and communicate their decision.

(30) A local authority should be required to carry out an assessment of the social care needs of a disabled child where the child is seeking to opt out of such an assessment if the child is experiencing, or is at risk of, abuse or neglect.

Advocacy[33]

(31) A disabled child should have the right to an independent advocate when the local authority is assessing and planning to meet their social care needs if they would otherwise experience substantial difficulty in understanding, retaining or using and weighing information, or communicating their views, wishes and feelings.

This should not require a local authority to arrange an advocate if: there is already an appropriate person to represent and support the child; or a child with the ability to refuse an advocate, does so.

(32) The parent or carer of a disabled child should have a right to an independent advocate when the local authority is assessing their needs as a parent or carer, if they would otherwise experience substantial difficulty in understanding, retaining or using and weighing information, or communicating their views, wishes and feelings.

This should not require a local authority to arrange an advocate if: there is already an appropriate person to represent and support the parent or carer; or a parent or carer with the ability to refuse an advocate, does so.

The transition to adult social care[34]

(33) The assessment of whether a disabled child is likely to have needs for care and support after becoming 18 years of age and, if so, what those needs are likely to be, should begin by the school year in which they turn 14.

The statutory guidance we recommend should clarify that this process can begin earlier if the local authority regards that as appropriate. In deciding whether it is appropriate to start the process earlier, local authorities should have regard to the need to prepare the child for adulthood and independent living.

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[33] See ch 12.

[34] See ch 13.

The intersection between disabled children’s social care and health care[35]

(34) Legislation should set out the existing dividing line between social care and health care for children, based upon the quality and quantity of the care being provided, emulating section 22(1) of the Care Act 2014.

(35) The statutory guidance we recommend should contain a section, co-produced between local authority and NHS representatives, and parents and carers, addressing the intersection between social care and health care in relation to children. It should make the following matters clear.

(a) How children with health care needs are to be identified, and by whom.

(b) Local authority responsibilities to meet the health care needs of disabled children.

(c) NHS responsibilities to meet the health care needs of disabled children.

(d) Expectations for joint working and joint accountability where local authority and NHS responsibilities overlap in the meeting of such needs.

(e) What mechanisms exist for dispute resolution.

(f) An expectation that disputes as between local authority and NHS organisations should not affect the meeting of the needs of the child in the interim.

(36) There should be a single provision setting out when a local authority with responsibilities under section 117 of the Mental Health Act 1983 is required to assess a disabled child’s social care needs. That provision should be contained in the single assessment duty that we recommend.

Assessing need in the local area and securing sufficient services to meet that need[36]

(37) Local authorities, and their partner integrated care boards,[37] should be required to prepare a joint strategic needs assessment covering the social care needs of disabled children in the area. This requirement should replace the requirement on local authorities to open and maintain a register of disabled children in their area.

Co-operation and joint working[38]

(38) Local authorities should be required to have a designated social care officer. Further operational detail about the role – such as the level of seniority – should be set out in the statutory guidance we recommend.

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[35] See ch 14.

[36] See ch 15.

[37] See para 15.1.

[38] See ch 16.

Remedies[39]

(39) There should be a fair, accessible, independent and effective system for resolving disputes about social care for disabled children. Further work is required on the part of Government to decide what the appropriate system should be.

(40) The SEND Tribunal should have an express power to recommend that a local authority carry out a social care assessment in an extended appeal.

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[39] See ch 17.

Chapter 2: A new legal framework

INTRODUCTION

2.1 In this chapter we consider whether a new legal framework is required for disabled children's social care, taking disabled children out of the scope of section 17 of the Children Act 1989. We also consider the guidance required to accompany the legal framework.

2.2 In our consultation paper, we dealt with these issues at the very end.[1] They formed the conclusion to which the rest of the paper led. However, the question of whether we have a new legal framework taking disabled children out of section 17 was perhaps the most important and divisive issue that we consulted on. Since it provides essential context to all of the recommendations we make in this report, we will start our report where the consultation paper left off, and deal with these issues first.

THE PROBLEM

2.3 Disabled children's social care law is too complicated. In fact, to describe it as a single piece of law is misleading: rather it is a medley of legal provisions spread across a body of primary and secondary legislation dating back to 1970, supplemented by various different pieces and forms of guidance, combined with numerous important court decisions interpreting the law. The most important piece of legislation in this area – the Children Act 1989 – is over 35 years old and has been amended many times over the years making it increasingly hard to follow. Further, there is no single piece of guidance or legislation which a family or local authority can go to, to find out what their respective rights and responsibilities are. We set out the legal framework in detail in our consultation paper. Tellingly, the document is over 300 pages long.

KEY LEGAL PRINCIPLES: A CHILD IN NEED

Section 17(1) of the Children Act 1989 places local authorities under a "general duty" to "safeguard and promote the welfare of children within their area who are in need" by providing a range of services appropriate to those needs. A child is "in need" if:[2]

(1) they are unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision of services by a local authority under Part 3 of the Children Act 1989;

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[1] Our proposals for a new legal framework can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 23.

[2] Children Act 1989, s 17(10).

(2) their health or development is likely to be significantly impaired, or further impaired, without the provision for them of such services; or

(3) they are disabled.

2.4 In addition, in the lead up to our consultation, parents and carers told us that there was too much emphasis on safeguarding disabled children from harm and abuse, and not enough attention given to identifying and meeting the needs arising from their disabilities. The power under section 17(1) of the Children Act 1989 has the dual function of safeguarding *and* promoting the welfare of disabled children (and other children in need). But many families reported that there was too much focus on the former at the expense of the latter. Often, we were told, parents and carers who asked for help in meeting the needs of their disabled child, were made to feel that their child's needs were the result of failings on their part rather than a lack of support. This trend was highlighted by the (then) Chief Social Worker for Adults and the Chief Social Worker for Children and Families in a 2021 report on working with autistic children and young people, which noted the "tendency to use the social work assessment as an opportunity to judge parenting capacity through a child protection lens rather than through a lens of social care need".[3] The trend has been referred to in academic research as "parent carer blame".[4] Specific examples we were given which gave rise to this perception of blame included:

(1) children being interviewed on their own by local authority officers tasked with assessing their needs;

(2) children's bedrooms being inspected;

(3) assessors looking in fridges and checking mattresses, and

(4) parents and carers being encouraged to attend courses where they could learn basic parenting skills.

2.5 Some of these practices may be appropriate in certain cases. For example, it might be necessary to see a child's bedroom to decide whether it requires adaptations. But when these practices occurred without any explanation to the family in instances where there was no evidence of risk of harm or abuse to the child, they left many families feeling, to quote the Independent Review of Children's Social Care, that they

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[3] Department of Health and Social Care, Chief Social Workers for Adults and Chief Social Worker for Children and Families, *A spectrum of opportunity: an exploratory study of social work practice with autistic young adults and their families* (February 2021).

[4] See L Clements, A L Aiello, *Institutionalising parent carer blame: The experiences of families with disabled children in their interactions with English local authority children's services departments* (July 2021); A Bilson, *Trends in Parent and Carer Blame: Patterns of service for children with a disability or mental illness referred to children's social care* (In press, 2025).

were “navigating a system that is set up for child protection, not support”.[5] We discussed this in chapters 4 and 23 of our consultation paper.

THE SOLUTION

Should there be a new legal framework for disabled children’s social care?

Our provisional proposal

2.6 Against this backdrop, in our consultation paper we proposed that:

> …disabled children should be taken out of the scope of section 17 of the Children Act 1989 and that there should be a new simplified and unified legal framework for addressing their social care needs.[6]

2.7 In making this proposal, our thinking was as follows.

(1) That it would simplify the law, providing a legal framework for disabled children’s social care similar to the Care Act 2014, which governs social care for adults who need care and support. That legislation provides an accessible, unified framework for adult social care.

(2) That it would strike an appropriate balance between the need to identify and meet the additional needs of disabled children, and the need to ensure they are safe from harm and abuse. We recognised the unique risks faced by disabled children and were clear that the powers and duties of local authorities to investigate and take action to keep them safe from harm (such as section 47 of the Children Act 1989) needed to be retained. However, we thought that a separate legal framework focused exclusively on meeting needs arising from disability would reduce the tendency for “parent carer blame”.

(3) That it would provide a vehicle to introduce the other legal changes proposed in our consultation paper. In the consultation paper we made a number of wide-ranging proposals relating to things like national eligibility criteria, advocacy provision, participation and statutory principles. These proposals (in line with our terms of reference) applied to disabled children only. We were concerned that introducing these changes into Part 3 of the Children Act 1989 – which covers a wide range of children and not just disabled children – would further complicate an already complicated piece of legislation.

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[5] J MacAlister, *An independent review of children's social care: The Case for Change* (June 2021) pp 29 to 30.

[6] Disabled Children’s Social Care (2024) Law Commission Consultation Paper No 265 para 23.23. This was in line with our terms of reference which specifically required us to consider whether “the inclusion of disabled children as children in need under section 17 of the Children Act 1989” was a barrier to meeting their needs. In suggesting that disabled children be taken out of the scope of section 17 of the Children Act 1989, our intention was that the specific category of child in need which relates to disability (Children Act 1989, s 17(10)(c)) should be removed, albeit a disabled child might still be classed as a child in need if they fell in one of the other more general categories, which relate to children who need support relating to health or development (Children Act 1989, s 17(10)(a) and (b)).

Consultation analysis

2.8 In total, 135 consultees responded to this question. A majority (79) agreed with the proposal, but a significant minority (25) disagreed with it, and a similar number (31) neither agreed nor disagreed.

2.9 Many of those in favour of the proposal saw it as a way of making the law clearer and more accessible. For example, the Prader-Willi Syndrome Association UK noted that "the complexity of the current system provides anxiety and confusion for families" and the Independent Provider of Special Education Advice felt that our proposal "would make it easier for parents and local authorities to understand their legal rights and duties and would make it more likely that disabled children would receive the support they need".

2.10 The desirability of separating out the functions of meeting the needs of a disabled child and safeguarding them from harm and abuse and reducing the associated trend of "parent blaming", were also recurrent themes among responses in favour of the proposal. For example, the Richmond Parent Carer Forum noted that "the needs of disabled children and their families are un-necessarily and inappropriately assessed through a safeguarding lens" which can lead to both "adverse consequences for individual children and families" as well as presenting "a barrier to families asking for the help that they need and are entitled to". Similarly, the National Network of Parent Carer Forums expressed the view that "the system is too focused on safeguarding rather than addressing the broader identified needs of children and families".

2.11 Those who opposed the proposal did not disagree with the objectives of simplifying the legal framework or striking a more appropriate balance between safeguarding disabled children from harm and meeting their needs. However, they questioned whether a new legal framework taking disabled children out of the scope of section 17 of the Children Act 1989 would achieve these objectives and were concerned about the risk of unintended consequences. The principal risks consultees identified were described as follows.

(1) A new legal framework would make it harder to take a holistic approach when identifying and meeting the needs of disabled children. For example, the Association of Lawyers for Children noted that "section 17 duties to children are holistic; they are not focussed simply on needs arising from disability", suggesting that our description of the role played by section 17 was oversimplified. Elaborating on this theme the British Association of Social Workers (England) expressed the view that:

> …issues such as poverty, isolation, racism, bullying at school, relations with siblings, isolation & lack of opportunities to develop friendships, poor housing, parent carer burnout, emotional wellbeing and the breadth of their intersecting identity based needs would be less likely to be addressed appropriately within a specialist assessment that focusses on needs relating to a disability.

(2) A separate legal framework would result in the segregation of disabled children. For example, Kent County Council highlighted the risk that our proposal might "inadvertently reinforce societal stigma, framing disability as an issue to be managed separately rather than part of a broader understanding of children's

welfare". Endorsing this theme, Dame Christine Lenehan voiced concern that a framework which separates disabled children out "will always be seen as lesser than one which safeguards children and therefore will be unable to attract the resources and calibre of staff necessary to deliver it".

(3) A separate, additional legal framework would complicate, rather than simplify, the law. East Sussex County Council noted the potential for this to result in "duplication and further confusion for families and professionals to navigate". In similar terms, the Association of Directors of Children's Services and the Local Government Association remarked on the potential for the proposal to lead to duplication and create an even more complex picture for families to navigate.

(4) A separate legal framework could make it harder to identify and deal with cases where a disabled child faces a genuine risk of harm or abuse. By way of context, the Association of Lawyers for Children reminded us that "children with disabilities are over-represented in children who suffer abuse: sexual, physical, neglect and emotional and resultant significant harm". Against this backdrop, the Council for Disabled Children expressed concern that there would be "a significant risk of unintended consequences particularly in relation to safeguarding disabled children". Similarly, Central Bedfordshire Council's Children with Disabilities Service warned "that safeguarding our most vulnerable children in society may be missed". Referring to her extensive professional experience in this field Dame Christine Lenehan explained that:

> As the lead Reviewer on the Hesley Review I also saw first hand the impact of child abuse and even now the lack of understanding about abuse and disabled children, the challenge in the past had been that disabled children's teams were not confident about investigating abuse and child protection teams did not understand disability, I worry we will make this worse. I understand parental concerns, but I am not sure this is created by the legal framework.

Discussion and recommendations

2.12 In deciding on our recommendation, we start with the common ground between the consultees. None of those who disagreed with the proposal were opposed to the objective of simplifying the legal framework. Similarly – and significantly – nobody who responded to the consultation or attended any of our consultation events around the country disagreed with the suggestion that, when it comes to disabled children, there is sometimes too much focus on safeguarding them from harm and abuse, and also that parents are sometimes made to feel as though they are to blame for their child's additional needs. For example, the British Association of Social Workers (England) (BASW) – who represent a significant number of social workers across the country[7] – endorsed the concerns that we reported about parent carer blame, characterising them as "systemic failings result[ing] from poor practice, usually driven by lack of both staffing and financial resources". The concern expressed by groups such as BASW was that trying to solve this problem by means of a separate legal framework, taking disabled children out of the scope of section 17 of the Children Act 1989, carried with

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[7] The British Association of Social Workers is the UK's professional association for social work, with over 22,000 members. Their response was on behalf of the England membership only.

it a risk of unintended consequences. They (and others) felt that the problems we described were not the result of any "inadequacy in the law" and that changing the law would not remedy them. Rather the remedy lay in:

> …improved guidance, better training for Social Workers, a right to advocacy for both parents and children, and most importantly, a social care system that is resourced so as to allow Local Authorities to discharge their duties in the way the law currently intends.

2.13 Turning to those who agreed with the proposal, no individual or group we heard from took issue with the suggestion that disabled children may face risks of harm or abuse that are not faced by other children.[8] Further, no consultee sought to downplay the vital role which section 17 of the Children Act 1989 plays in allowing the wider needs of disabled children to be viewed and met holistically.

2.14 In light of the substantial common ground between consultees, we are persuaded that although we correctly identified the problem in our consultation paper, the solution we proposed was not the right one. As such, our objective now is to find the middle ground, which deals with the problem to the extent that we can, while minimising the risk of unintended consequences. We think this is best achieved in the following way.

(1) Disabled children should remain within the scope of section 17 of the Children Act 1989.

(a) As we observe in our consultation paper, section 17 was a groundbreaking provision. The intention behind it was to bring together the various "scattered provisions" providing help to families with children alongside "a broad power to provide services to promote the care and upbringing of children within their families".[9] Doing this meant bringing together the law relating to services for disabled children with the law relating to services for children in need of protection from harm. In the words of Baroness Hale, one of the architects of the Children Act 1989, "the hope was that all would be seen simply as children in need of help".[10] Removing disabled children from the scope of section 17, and consciously undoing what the framers of the Children Act 1989 set out to achieve, carries the risks of segregation for disabled children and the deprioritisation of this area of social work.

(b) Removing disabled children from the scope of section 17 may also impede the ability of social workers to identify and meet the needs of disabled children holistically. This point is significant. BASW pointed to the role that section 17 plays in meeting needs relating to things like

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[8] We discuss the evidence base for this risk in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 23.20(2). For present purposes we highlight that the evidence does not clearly differentiate between abuse and neglect outside the home or in institutional settings on the one hand, and abuse and neglect in the familial setting on the other. As such, in referring to this risk, we are not suggesting that risks faced by disabled children emanate from their families.

[9] Department of Health and Social Security, *Review of Child Care Law, Report to Ministers of an Interdepartmental Working Party* (September 1985) paras 5.7 to 5.15.

[10] Baroness Hale, *30 Years of the Children Act 1989 - Scarman Lecture 2019* (November 2019).

poverty, isolation, racism, bullying and poor housing, as well as needs arising directly from disability. By way of context, recent research carried out by and for the Association of Directors of Children's Services highlights the increasing reliance on section 17 to supplement rents and sustain families living in unaffordable or poor-quality housing.[11] Similarly, in consultation events we heard from several parents and carers who had become homeless or faced the risk of homelessness owing to the financial cost of supporting their disabled child. There are difficult issues of policy underpinning these trends: the Association of Directors of Children's Services describes the use of section 17 for these purposes as being "unsustainable".[12] We cannot, in this review, seek to resolve these issues. But for present purposes, the critical point is that section 17 *is* being used in this way, and there is a risk that removing disabled children from the scope of section 17 might make it harder to meet these wider needs.

(c) The holistic role played by section 17, as was pointed out to us, is one way in which the children's social care system differs from the adult social care system. This difference means that the Care Act 2014 is not necessarily an appropriate model to emulate.

(2) A discrete set of provisions should be introduced into the Children Act 1989, to implement the various other recommendations we make in this report. This new legal framework would apply solely to children who are disabled within the meaning of section 17.[13] This would provide a simpler, largely unified framework for disabled children's social care while keeping disabled children within the scope of section 17 and avoiding the complexity arising from adding a further, separate piece of social care legislation to the statute book.

(3) As we discuss below at paragraphs 2.18 to 2.24, this new legal framework should be accompanied by dedicated statutory guidance, and this guidance should include material which helps local authorities to ensure that there is an appropriate balance struck between identifying and meeting the needs of disabled children and their families in a non-stigmatising way and safeguarding them from harm and abuse. The point of this is to avoid inappropriate parent and carer blame. It is not for us to dictate the form or detailed content of the guidance, or what the appropriate balance is. But it is clear from our consultation that guidance is needed in order to ensure that the legal framework operates effectively to meet the social care needs of disabled children. We restrict our recommendation to guidance, as that is the issue upon which we consulted. But we note that there were other suggestions made by consultees as to how this objective might be achieved which also merit consideration: these included training and resourcing.

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[11] ADCS, *ADCS Safeguarding Pressures Research – Phase 9* (January 2025).

[12] ADCS, *Headlines from phase nine of the ADCS Safeguarding Pressures research* (January 2025).

[13] In Chapter 3 we make recommendations to revise and update the definition of disability.

Recommendation 1.

2.15 Disabled children should remain within the scope of section 17 of the Children Act 1989 and a disabled child should continue to be classed as a “child in need”.

2.16 A discrete set of provisions should be introduced into the Children Act 1989, to implement the various recommendations we make in this report, thereby providing a simpler, largely unified framework for disabled children’s social care. This new legal framework would apply solely to children who are disabled within the meaning of section 17.

2.17 This new legal framework should be accompanied by dedicated statutory guidance, and this guidance should include material which helps local authorities to ensure that there is an appropriate balance struck between identifying and meeting the needs of disabled children and their families in a non-stigmatising way and safeguarding them from harm and abuse.

What guidance is needed to accompany the legal framework?

Our provisional proposal

2.18 We proposed that the legal framework for disabled children’s social care should be “accompanied by two sets of guidance, one for professionals applying the law, and the other for parents and carers who need to understand their rights under the law”.

Consultation analysis

2.19 In total, 135 consultees answered this question, with 108 in favour of the proposal, 12 against and 15 neither for nor against. Those in favour of the proposal focused on the vital role to be played by separate guidance in making the legal framework clearer and more accessible, highlighting the importance of guidance for parents and carers to “know their rights”. A number of consultees pointed to the current lack of dedicated guidance on disabled children’s social care and the lack of clarity this creates.

2.20 Consultees who were against the proposal tended to take the view that these same objectives could be fulfilled by one set of guidance written in a style accessible for families and professionals. The *Care and Support Statutory Guidance*[14] was cited as an example of a single piece of guidance which is relatively accessible to all. Multiple consultees also highlighted the importance of co-production in drafting the guidance and suggested that other formats – such as accessible versions for children and young people – might also be needed. Finally, several consultees emphasised the importance of considering the precise legal status and effect of any guidance. They queried whether both sets of guidance would be statutory guidance which local authorities must follow unless there is good reason to deviate from it. If so, they questioned how this would work if only one of the sets of guidance was directed at

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[14] Department of Health and Social Care, *Care and Support Statutory Guidance* (July 2025).

local authorities and whether there might be a risk of conflict between the two guidance documents.

Discussion and recommendations

2.21 No consultees disputed the need for accessible guidance to enable those who use the disabled children's social care system to understand their respective rights and responsibilities. Rather the responses which were against our proposal focused on points of detail and context which had been overlooked in our proposal. We accept the validity of these points and the need to adapt our proposal accordingly. Our intention was that the guidance should be statutory guidance issued under section 7 of the Local Authority Social Services Act 1970, and that local authorities must follow it unless there is good reason to deviate from it;[15] otherwise it may not have any significant effect on practice. It follows from this, that to avoid any potential for conflict, there should be only one set of guidance, but that guidance should be reproduced in a variety of versions to make it accessible to all who need to use it.[16] That should include a version for children and young people. Finally, to ensure that the content and format of the guidance is fit for purpose, it should be produced with input from disabled children and young people, families and local authorities. This co-production element is, in our view, particularly important in order to achieve the balance we advocate at paragraph 2.14(3) above.

Recommendation 2.

2.22 There should be a single, comprehensive piece of statutory guidance on disabled children's social care law. That guidance should set out the respective rights and responsibilities of disabled children, families, and local authorities.

2.23 The guidance should be published in a variety of formats, to ensure that it is accessible for all of the various groups and individuals who need to rely on it.

2.24 The guidance should be produced with input from disabled children and young people, families, and local authorities.

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[15] See para 1.18.

[16] See Department for Education and Mencap, *Changes to special educational needs and disability support - Easy read guide for children and young people* (2014) for an example of an accessible version of a statutory guidance document. It contains the following explanation at the outset to account for minor deviations or omissions from the guidance on which it is based: "This guide sets out the new law for those with special educational needs or a disability. Some of the new law is not easy to summarise in a few lines, and we have had to simplify it for this guide."

Chapter 3: The definition of disability

INTRODUCTION

3.1 In this chapter, we consider how "disability" should be defined for the purposes of disabled children's social care law.[1]

KEY LEGAL PRINCIPLES: DEFINITIONS OF DISABILITY

The Children Act 1989

The current definition of disability for the purposes of disabled children's social care law is found in the Children Act 1989 which provides that:

> For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed.[2]

The same definition applies for the purposes of the Chronically Sick and Disabled Persons Act 1970.[3]

The Equality Act 2010

The Equality Act 2010 prohibits discrimination against disabled people. For the purposes of that Act a person has a disability if:

(1) they have a physical or mental impairment; and

(2) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

"Substantial" means "more than minor or trivial".[4] The effect of an impairment is "long-term" if it: has lasted for at least 12 months; is likely to last for at least 12 months; or is likely to last for the rest of the life of the person affected.[5] The Equality Act (Disability) 2010 Regulations adapt the definition of "substantial and long-term" for children under six. They also prevent addiction and certain behaviours (such as "a tendency to physical or sexual abuse") from amounting to impairments.[6]

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[1] Our proposals on the definition of disability, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 19.

[2] Children Act 1989, s 17(11). No additional disabilities have been prescribed.

[3] Chronically Sick and Disabled Persons Act 1970, s 2(4).

[4] Equality Act 2010, s 212.

[5] Equality Act 2010, s 6(6) and Sch 1, para 2.

[6] The Equality Act 2010 (Disability) Regulations 2010, SI No 2128, regs 3, 4 and 6.

The Children and Families Act 2014

For the purposes of Special Educational Needs and Disability (SEND) law, the Children and Families Act 2014 uses the definition of disability contained in the Equality Act 2010. The definition of special educational needs in the 2014 Act includes children who have a disability – as defined in the Equality Act 2010 – which prevents or hinders them from making use of facilities of a kind generally provided for others of the same age in mainstream education, and which requires special educational provision.[7]

The social model of disability

The social model is a concept rather than a definition. It embodies the principle that a person is disabled not by any impairment they might have, but because of society's failure to respond to their needs in a way that enables them to live life on an equal basis with others. The social model underpins the United Nations Convention on the Rights of Persons with Disabilities, which was concluded in 2006 and signed by the United Kingdom in 2009. Disabled people played a significant part in its drafting. It has not been incorporated into the law of England[8] but represents an international consensus on the rights of disabled people.

THE PROBLEM

3.2 In our consultation paper, we identified two problems with the definition of disability in the Children Act 1989.[9] The first and most obvious problem is that the language of the definition is out of date, reflecting a time when society had a very different understanding of what it means to be disabled. The second is that the definition is inconsistent with the definition that applies in SEND law. This adds an unnecessary layer of complexity to the law, meaning that a local authority may need to apply two different definitions to the same child in two closely related contexts.

THE SOLUTION

Following the Equality Act 2010 approach

Our provisional proposals

3.3 We proposed that the definition of disability contained in section 6 of the Equality Act 2010 should apply to disabled children's social care. This definition is relatively well-known and easy to understand and is widely used in guidance and cross-governmental policy.

3.4 We did not, however, propose to adopt the exclusions from the definition of disability contained in the Equality Act 2010 (Disability) Regulations 2010, such as addiction and a tendency to physical abuse. This was because we were concerned that they

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[7] Children and Families Act 2014, ss 20(1) to (2) and 83(3).

[8] *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428 at [77] to [96].

[9] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 19.12 to 19.15.

might not be appropriate for disabled children's social care law. There are currently no such exclusions in the Children Act 1989 definition and we were conscious that introducing such exclusions might have the unintended consequences of excluding children born with addictions, or conditions arising from parental addiction, or children who exhibit behaviour that challenges,[10] from receiving social care.

3.5 We acknowledged that our proposal would not result in complete consistency between disabled children's social care law and SEND law. However, we suggested it would reduce the level of inconsistency significantly.

3.6 Alongside this proposal, we sought views on the modified definition of "substantial and long-term" that applies to younger children which is contained in the Equality Act 2010 (Disability) Regulations 2010. This provides that where a child under six years of age has an impairment which does not have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, the impairment is to be taken to have such an effect if it would normally have that effect on a person over the age of six.[11] We asked consultees to tell us whether they thought this modified approach was appropriate for disabled children's social care law.

Consultation analysis

3.7 In total, 141 consultees responded to our proposal to adopt the Equality Act 2010 definition of disability. Of those, the majority (98) agreed with our proposal. They did so primarily because of the alignment it would bring between the definition of disability for the purposes of disabled children's social care and that in the Equality Act 2010. As Steve Broach KC put it, "tying the definition to the Equality Act 2010 is the only sensible and legally coherent approach". A similar view was expressed by the Office of the Children's Commissioner. Other consultees emphasised that the current definition in the Children Act 1989 was outdated, with one disabled participant at a consultation event characterising the current definition as "disgusting".

3.8 Some of the eight consultees who were opposed to our proposal expressed concerns that the Equality Act 2010 definition, itself, was not fit for purpose. A number of consultees highlighted that they considered the reference to "impairment" in the Equality Act 2010 problematic. For example, the Challenging Behaviour Foundation observed that this language "carries negative connotations and may not accurately reflect the diverse range of conditions which can affect a child's ability to perform daily activities". The negative connotations of the language were less of a concern in the consultation sessions we facilitated for children and young people. The prevailing view at these events was that rather than seeking to avoid negative language to define the word disability, the focus should be on encouraging society generally to view disabled people more positively.

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[10] The Challenging Behaviour Foundation describes challenging behaviour as "a range of behaviours which some people with severe learning disabilities may display when their needs aren't being met" including hurting others, self-injury and destructive behaviour. We use the phrase "behaviour that challenges" to describe such conduct as this was the preferred terminology among families at consultation events.

[11] The Equality Act 2010 (Disability) Regulations 2010, SI No 2128, reg 6.

3.9 The Potato Group[12] – an organisation made up of parents of adopted children who have experienced trauma – expressed strong concerns that the Equality Act 2010 definition was too narrow. They observed that adopted children often have "lifelong mental impairments due to their early adversity" and that the "long term effects from their trauma… absolutely effects their ability to carry out normal day to day activities", but this is often overlooked by local authorities. They cited the difficulties in obtaining a diagnosis in respect of needs arising from trauma and the omission of developmental trauma from the Diagnostic and Statistical Manual of Mental Disorders,[13] as factors that contributed to this situation. In light of these difficulties, they felt that the first part of the Equality Act 2010 definition, which requires a "physical or mental impairment", could further impede access to social care for adopted children.

3.10 A total of 130 consultees responded to our proposal that the exclusions contained in the Equality Act 2010 (Disability) Regulations 2010 should not apply in the context of disabled children's social care law. Of those who responded, the majority (104) agreed that the exclusions should not apply. They primarily did so because they considered that this would ensure that the definition of disability was inclusive. For example, the Somerset ICB highlighted the importance of ensuring that "children aren't denied services or labelled as unworthy of care simply because of specific behaviours that are difficult to manage" observing that such behaviours "could stem from unmet needs, miscommunication, or a lack of appropriate support". Relatedly, a focus group we convened with parents of Black and mixed heritage children raised the possibility that the exclusions, if applied to disabled children's social care law, could adversely impact on those children in particular. They told us that disabled Black children who display behaviour that challenges can be characterised as disruptive or "troublemakers", as opposed to children who may have unmet needs arising from a disability. The concern of the group was that exclusions based on "abusive" behaviour might be inappropriately and disproportionately applied to these children.

3.11 Conversely, some of the thirteen consultees who opposed the proposal suggested that the behaviours under consideration were not disabilities. Alison Bush, for instance, suggested that they were, instead, "learned behaviours" while emphasising that "of course, they should receive appropriate help".

3.12 We received 99 responses to our request for views on whether the modified definition of the "substantial and long-term" test that applies to children under the age of six was appropriate for disabled children's social care law. Of these, 43 felt that the basic definition in the Equality Act 2010 does require modification in order to provide for the specific needs of younger children and 26 thought that it does not. However, a number of consultees appeared to have misunderstood how the test works, suggesting either that this aspect of the law is unclear, that our explanation of it was unclear, or both.

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[12] Parents of Traumatised Adopted Teens Organisation.

[13] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR)* (5th ed 2024).

Discussion and recommendations

The basic definition

3.13 Consultation reinforced our view that the only viable option to replace the outdated definition of disability in the Children Act 1989 was that contained in section 6 of the Equality Act 2010. That does not mean that we consider that this is necessarily a perfect solution. We raised a number of concerns in our consultation paper about the Equality Act 2010 definition. These included:[14]

(1) a commonly held perception that a formal diagnosis is required in order for a person to be recognised as disabled within the meaning of the Act;

(2) that the language of section 6 of the Equality Act 2010 (in particular, the use of the word "impairment") is offensive to some and aligns more closely with the medical model of disability, rather than the social model;

(3) the potential difficulty in applying this definition to children suffering the after-effects of trauma.

3.14 As the consultation analysis section above illustrates, these concerns were shared by a number of consultees. However, the Equality Act 2010 definition is the principal definition of disability in domestic law and – significantly – is the definition that applies in the context of SEND. It is well-known and understood and is widely used in guidance and cross-governmental policy. These are all strong factors in favour of this solution, and, in the absence of viable alternatives, our view is that this is the definition that should apply in disabled children's social care and that the appropriate course is to seek to mitigate the concerns set out in paragraph 3.13, as follows.

3.15 Dealing with the three points in turn, the courts have made clear that a specific medical diagnosis is not required in order to establish that a person is disabled within the meaning of the Equality Act 2010. Further it would be "an error of law… to decide that an impairment meeting the description in section 6(1) was not a disability simply because it was not an identified medical condition".[15] This should be made clear within the guidance that we recommend in Chapter 2, to accompany the legal framework for disabled children's social care law.

3.16 In relation to the language of section 6 of the Equality Act 2010, we cannot avoid the fact that the word impairment carries negative connotations for some people. However, guidance can and should clarify that this definition can encompass the diverse range of conditions which can affect a child's ability to perform daily activities.

3.17 As to the potential difficulties that may arise in trying to establish whether a child who is suffering the consequences of trauma has a disability, we acknowledge the concerns raised by the parents of adopted children from whom we have heard during this review. Although, numerically, they represent a minority of the parents and carers of disabled children, this cohort provided us with some of the most extreme and

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[14] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 at paras 19.17 to 19.20.

[15] *Young v Commissioner of Police of the Metropolis (Disability Discrimination; Meaning of Disability)* [2024] EAT 55 at [14] by Jason Coppel KC, sitting as a Deputy High Court Judge.

troubling examples of cases where a lack of local authority support has had devastating consequences on the life of a child or young person. The consequences included children returning to care, being detained within the criminal justice system, and facing serious harm or death. That notwithstanding, we are not in a position to state that all children who have experienced trauma should be regarded as disabled for the purposes of disabled children's social care law. As we said in our consultation paper, that goes beyond the role of law reform and raises difficult questions engaging clinical, social work and political policy considerations. However, we make the following observations.

(1) If a child has needs arising from trauma, the lack of a recognised medical diagnosis should not by itself prevent them from being accepted as disabled within the meaning of the Equality Act 2010. See paragraph 3.15 above.[16] This could be clarified in the dedicated guidance on disabled children's social care that we recommend in Chapter 2.

(2) A child who has needs arising from trauma who, nevertheless, is not recognised as being disabled within the meaning of the Equality Act 2010, may still be a child in need for the purposes of section 17 of the Children Act 1989, and entitled to support on that basis. Again, this could be clarified in guidance.

(3) The problems that we have heard in the course of this review about the difficulties faced by the families of adopted children in accessing local authority support are many and varied. However, the consequences where sufficient support is not provided are invariably severe. Many of the problems we heard about go well beyond the scope of this review but, given their importance, we highlight this as an area which the Department for Education may wish to consider in future work.

Exclusions from the basic definition

3.18 The next question is whether the exclusions contained in the Equality Act 2010 (Disability) Regulations 2010 should apply to disabled children's social care. While the language used in the Children Act 1989 definition of disability is outdated, it does enshrine a broad approach, including children with addictions or whose impairments manifest themselves in abusive behaviours. Applying the exclusions contained in the 2010 Regulations might narrow that scope. Consultation has reinforced our view that this would not be an appropriate recommendation for us to make. We accept that this will mean that the definition of disability that applies in disabled children's social care law is not identical to the definition that applies in SEND. However, in practical terms, the inconsistency will be minimal. The impression that we have gained over the course of the review is that the exclusions are rarely invoked in the SEND context and so will only result in a different outcome in a minority of cases.

Modifications to the basic definition

3.19 There was no clear consensus in relation to whether the modified definition of the "substantial and long-term" test that the Equality Act 2010 (Disability) Regulations 2010 applies to children under the age of six, was appropriate for disabled children's

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[16] Nor should lack of a formal diagnosis be a barrier to obtaining an assessment or eligibility for services: see paras 5.28, 7.23 and 7.41.

social care law. However, we note that this modification applies in SEND law and during consultation events and within consultation responses no-one suggested to us that the modification had unintended consequences or was otherwise inappropriate in that context. If, in practice, the modified definition works effectively in SEND, we cannot readily identify any reason why it would not work in the social care context as well. For the sake of consistency with the SEND system we therefore recommend the inclusion of this modification.

Placement of the definition

3.20 We recommend that the definition of disability is set out in full in section 17(11) of the Children Act 1989, as opposed to cross-referring to the definition in the Equality Act 2010. This is in keeping with our central recommendation in Chapter 2 that there should be a simpler, largely unified framework for disabled children's social care introduced into the Children Act 1989.

Recommendation 3.

3.21 For the purposes of disabled children's social care law, a child should be regarded as having a disability if:

(1) they have a physical or mental impairment; and

(2) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

3.22 The modified definition of "substantial and long-term" contained in regulation 6 of the Equality Act 2010 (Disability) Regulations 2010, that relates to younger children, should apply to this definition of disability. This provides that where a child under six years of age has an impairment which does not have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, the impairment is to be taken to have such an effect if it would normally have that effect on a person over the age of six.

3.23 The exclusions contained in regulations 3 and 4 of the Equality Act 2010 (Disability) Regulations 2010 should not be applied to this definition of disability.

3.24 The statutory guidance we recommend in Chapter 2 should:

(1) clarify that a recognised medical diagnosis is not necessary to satisfy this definition of disability;

(2) clarify that the definition can encompass the diverse range of conditions which can affect a child's ability to perform daily activities; and

(3) address the particular circumstances of disabled children in adoptive families.

Chapter 4: Statutory principles

INTRODUCTION

4.1 In this chapter, we consider whether there should be a set of statutory principles that apply to disabled children's social care and, if so, what they should be.[1]

KEY LEGAL PRINCIPLES: WHAT IS A STATUTORY PRINCIPLE?

When we use the term "statutory principle" we are referring to a legislative provision which sets out how the legislation should be applied to specific situations. We use the term "statutory principle" in contrast to a rule which tells decision-makers to have regard (or particular regard) to a list of factors. Such rules tell the decision-maker what factors they need to take into account when making a decision. But they stop short of giving the decision maker the type of guidance that is provided by a principle. The two can be combined, by setting out a principle combined with a list of factors which must be considered when giving effect to the principle.

THE PROBLEM

4.2 At present, there are no statutory principles governing the provision of social care for disabled children. The *Children's Social Care National Framework* does set out six "principles of children's social care"[2] that are intended to guide social work practice. However, they are not statutory principles and, for the most part, decision-makers are not under a duty to apply them in an individual case. In contrast, statutory principles are a feature of Part 1 of the Children Act 1989,[3] the Mental Capacity Act 2005,[4] and the Care Act 2014.[5] In the lead up to the consultation, stakeholders – including judges, local authority decision-makers and those providing legal advice and assistance to families – commented favourably on the use of statutory principles in these contexts. They told us that principles can have a positive impact on culture and attitudes and provide assistance in making decisions in individual cases.

THE SOLUTION

Statutory principles for disabled children's social care

Provisional proposals

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[1] Our proposals on statutory principles and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 20.

[2] Department for Education, *Children's Social Care National Framework* (December 2023) p 14.

[3] Children Act 1989, s 1. Dealing with court orders in relation to the upbringing of children.

[4] Mental Capacity Act 2005, s 1. Governing decision-making on behalf of persons who lack capacity.

[5] Care Act 2014, s 1. The legal framework for adult social care.

4.3 With a view to replicating these positive effects, we proposed that statutory principles should be introduced to disabled children's social care law. Specifically, we proposed that decision-making in relation to the social care needs of disabled children should be based upon:

(1) an overarching principle that the best interests of the child should be the primary consideration for decision-makers;

(2) a set of considerations to which decision-makers must have regard in applying that principle; and

(3) a final check, that decision-makers must apply, being whether the purpose being served by the proposed decision or action can be as effectively achieved in a way which is less restrictive of the child's rights and freedom of action.

4.4 The set of considerations to which we proposed that decision-makers should have regard consisted of:

(1) the importance of promoting the upbringing of the child by the child's family, in so far as doing so is consistent with promoting the best interests of the child;

(2) the importance of the child participating as fully as possible in decisions relating to the exercise of the function concerned;

(3) the importance of the child being provided with the information and support necessary to enable participation in those decisions, having regard to their particular needs;

(4) the views, wishes and feelings of the child;

(5) the views, wishes and feelings of the child's parents or carers and their knowledge of their child's condition and needs;

(6) the need to support the child and their parents or carers in order to facilitate the development of the child and to help them achieve the best possible outcomes at each stage of their life;

(7) the importance of preventing or delaying the development of the needs for care and support;

(8) the need to prepare the child for adulthood and independent living; and

(9) the characteristics, culture and beliefs of the child (including, for example, language).

4.5 These considerations are a mixture of:

(1) requirements under other closely related legislation (such as the Children and Families Act 2014) which we would like disabled children's social care to align with;

(2) matters that should be considered when working with disabled children but are sometimes overlooked; and

(3) duties under international treaties like the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities.

4.6 To help us evaluate the potential effectiveness of statutory principles we asked consultees for their experiences of the operation of section 1 of the Care Act 2014. We also asked whether the approach to decision-making under the principles we proposed might need to vary depending on the age of the child.

Consultation analysis

4.7 In total, 126 consultees answered the question of whether there should be statutory principles. Of these, the majority (115) agreed there should be, largely on the basis that statutory principles could support good quality decision-making. The Challenging Behaviour Foundation (CBF) also emphasised that the final check we proposed (see paragraph 4.3(3)) was “crucial to safeguarding the rights and freedoms of children with disabilities”. The CBF suggested that the approach “aligns with the principles of human rights and ensures that children are not subjected to unnecessary limitations on their autonomy”. In a similar vein, Hertfordshire County Council Children’s Services “particularly supported” the check from a children’s rights perspective.

4.8 A number of those supporting the proposal sought further clarification of what was intended. For instance, Steve Broach KC observed that if the best interests of the child were “the” primary consideration, “that would suggest on the current case law that they would trump resource considerations”. Whilst he noted that he would welcome this, “it would seem to be unrealistic”. Rather, he suggested that “‘a’ primary consideration may be preferred - which following *ZH (Tanzania)*[6] would mean the child's best interests have to be considered first but could be trumped by countervailing considerations of considerable force, including cost”. Some parent carer consultees, however, emphasised that they considered that the child’s best interests had to be paramount, irrespective of cost. As one parent carer put it, “the best interests of the child need to come first, not the best interests of [the local authority’s] budget”.

4.9 A variety of views were expressed as to the relative weight that should be given to the views of children, parents and carers when applying our proposed principles.

(1) Some parents and carers were concerned that children might be placed at risk if too much weight was given to the views of the child, including their views about the involvement of their parents or carers.

(2) In relation to the views of parents and carers, one parent carer suggested that their views should take priority over social workers’ views. Conversely, the North West Association of Directors of Children’s Services suggested there was a tendency for “parental voice [to] dominate decisions”.

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[6] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 at [23] by Lady Hale.

4.10 Some consultees supported the proposal, but made clear how important it was for steps to be taken to implement the principles consistently. We were also challenged by the National Children with Disabilities Network as to why the principles should be limited solely to disabled children. One of the three consultees who opposed the proposal, the Parent and Carer Alliance, expressed concern that the principles might be ineffective, amounting – in practice – to guidance which might be disregarded.

4.11 A total of 130 consultees responded to the set of considerations which we proposed that decision-makers should have regard to. Of these, 111 agreed with the list of considerations, two disagreed and 17 neither agreed nor disagreed. Those who agreed felt that the considerations we proposed would support good quality decision-making. Of those who disagreed, one consultee was concerned that the considerations might be disregarded by local authorities and the other was concerned that factors such as the child's history of abuse and neglect were not included in the list of considerations.

4.12 We received a relatively small number of responses (22) to our comparative question about the effect of section 1 of the Care Act 2014. Garden Court Chambers Community Care and Education Law Team,[7] the Community Care Lawyers Group and the Court of Protection Bar Association all expressed the view that the list of considerations in section 1 was helpful. As the Court of Protection Bar Association put it, "it provides a clear and authoritative checklist for decision makers and may also be used as a benchmark to evaluate and hold decision-makers to account".

4.13 A total of 75 consultees answered the question about whether the approach to principles should vary according to the age of the child. There was a range of views expressed, with the biggest theme being that the approach should vary primarily by reference to the ability of the child, rather than their age. For example, the Down's Syndrome Association expressed the view that the participation of children with Down's Syndrome should be "supported in a way that meets their individual needs and abilities, rather than it being related to their age". Similarly, Lancashire County Council suggested that "cognitive ability and ability to communicate also need to be considered alongside age" and that guidance could "set out good practice examples of participation based on age".

Discussion and recommendations

4.14 The broad support for our proposals set out above has affirmed our view that the legal framework for disabled children's social care should contain statutory principles, together with relevant considerations, to guide the application of the legislation. Such an approach does not prescribe what decision-makers should do, but seeks to influence and assist them in discharging their functions, in a manner which promotes the policy underpinning the legal framework. Enacting these principles in legislation rather than guidance means that they must be applied in all cases, thereby encouraging consistency in decision-making.

4.15 There was a broad consensus in both consultation responses and at consultation events in favour of the specific principles and considerations we identified, and we recommend these be adopted, subject to two clarifications. First, we accept that the

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[7] A set of barristers who practice in the field.

best interests of the child cannot be "the" primary consideration, outweighing all other considerations, including the resources that the local authority has available to promote those interests. That was not the intention behind the proposal[8] and the more appropriate phrasing is that the best interests of the child should be "a" primary consideration. That is consistent with article 3 of the United Nations Convention on the Rights of the Child. In practice, making the best interests of the child "a primary consideration" means starting with the child's best interests, before asking whether the strength of other considerations (including the local authority's resources) outweigh those interests.[9]

4.16 Second, we have decided to separate the need to have regard to "the views, wishes and feelings of the child's parents and carers and their knowledge of their child's condition and needs", into two distinct factors that decision makers should have regard to. This is to clarify that the views, wishes and feelings of a parent or carer are not the same as the subject matter expertise and specialist knowledge they may have developed in relation to their child's disability, and that both are relevant factors.

4.17 We do not recommend any adaptation of the principles or considerations to take into account the age or ability of the child. Consultation has affirmed the idea that the approach of decision makers will need to vary depending on the age and ability of the child. But we think that the principles and considerations we are recommending are sufficiently flexible so as to allow that variation to occur, without requiring any specific adaptation or express drafting. For example, following the approach we recommend, a decision-maker will be required to have "due regard" to the "views, wishes and feelings of the child". This will allow the decision-maker to give more weight to those views, wishes and feelings as the child's decision-making ability develops.

4.18 The flexibility that is built into the principles and considerations will also be important in dealing with cases where are differences in opinion between the decision maker, the parent or carer, and the child. Consultees highlighted these cases as potentially problematic with some suggesting that the views of one party should take precedence over another. However, the situations in which these differences in opinion might arise are too varied for the law to prescribe precisely how they should be dealt with. What is appropriate in one case may not be appropriate in another. The way to reflect this is to allow the decision-maker to give such weight to the competing views as they assess to be appropriate, based on their professional expertise. The approach we recommend allows for this.

4.19 The last point to consider is the final check that decision-makers must apply: whether the purpose being served by the proposed decision or action can be as effectively achieved in a way which is less restrictive of the child's rights and freedom of action. One of the functions that this check can serve is to require local authorities to consider whether it is truly necessary to deprive a disabled child of their liberty, or whether the needs of the child can be met by less restrictive means. The Court of Appeal has recently emphasised the importance of the "checks and safeguards" provided by the right to liberty and security, protected under article 5 of the European Convention on

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[8] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 20.9 and 20.32.

[9] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 at [26] by Lady Hale.

Human Rights in this context.[10] This reinforces our view that this final check is important to prompt local authorities to consider whether the arrangements proposed for the child give rise to a risk that they will be deprived of their liberty. If there is such a risk, and steps cannot be taken to ensure that it does not arise, then a local authority will have to obtain authorisation.

4.20 The recommendations we make here, as is the case throughout this report, apply only to disabled children. We have not consulted on whether the recommendations should apply to children in need more broadly, and to do so would lie outside of our terms of reference. However, we acknowledge the point that the principles we recommend could be applied to children in need more generally and we record it here as the Department for Education may wish to consider it in deciding whether and how to implement our recommendations.

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[10] *J v Bath and North East Somerset Council and Others* [2025] EWCA Civ 478 at [49] by Sir Andrew McFarlane, President of the Family Division.

Recommendation 4.

4.21 Decision-making in relation to the social care needs of disabled children should be based upon:

(1) an overarching principle that the best interests of the child should be a primary consideration;

(2) a set of considerations to which decision-makers must have regard in applying that principle; and

(3) a final check, as to whether the purpose being served by the proposed decision or action can be as effectively achieved in a way which is less restrictive of the child's rights and freedom of action.

4.22 The set of considerations which decision-makers must have regard to consists of:

(1) the importance of promoting the upbringing of the child by the child's family, in so far as doing so is consistent with promoting the best interests of the child;

(2) the importance of the child participating as fully as possible in decisions relating to the exercise of the function concerned;

(3) the importance of the child being provided with the information and support necessary to enable participation in those decisions, having regard to their particular needs;

(4) the views, wishes and feelings of the child;

(5) the views, wishes and feelings of the child's parents or carers;

(6) the parents' or carers' knowledge of their child's condition and needs;

(7) the need to support the child and their parents or carers in order to facilitate the development of the child and to help them achieve the best possible outcomes at each stage of their life;

(8) the importance of preventing or delaying the development of the needs for care and support;

(9) the need to prepare the child for adulthood and independent living; and

(10) the characteristics, culture and beliefs of the child (including, for example, language).

Chapter 5: Assessing the child's needs

INTRODUCTION

5.1 In this chapter we consider social care assessments for disabled children: the process of identifying the social care needs of a disabled child by collecting information and evidence. The purpose of the assessment is to decide whether a child requires extra help to meet their social care needs, and if so, how the local authority will provide that help. The first section of the chapter considers the way in which an assessment is obtained.[1] The second section considers the process and content of assessments.[2]

OBTAINING AN ASSESSMENT

KEY LEGAL PRINCIPLES: THE DUTY TO ASSESS

Local authorities are under a duty to assess the social care needs of any child within their area who appears to be "in need". Disabled children are one category of "child in need".[3] This means that a local authority is required to assess the social care needs of any disabled child (or child who appears to be disabled) within their area. This duty is not set out expressly in the legislation; the courts have explained that the duty is implicit.[4]

The threshold for engaging the duty to assess is low: that the child should *appear* to be in need. A child does not need a diagnosis of a specific medical or other condition in order for the assessment duty to arise.[5]

The duty to assess applies to any child who is "within [the] area" of the local authority.[6] This is not a technical legal test, in contrast with the concepts of "ordinary" or "habitual" residence which are used in adult social care and the social security context. It requires only physical presence in the area of the authority.[7]

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[1] Our proposals on obtaining an assessment, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 3.

[2] Our proposals on the process and content of an assessment, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 4.

[3] Children Act 1989, s 17(10).

[4] *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208 at [32] by Lord Nicholls.

[5] See the definition of disability in Children Act 1989, s 17(11).

[6] Children Act 1989, s 17(1)(a).

[7] *R (Stewart) v Wandsworth London Borough Council, Hammersmith and Fulham London Borough Council and Lambeth London Borough Council* [2001] EWHC Admin 709, [2002] FLR 469 at [23] by Jack Beatson QC sitting as a Deputy High Court Judge.

THE PROBLEM

5.2 As set out in chapter 3 of our consultation paper,[8] the first problem with the law relating to assessments is that the duty to assess the social care needs of a disabled child is implied, not express. It is not clear from reading the legislation alone that the duty exists, meaning that disabled children and their families may not be aware that they are entitled to an assessment. We also heard that some local authorities were not carrying out assessments when they should be.[9] Internet based research we carried out, considering the policies and criteria applied by 104 local authorities across the country, suggested that some authorities apply a threshold to decide which disabled children are entitled to an assessment. These thresholds were higher than the legal threshold described above.[10]

5.3 The second problem we identified was that there are multiple legal routes to an assessment of a disabled child's social care needs. This creates complexity and confusion in the law. For example, the duty to assess under section 17 of the Children Act 1989 can be indirectly triggered under the Chronically Sick and Disabled Persons Act 1970 read together with the Disabled Persons (Services, Consultation and Representation) Act 1986.[11] A more convoluted example is the duty under section 117 of the Mental Health Act 1983. This provides that a child detained in hospital under the Mental Health Act 1983, who is being assessed to see whether they need "aftercare", is entitled to have their social care needs assessed under section 17 of the Children Act 1989 after discharge. But it is necessary to look at five different pieces of legislation and case law to know that this is the case.[12]

5.4 Third, it is unclear how the duty to assess under section 17 of the Children Act 1989 interacts with other types of assessments that disabled children might be entitled to. For example, how the duty to assess under section 17 relates to the powers and duties to carry out:

(1) assessments of the needs of looked after,[13] eligible and relevant children;[14]

(2) education, health and care (EHC) needs assessments;[15]

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[8] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 3.

[9] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 3.31.

[10] This research will be published alongside this report.

[11] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 3.11.

[12] See Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 3.12. See further ch 14 of this final report on the intersection with health care.

[13] A "looked after child" is a child in the care of the local authority or who is accommodated under the Children Act 1989, except for under sections 17, 23B and 24B, for more than 24 hours: Children Act 1989, s 22(1).

[14] Eligible and relevant children are those who been looked after for 13 weeks or more, beginning on or after their 14th birthday and ending on or after their 16th birthday: Children Act 1989, ss 23A(2) and 3 and Sch 2, para 19B(2); Care Planning, Placement and Case Review (England) Regulations 2010, SI No 959, reg 40(1); Care Leavers (England) Regulations 2010, SI No 2571, reg 3(1) and (2).

[15] An assessment of the educational, health and social care needs of a child or young person carried out for the purposes of the special educational needs and disability system: Children and Families Act 2014, s 36.

(3) Early Help[16] assessments; and

(4) short break assessments.[17]

5.5 We described these assessments in more detail in our consultation paper.[18] The key point is that the content of these assessments can overlap considerably with an assessment under section 17 of the Children Act 1989, but it is not always clear whether and how these assessments can be combined. This can be confusing to professionals, children, parents and carers. There is a power to combine assessments in Schedule 2 of the Children Act 1989, but we gained the impression in the lead up to our consultation that this power is not well-known and is underused. If two separate assessments which cover the same material are undertaken, this may result in local authorities duplicating work and may require families to re-tell their stories which may be emotionally taxing.

5.6 We also noted that social care assessments are not always carried out during the EHC needs assessment process when they should be.[19] Further, the intersection between disabled children's social care law and the legal framework governing Early Help – a system of support which aims to support children and families as soon as problems arise[20] – is not clear.[21]

THE SOLUTION

Single duty to assess

Our provisional proposal

5.7 In our consultation paper, we proposed that there be a single express duty to assess the social care needs of disabled children. We proposed that this single duty would be the gateway to all services for disabled children, including short breaks. This proposal was intended to simplify and clarify the current law.

Consultation analysis

5.8 In total, 148 consultees answered this question. Of those who answered, the majority of consultees (123) were in favour of our proposal. Those in favour primarily saw the proposal as a way of making the law clearer and ensuring better accountability, which should result in more disabled children receiving the assessments to which they are entitled. Northumberland Council explained that having a single duty to assess "would

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[16] Early Help is "a system of support which aims to support children and families as soon as problems emerge": HM Government, *Working Together to Safeguard Children 2023* (December 2023) p 43, fn 40. See paras 5.46 to 5.56 of this report, and Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 3.18 to 3.25.

[17] An assessment to determine whether a disabled child or their family requires a short break. See Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 3.13 and 3.14.

[18] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 3.13 to 3.28.

[19] Special Educational Needs and Disability Regulations 2014, SI No 1530, reg 12(1)(h); Department for Education and Department of Health, *Special educational needs and disability code of practice: 0 to 25 years* (January 2015) para 9.62.

[20] We discuss Early Help in more detail at paras 5.46 to 5.56.

[21] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 3.18 to 3.25.

reduce uncertainty and disputes around the right to an assessment and would be of benefit to both children and their families, and to local authorities". The Association of Directors of Children's Services and the Local Government Association "broadly" agreed, explaining that it will "make it easier for both families and services to understand entitlements". Garden Court Chambers Community Care and Education Law Team[22] agreed with our proposal because "the current regime is not tenable, and we have seen multiple examples in practice of this not working". They noted that the current regime "affects some of the most complex and vulnerable disabled children given that they are most likely to have multiple duties owed to them". Many consultees also observed that this proposal could lead to better decision-making and scrutiny. They remarked that this could result in costs savings for local authorities in the long run.

5.9 A small number of consultees (nine) did not agree with the proposal. They expressed concerns that it would be too costly or onerous on local authorities. For example, Birmingham Children's Trust explained that "a duty to assess would have significant costs implications for assessments with no reasonable hope of having services provided". Hampshire County Council commented that "it could lead to an expectation that assessment equates to services being delivered following this". Some consultees who neither agreed nor disagreed with the proposal raised similar concerns such as the lack of resources and the need for guidance to accompany the duty. Finally, some consultees, in particular the Children's Commissioner's Office, supported the proposal but were concerned about the inconsistencies this could create with other children in need, who are also entitled to an assessment but would not have the duty to assess their needs set out in legislation.

Discussion and recommendation

5.10 Consultation reinforced our view that the duty to assess the social care needs of disabled children should be set out clearly in statute. The aims of our review include simplifying the law to promote clarity and consistency of understanding as to entitlements. This proposal does that, by removing the various statutory routes to an assessment for disabled children and having one clear duty to assess set out in legislation. The purpose of this assessment is to identify the child's needs and decide whether or not the local authority can or should use the powers or duty we discuss in Chapter 7 to meet those needs.

5.11 We acknowledge the practical concerns raised by local authority consultees about the resource implications of codifying the assessment duty. However, these are arguments against the existence of a duty to assess in the first place, and not reasons to refrain from simplifying the law. To mitigate the concerns raised by consultees about resourcing, we discuss at paragraphs 5.68 to 5.77 below the need for assessments to be proportionate and appropriate, meaning that they do not always need to be an onerous or resource intensive process. We also address these resourcing concerns when considering the threshold for the duty to assess at paragraphs 5.22 to 5.31 below.

5.12 We note the concerns raised by the Children's Commissioner's Office about the need to codify the assessment duty for all children in need. This is not a matter upon which

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[22] A set of barristers who practice in the field.

we have consulted or which we have the evidence or remit to make a recommendation on in this current review. However, we highlight the point as one which the Department for Education may wish to consider in deciding whether and how to implement our recommendations. This consideration applies to the majority of the recommendations on assessments set out in this chapter.

Recommendation 5.

5.13 There should be a single statutory duty to assess the social care needs of disabled children.

Threshold for assessment

Our provisional proposal

5.14 Any duty to assess must contain a threshold for that duty to arise. We invited consultees' views on the appropriate threshold for carrying out an assessment. We consulted on several different options, rather than simply suggesting that the current threshold is codified, in deference to the strong views expressed by local authority stakeholders during our pre-consultation engagement that clarifying the law would increase the burden on local authorities. It was important for us to hear the views for and against other thresholds to establish whether there was a case for doing something more than codifying the current threshold. We identified five possible options for the threshold, drawing from other jurisdictions and legislative frameworks.

(1) Option 1: an assessment should be carried out if the child appears to be disabled. This would codify the current threshold.

(2) Option 2: an assessment should be carried out if it appears the child may have needs for care and support. This threshold is similar to the threshold in adult social care law. Under the Care Act 2014, if it appears to a local authority that an adult may have needs for care and support, the local authority must assess whether they do, and, if so, what those needs are.[23]

(3) Option 3: an assessment should be carried out if it appears the child may be eligible for care and support. We drew on the threshold for obtaining an EHC assessment under the Children and Families Act 2014 for this option.[24]

(4) Option 4: an assessment should be carried out if the child is likely to be eligible for care and support. We provided this as an option to meet some of the concerns raised by local authority stakeholders during the pre-consultation stage of the review that a low threshold would be too resource intensive.

(5) Option 5: an assessment should be carried out if it appears that a child may need care and support in addition to or instead of that provided by their family. This is based on the threshold for an assessment of need under the Social

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[23] Care Act 2014, s 9(1).

[24] Children and Families Act 2014, s 36.

Services and Well-being Act 2014.[25] In deciding whether the threshold for an assessment is met under that Act, “a disabled child is presumed to need care and support in addition to, or instead of, the care and support provided by the child's family”.[26] This means that in most cases, a local authority will be obliged to assess the needs of any disabled child.[27]

Consultation analysis

5.15 152 consultees answered this question. There was no clear preference for one particular option, with options 1, 2, 5 and ‘other’ receiving the most support from consultees. It should be noted however, that some consultees selected one option, but in their response explained that they would also be content with another of the options, or a combination of the options. As such the numbers do not represent exclusive preference for that option.

5.16 In total, 33 consultees selected option 1. Most consultees chose this option because it provides a low threshold, which is easier to understand and apply. Some consultees were concerned that any other threshold would be too high. The Independent Provider of Special Education Advice (IPSEA) suggested that the threshold should remain the same because “there is no policy rationale for raising it and the risk of disabled children losing out on essential support is too great”. During our pre-consultation work, they challenged the premise of our question pointing out that, in presenting alternative options, we were going beyond our stated aim of simplifying and clarifying the law.

5.17 Other consultees favoured option 1 because it does not require a diagnosis. However, Prader-Willi Syndrome Association UK expressed the concern that the focus of this threshold “is on disability rather than need”. Some, including local authority consultees, noted that option 1 avoids the need for a lengthy process of inquiry to decide whether the child needs an assessment – a “pre-assessment assessment” – arguing that the other thresholds would require this. A few consultees opposed this option because of the language, for example, one local authority consultee felt that the word “appears” is open to interpretation and could lead to inconsistency.

5.18 In total, 34 consultees chose option 2. Consultees who supported this option expressed the view that it strikes the right balance of having a low enough threshold whilst also focusing on the purpose of the assessment being to identify a disabled child’s social care needs. Others favoured this option as it would align the threshold for disabled children with the threshold for adults under the Care Act 2014. Some consultees also noted that the language of this option ensures there is less of a focus on diagnosis, or the language of disability, and more focus on need. Additionally, Somerset ICB noted that “national guidance would be required to outline examples of care and support needs that require assessment”. North Tyneside Council was worried about the resource implications of this threshold, noting that “there are thousands of children without a formal diagnosis who may have needs and assessing all of these children along with those with a formal diagnosis will be overwhelming in practice”. The Association of Lawyers for Children suggested this option may lead to

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[25] Social Services and Well-being (Wales) Act 2014 (anaw 4), s 21(1).

[26] Social Services and Well-being (Wales) Act 2014 (anaw 4), s 21(7).

[27] Explanatory notes to the Social Services and Well-being (Wales) Act 2014 para 50.

difficulties as “unlike adults all children have a need for care and support to some degree”.

5.19 Option 3 was chosen by eight consultees. One parent carer suggested it is “one step higher than the appearance of need for care and support however provides some flexibility to capture those young people who are borderline in terms of eligibility”. Option 4 was selected by nine consultees, with some suggesting it was the most “proportionate” threshold. Rotherham Metropolitan Borough Council explained that “option 4 offers the most pragmatic approach, balancing the need to manage resources effectively with ensuring access to assessments for those likely to be eligible for care and support”. A number of consultees from the legal sector expressed concerns over options 3 and 4. For example, Coram Children’s Legal Centre “strongly opposed” these options on the basis that “the threshold must remain low, to prevent vulnerable children from being wrongly denied assessments and services as a result of a lack of knowledge or information on the part of those considering whether to carry out an assessment”. Steve Broach KC commented, in relation to option 3, that “the section 36 CFA threshold for an [EHC needs assessment] is not a relevant comparator, as there are much narrower circumstances in which an EHC Plan may be required than those in which a child may have eligible needs for social care support”.

5.20 In total, 31 consultees selected option 5. Dame Christine Lenehan preferred this threshold because “it is an important principle that, from the outset we develop a framework of shared responsibility with families, and that the state only intervenes on the basis of supporting and strengthening families rather than usurping or displacing their role”. Other consultees provided criticisms or further questions regarding option 5. For example, West Sussex County Council asked: “who would be looking/assessing they may need care outside of their own families, who makes this decision?”. One parent carer explained that “social care bodies are already scrutinising what can be provided by family or extended family and trying to say that there is already sufficient support in place from that extended family”.

5.21 Finally, 37 consultees did not choose any one of the options that we provided. Instead, they provided comments on some or all the options or suggested alternatives. Some consultees advocated generally for a low threshold. Irwin Mitchell, a law firm, emphasised that a low threshold would lead to fewer legal challenges which are “costly not only to the local authority in terms of time and resource but potentially to the child and their family, taking away their energies away from caring […]”. The Association of Directors of Children’s Services and the Local Government Association expressed some support for a combination of options 4 and 5, suggesting that “the threshold for assessment used in Wales is most helpful, recognising that disabled children may have additional needs for support and building on the strengths of families”, however they proposed the language be changed to “it appears that a child is likely to need care and support in addition…”. A few consultees, such as Professor Luke Clements and Autistica, suggested a combination of options 1 and 2.

Discussion and recommendations

5.22 In our consultation paper we acknowledged that options 3 and 4 may not be viable in practice as a “pre-assessment assessment” would be needed to answer the questions set by the threshold. We also noted that having too high a threshold carries a material risk that some children who need and are entitled to an assessment, do not get one, as they are adjudged (wrongly) not to meet the threshold. This could lead to costly litigation. Consultees against these options shared these concerns. Those in favour of options 3 and 4 did not contest the suggestion that the higher threshold could potentially lead to more errors and disputes, or require more time to be spent conducting a pre-assessment assessment. Instead, their concerns were that a lower threshold would have resourcing and deliverability implications.

5.23 We recognise the importance of these resource concerns. However, there are also resource concerns if the threshold is set too high: namely the cost of carrying out a "pre-assessment assessment" and legal costs, which may be significant, where a refusal to assess is litigated. More fundamentally, our objective here is to simplify and clarify the law and not to make it harder for disabled children who want and need support, to obtain an assessment.

5.24 Having said that, we do think that some limited modification to the law is justified to ensure that it is focused on those children who want and need support. The current threshold is focused solely on whether a child appears to have a disability, whereas the more relevant question is whether, because of that, they may have needs for care and support (option 2). That is more in line with the social model of disability, which is focused on need rather than impairment. It would also bring the law closer in line with the Care Act 2014, improving integration between disabled children's social care and adult social care, and closer in line with how the current threshold for an assessment works in practice for other categories of children in need.[28] We do not dismiss the concerns about deliverability and resourcing raised by consultees in favour of a higher threshold. However, our recommendation on having proportionate and appropriate assessments (see paragraphs 5.68 to 5.77 below) addresses these points.

5.25 For these reasons we think an amalgamation of options 1 and 2 is appropriate. Option 2 by itself is no longer viable and requires modification, in light of our decision to keep disabled children within the scope of section 17 of the Children Act 1989.[29] The options presented in our consultation paper accounted for the possibility that disabled children could be taken out of section 17 and put into a separate legal framework. In light of consultation responses, we are not pursuing that option. Instead, we are recommending that disabled children should continue to be children in need for the purposes of section 17, and that children who are in need because they are disabled should have the benefit of the rights and entitlements recommended in this report, within a new Part or Schedule to the Children Act 1989. Accordingly, deciding whether the child in question is disabled will still be an essential part of the assessment process.

5.26 An amalgamation of options 1 and 2, providing an assessment to any child who appears to be disabled, and who it appears to the local authority may have needs for care and support arising from that disability, strikes us as an appropriate alternative. This incorporates the existing threshold while refining it to focus on those who may need help.

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[28] Children Act 1989, s 17(10)(a) to (b).

[29] See ch 2 (a new legal framework).

5.27 We do not recommend option 5, even though it attracted a degree of support from consultees. This option was based upon Welsh legislation.[30] This legislation presumes that disabled children need care and support in addition to, or instead of, the care and support provided by their family. Many consultees who supported option 5 appeared to overlook this presumption. Instead, the support for this option seemed to be based on the idea that local authorities should not be replacing the role of parents and carers and should only be stepping in where they need extra help. We agree with that approach and endorse the views expressed by Dame Christine Lenehan that the legal framework we recommend should not usurp or replace the vital role played by families. However, we think that the appropriate way to embody this policy in the law is in relation to eligibility criteria, which we discuss further at paragraphs 7.35 to 7.37 and 7.43: familial support should be taken into account in deciding whether and how to meet a child's needs. But the fact that parents are providing support should not be a barrier to the identification of those needs. Otherwise, there is a danger that situations where care arrangements are at risk of breaking down may be overlooked.[31] The way to avoid this risk is to combine options 1 and 2 as set out above and follow the approach under the Care Act 2014 that the need for care and support should be judged without reference to the support the child is currently receiving.[32] This approach means that, should there be a breakdown in caring arrangements, the local authority is already aware of the child's needs and can move quickly to provide alternative help.

5.28 In light of this, we recommend that the duty to assess should arise if it appears to a local authority that a child is disabled and may have needs for care and support arising from their disability. This amalgamation of options 1 and 2 adapts the existing threshold to focus on those disabled children who may need extra help. It involves consideration of needs, and not just impairment, which brings the threshold more in line with the social model of disability. Further, a child would not require a diagnosis to meet this threshold, which means that children should not miss out on support because they are waiting for a diagnosis. It strikes a balance between ensuring that children who may need help can have an assessment, without requiring local authorities to carry out assessments which are not wanted or needed.

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[30] Social Services and Well-being (Wales) Act 2014 (anaw 4), s 21.

[31] See para 7.37 which addresses a similar point.

[32] Care Act 2014, s 9(3).

Recommendation 6.

5.29 The duty to assess should arise if it appears to the local authority that a child in the area:

(1) is disabled; and

(2) may have needs for care and support arising from their disability.

5.30 The need for care and support should be judged without reference to the support the child is currently receiving.

5.31 The statutory guidance we recommend in Chapter 2 should clarify that a diagnosis is not necessary to meet this threshold.

Combining assessments

Consultation question

5.32 As we recommend that the duty to assess the social care needs of a disabled child is set out in statute, we need to consider the relationships between that duty and other assessment duties which may apply to the same child.[33] As explained in paragraph 5.3 above, the interaction of the duty to assess under section 17 of the Children Act 1989 and other assessment duties is complex. To address this complexity, we invited consultees' views on the extent to which, if at all, the law should facilitate or encourage the combining of assessments. We provided three options.

(1) Option 1: The legislation could make clear that the assessment for a disabled child should be separate and additional to other assessments. This would not allow for the combining of assessments.

(2) Option 2: The legislation could remain silent and allow local authorities the freedom to choose whether the assessments can or should be combined. By this, we mean that the power to combine assessments would remain – it would be an ability to combine assessments, but not an encouragement or requirement to do so. This would provide a fair amount of discretion, but potentially at the expense of clarity.

(3) Option 3: The legislation could encourage or compel the assessments to be combined. This would clarify the legal position and promote the combining of assessments.

5.33 For those who favoured option 3 – that the legislation encourages or compels assessments to be combined – we provided three further options as to how the legislation could achieve this.

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[33] Such as the duty to assess under s 36 of the Children and Families Act 2014 and the needs assessments under other provisions of the Children Act 1989 such as s 22(1) and para 19B of Sch 2.

(1) Sub-option (a): By means of a power to combine assessments. This reflects the current law which allows local authorities to assess the needs of a child under the Children Act 1989 at the same time as any other assessment under the Chronically Sick and Disabled Persons Act 1970, the Disabled Persons (Services, Consultation and Representation) Act 1986, the Children and Families Act 2014 or any other enactment.[34]

(2) Sub-option (b): By imposing a duty to combine assessments. This would strengthen the current power to a duty, requiring local authorities to carry out assessments together.

(3) Sub-option (c): By a presumption that assessments should be combined except where there is a good reason not to do so.

5.34 This consultation question did not cover the combining of the assessment of the needs of the disabled child with their parent, carer or sibling's needs assessment.[35] Parent carer's needs assessments and young carer's needs assessments can be combined with the assessment of the disabled child's needs in certain circumstances,[36] and these are discussed in more detail in Chapter 6. The consultation question above specifically addressed assessments focused on the disabled child's needs and how the law can facilitate their combination.

Consultation analysis

5.35 In total, 142 consultees answered the first part of the question. Of these, 28 consultees were in favour of option 1 (that legislation requires assessments to be separate). They were in favour of separate assessments due to concerns that combining assessments could lead to confusion, with it not being clear who owns what assessment or who would be accountable for a combined assessment. Consultees noted that the various assessments mentioned have different focuses which cannot be aligned.

5.36 Only eight consultees chose option 2 (that legislation is silent on this matter). They emphasised the need for a nuanced approach, relying on the discretion of local authorities. For example, Kent County Council said that "having a set law that assessments should be combined, may cause additional work that may not be required or appropriate".

5.37 The majority (93) supported option 3 (that the legislation should encourage or compel the combining of assessments). A number of consultees noted that this option would minimise repetition and re-telling of stories on the part of the family, allow more flexibility for social workers and lead to better joint working and collaboration. Some consultees supported this option due to the inadequacies of the current law, for example, Garden Court Chambers Community Care and Education Law Team

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[34] Children Act 1989, Sch 2, para 3.

[35] Or their sibling's young carer's needs assessment if applicable.

[36] Children Act 1989, s 17ZE(3) and Children Act 1989, s 17ZB(7). There is no legislation which addresses combining assessments of the needs of carers without parental responsibility with the child's needs assessment. However, as we explain in ch 6, we recommend that assessments for all adult carers (with and without parental responsibility) be brought into one single assessment duty in any case.

explained that in practice it “does not result in a coordinated approach where assessments are available in the same place and/or combined”. Irwin Mitchell emphasised that combined assessments would “also allow other professionals to see what was being delivered by other services”.

5.38 In total, 110 consultees answered the second part of the question on the sub-options for how legislation could encourage or compel the combining of assessments. Answers varied depending on the level of flexibility they thought local authorities should have in combining assessments. Sub-option (a) received the least support from consultees (eight). Some said that this was the least prescriptive of the options, and that having a power rather than a duty would allow for discretion in circumstances where it would not be appropriate to combine assessments. For example, North Yorkshire Council felt that “sometimes assessments can be combined but not always so we feel a power rather than compulsion is the best approach”.

5.39 Sub-option (b) was supported by 34 consultees. They were of the view that the other options give local authorities too much flexibility. For example, Stuart Marpole, a retired social worker, was in favour of a duty rather than a power because “local authorities can be all too easily inclined to opt out of using powers”. Contact was of the view that a duty to combine would help “address the standard ‘child not known to social care services’ response from social care services when asked to provide input to the EHC plan [and] assessment”.

5.40 Sub-option (c) was supported by 37 consultees, who took the view that this option would lead to consistency whilst allowing for flexibility in circumstances where combining is not appropriate. Irwin Mitchell provided examples of when it may not be appropriate, for the assessments to be combined, “if there was going to be a long delay for the assessment to be completed and support was required urgently” or “where there are safeguarding issues”.

5.41 An additional consideration raised by consultees was the need for guidance to explain or provide examples of scenarios where there is a good reason not to combine assessments.

Discussion and recommendations

5.42 The majority of consultees were of the view that legislation should encourage or compel assessments to be combined. We agree. There is already a legislative power to combine assessments but strengthening this could reduce duplication of work and minimise families having to re-tell their stories. Whilst consultees raised important examples of situations where it is not appropriate to combine assessments, these do not detract from the idea that the law should do more to encourage or compel the combining of assessments in circumstances where it is appropriate.

5.43 As to the question of how the legislation achieves this, we agree with consultees that there already is a power to combine assessments, and this does not work effectively. We also agree that having a duty to combine is too prescriptive and would not allow local authorities enough flexibility. It is not always appropriate to combine, and local authorities should be allowed to keep assessments separate if that is the case. Therefore, we think the best option is to have a rebuttable presumption that assessments should be combined, unless there is good reason not to. We also agree with consultees that having guidance on situations where combining assessments is unlikely to be appropriate would be beneficial. This guidance could also explain the different assessments that may be combined, and how.

Recommendation 7.

5.44 There should be a rebuttable presumption that assessments should be combined unless there is a good reason not to do so.

5.45 The statutory guidance we recommend in Chapter 2 should provide examples of situations in which combining assessments may not be appropriate.

Relationship between the duty to assess and Early Help/Family Help assessments

5.46 A number of consultees queried the interaction between our proposals on assessments with Early Help assessments, and the Family Help reforms which we describe at paragraph 1.13. Some consultees were worried that disabled children's social care assessments might replace Early Help assessments. For example, in response to our proposal on the duty to assess, Hampshire County Council said it was concerned that "[t]here is already a duty on local authorities to assess needs. This new duty would simply mean that assessment at Early Help level would not meet the requirement". Others were worried that Early Help assessments might be used to "circumvent" disabled children's social care assessments. For example, Cerebra expressed concern that "some local authorities will try to circumvent any single duty to assess by continuing to refer families for 'Early Help' assessments, causing confusion and delay to families". Cerebra pointed to its research which explains why it believes "that the use of Early Help assessments is inappropriate in the case of disabled children" and asked that the interaction between Early Help and the single duty to assess could be clarified in guidance, whilst welcoming the Commission's further views and/or recommendations on how this interaction would work.

5.47 We do not think that our recommendation will replace or duplicate Early Help or Family Help assessments. Nor do we think that Early Help or Family Help assessments can be used to circumvent the assessment we recommend. To explain our position on these issues it is helpful to explain what Early Help and Family Help are and to clarify our interpretation of the law in this area.

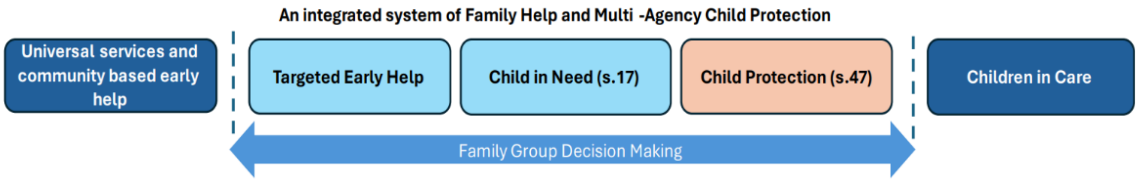
KEY PRINCIPLES: EARLY HELP AND FAMILY HELP

Early Help: The *Working Together* guidance describes Early Help as “a system of support which aims to support children and families as soon as problems emerge”.[37] As part of this, local authorities carry out “Early Help assessments”. An Early Help assessment is a “social care assessment of a child and his or her family, designed to identify needs at an early stage and enable suitable interventions to be put in place to support the family”.[38]

Targeted Early Help: The *Working Together* guidance explains that “some early help support is described as ‘targeted early help’ and is provided to children and families who are identified by practitioners to have multiple or complex needs requiring a specialist and/or multi-agency response but where statutory intervention is not needed”.[39]

Family Help: The aim of Family Help is to bring “closer alignment between targeted early help and child in need support and services, to create a seamless support system that promotes early intervention”.[40] At the time of writing our consultation paper, the Family Help reforms were being trialled in a number of local authorities as part of the “Families First for Children pathfinder programme”. These reforms are now being implemented nationally.[41] The aim within Family Help is to have “one assessment and plan, which will stay and evolve with a family, and will be accessed by all practitioners and agencies working with them”.[42]

5.48 The diagram below illustrates the Department for Education’s vision for how local authorities deliver social care to families, showing how “different support and services can operate together to wrap help and support around families and adapt as needs change”.[43]



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[37] HM Government, *Working Together to Safeguard Children 2023* (December 2023) p 43, fn 40.

[38] Department for Education and Department of Health, *Special educational needs and disability code of practice: 0 to 25 years* (January 2015) p 279.

[39] HM Government, *Working Together to Safeguard Children 2023* (December 2023) p 43, fn 40.

[40] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 18.

[41] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 5.

[42] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 24.

[43] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 12.

5.49 Early and Family Help are policies, neither of which are provided for expressly in statute. However, local authorities are statutory bodies. This means that they can only exercise powers conferred by statute.[44] As such, children's services do not have any power to provide "non-statutory services". There are a range of views as to the statutory basis upon which Early Help is provided by local authorities.[45] Our view is that any goods, services or financial assistance provided by social services to disabled children and other children in need are likely to be provided pursuant to section 17 of the Children Act 1989, and that this is the case even if the help is provided under the banner of Early Help, Targeted Early Help or Family Help. The legal source of the power remains the same, irrespective of the policy which the power is used to implement. We are not proposing that this be changed.

5.50 The same reasoning applies to assessments: an assessment of the social care needs of a disabled child is carried out under section 17 of the Children Act 1989. This is the case irrespective of whether it is called a section 17 assessment or an Early Help or Family Help assessment, and irrespective of whether it is carried out by an Early Help or Family Help team or service.

5.51 There are other statutory powers and duties which may be used to implement the Early Help and Family Help policies, and assess and meet a child's needs. For example (as the diagram at paragraph 5.48 above indicates) an Early Help or Family Help team might make inquiries under section 47 of the Children Act 1989 to decide whether they need to take action to safeguard the welfare of a child – whether disabled or not – who is suffering significant harm. Alternatively, services could be provided to a child who is not disabled (and is not otherwise a child in need) under section 1 of the Localism Act 2011. However, assessing and meeting the social care needs arising from a child's disability will generally, if not always, be carried out under section 17 of the Children Act 1989, no matter what label is given to the process.

5.52 Under our recommendations, all disabled children who meet the threshold set out at paragraph 5.29 above are entitled to an assessment. This assessment must meet the requirements we set out later in this chapter. The purpose of the assessment is to identify the child's social care needs and decide whether the local authority should use the powers or duty we discuss in Chapter 7 to meet those needs.

5.53 An assessment that meets these requirements will be adequate even if it is called an Early Help or Family Help assessment and/or is carried out by the Early Help or Family Help team or lead practitioner. The important question is whether the assessment meets the relevant requirements, not what the assessment is called. An Early Help or Family Help assessment that does not meet these requirements – for example because it is carried out for some other purpose – will not be sufficient by itself, but could be combined with the assessment we recommend in this chapter. This is in line with the Family Help policy, which suggests that an assessment should be co-ordinated with other assessments where possible (such as the EHC needs

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[44] *R (Ncube) v Brighton and Hove City Council* [2021] EWHC 578 (Admin), [2021] 1 WLR 4762 at [43] by Freedman J.

[45] Such as Children Act 2004, ss 10 and 11 or Localism Act 2011, s 1(1).

assessment)[46] and culminate in one assessment and plan, avoiding families having to retell their stories.[47]

5.54 Viewed in this way, the recommendations we make about assessments in this chapter should not duplicate or replace Early Help or Family Help assessments. Conversely, carrying out an Early Help or Family Help assessment should not provide a way to circumvent the recommendations in this chapter. In our view the legal changes we recommend in this chapter are consistent with the policies on Early Help and Family Help, and the policies are consistent with the changes we recommend.

5.55 In light of the concerns that were raised in our consultation about these matters and the complexity and importance of these issues, we recommend that the interaction between the new duty to assess and assessments for the purposes of Early Help and/or Family Help should be set out in guidance.

Recommendation 8.

5.56 The statutory guidance we recommend in Chapter 2 should explain the relationship between the duty we recommend to assess the social care needs of a disabled child and assessments carried out under Early Help and Family Help.

Equivalent assessments

5.57 In our consultation paper we raised the possibility of using the concept of “equivalent assessments” in disabled children’s social care as a way of avoiding repetition of unnecessary paperwork and assessments.

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[46] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 25.

[47] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 24.

KEY LEGAL PRINCIPLES: EQUIVALENT ASSESSMENTS

Before making a "standard authorisation" to deprive a hospital or care home resident of their liberty, a local authority will usually need to ensure that a series of assessments are carried out. The purpose of these assessments is to establish whether the person meets the "qualifying requirements" to be deprived of their liberty.[48] For example, an "age assessment" is required to establish that they are over 18[49] and a "mental health assessment" is required to establish whether they suffer from a mental disorder.[50]

However, the requirement to carry out these assessments is relaxed in cases where an "equivalent assessment" has already been carried out.[51] An equivalent assessment is an existing assessment which, among other things, has been carried out (in most cases) in the last 12 months, which the local authority is satisfied is still accurate and which meets the same requirements as the assessment which would otherwise be required.[52]

The equivalent assessment can be one which was carried out for a completely different purpose.[53] For example, the Home Office or a local authority may have assessed the age of an unaccompanied asylum-seeking child. An age assessment carried out for these purposes that meets the requirements of the Mental Capacity Act 2005 could be re-used as an equivalent assessment.

Consultation question

5.58 We invited consultees to provide their:

(1) experiences of the use of equivalent assessments under the Mental Capacity Act 2005; and

(2) views on whether this approach would be appropriate in the context of disabled children’s social care.

5.59 We suggested equivalent assessments could be a way of mitigating the concerns of local authorities that an express assessment duty would open bureaucratic floodgates. It would also be a way of reducing the number of times that families have to repeat their stories to professionals.

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[48] Mental Capacity Act 2005, Sch A1, paras 12, 33 and 50.

[49] Mental Capacity Act 2005, Sch A1, paras 12(1)(a), 13 and 33(2)(a).

[50] Mental Capacity Act 2005, Sch A1, paras 12(1)(b), 14 and 33(2)(b).

[51] Mental Capacity Act 2005, Sch A1, paras 33(5) and 49(1).

[52] Mental Capacity Act 2005, Sch A1, para 49(2) to (5).

[53] Mental Capacity Act 2005, Sch A1, para 49(7).

Consultation analysis

5.60 Some common themes in responses which favoured using equivalent assessments in this context were that they could reduce duplication and provide more clarity for families. For example, the Challenging Behaviour Foundation explained that "adopting equivalent assessments would reduce the need for disabled children and parents to repeat information and would be a more efficient use of resources". The Court of Protection Bar Association said that its:

> […] anecdotal experience is that assessments, under the Mental Capacity Act 2005, Schedule A1, para 49, are generally quick and effective though occasionally repetitive if they have not been combined into a single assessment. In general, they bring clarity and certainty to the vulnerable party/their family and carers. A similar level of specificity as in the Mental Capacity Act 2005 would likely be helpful when making equivalent assessments in the context of disabled children's social care.

5.61 Concerns raised by those who did not think equivalent assessments should be used in this context included that the focus of the assessment might be lost, that out-of-date information might be relied on, and that it was generally not appropriate. For example, Northumberland Council commented that the "use of other assessments as the social care assessment risks losing this focus and means that potentially people with less expertise are undertaking those assessments".

Discussion

5.62 Whilst consultees had some positive experiences of the use of equivalent assessments, there was no clear consensus among consultees that their use would work in disabled children's social care. Equivalent assessments are very specific to the Mental Capacity Act 2005, as capacity or age assessments may be done in one context but reusable in another. This is not necessarily the case in disabled children's social care, and we were not provided with any examples of assessments that would be equivalent to a disabled child's social care assessment that could be repurposed. Furthermore, as outlined by a number of consultees, the use of equivalent assessments could lead to outdated assessments being relied upon, and could cause more confusion for children, young people and their families. We do not therefore recommend that these should be used in the context of disabled children's social care law.

THE PROCESS AND CONTENT OF ASSESSMENTS

5.63 Chapter 4 of our consultation paper covered the following questions relating to the process and content of assessments.

(1) How is an assessment carried out?

(2) Who carries out an assessment?

(3) What should be in an assessment?

THE PROBLEM

5.64 The answers to the questions set out above are largely not in legislation. Rather, they are addressed by a combination of legal duties identified by the courts, statutory and non-statutory guidance, and in local protocols for assessment.[54] This is a problem in and of itself as it makes the law more complex and less accessible. A number of further problems with the process and content of assessments were raised with us by stakeholders in the lead up to the consultation.[55] Some of these problems were that:

(1) assessments are not always carried out in a timely fashion;

(2) assessments are not always carried out by an appropriate method;

(3) assessors may lack training, experience and understanding of disability; particularly in conditions such as autism;

(4) where a social care team recognise that they lack the relevant expertise, it can be difficult for them to access necessary expertise from other disciplines such as occupational therapy, speech and language therapy or educational psychology;

(5) there can be a lack of communication between departments and teams, inhibiting information gathering, and children and their parents to repeat the same information;

(6) the process of assessment does not always properly consider the voices of children, or their parents and carers;

(7) the process of assessment does not always capture the entirety of the child's needs or take a holistic view of those needs; and

(8) there is a focus on safeguarding in assessments, at the expense of consideration of social care need.[56]

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[54] Disabled Children’s Social Care (2024) Law Commission Consultation Paper No 265 paras 4.4 to 4.12.

[55] We list these in more detail in Disabled Children’s Social Care (2024) Law Commission Consultation Paper No 265 at para 4.13.

[56] See further Disabled Children’s Social Care (2024) Law Commission Consultation Paper No 265 paras 4.13 to 4.22.

Experiences of assessments

Consultation question and analysis

5.65 We invited consultees to tell us about their experiences, both positive and negative, of the current process of assessing the social care needs of disabled children. Many local authority consultees provided a summary of their approach to assessments and examples of good practice. But the majority of parents, carers and charities who responded to this question provided negative experiences of assessments. We set out the main themes below. Some of them mirror the themes we had identified in our pre-consultation work. Others were new.

(1) A focus on safeguarding, rather than assessing the needs of the child which arise from disability. A number of parents and carers shared that they felt anxious about asking for an assessment for fear of being judged or due to the lack of trust in the professionals and the assessment process.

  (a) The Potato Group in particular explained that there was a lack of understanding of the intersection between their children being adopted and disabled, explaining that social workers assessing their children "didn't understand my children were scared of social workers (they are adopted) and probably viewed me as being overprotective and obstructive".

  (b) However, the focus on safeguarding was described by some consultees as a nuanced issue, with one health care consultee making the point that a social worker checking a child's bedroom may be necessary as it "gives important information about the needs and vulnerability of a child. For example, physically disabled children may need equipment space, and children with autism may need space to let off steam and their own bedroom in order to support other children".

(2) The absence of a clear statutory framework and underpinning to the assessment process. For example, Professor Luke Clements commented that "the absence of statutory underpinning of this kind has, in large measure, caused the wholly inappropriate assessment practice". Parents and carers also shared that they were unsure who to go to for an assessment or what the process is/entails.

(3) The length of the assessment process, with delays and refusals to assess. WellChild observed that "many parents reported long waits to receive services" and gave the example of one parent who "had been battling their local authority for two years".

(4) Assessors lacking the appropriate expertise and not bringing in that expertise. Foundations reported that "the situation is further complicated by a shortage of specialist expertise among assessors", while one parent carer shared that "those assessing do not have sufficient knowledge of my son's disability [fetal alcohol spectrum disorder]".

THE SOLUTION

5.66 In our consultation paper we made three proposals, and asked one open question, aimed at improving the law relating to the process and content of assessments to address some of the problems set out above. The first was that assessments should be proportionate and appropriate to the circumstances of the child and their family. The second was that assessors should have appropriate expertise and training. The third was that local authorities should be required to provide disabled children and their families with a copy of their assessment. We also asked an open question on delegating assessments. We discuss these in turn below.

5.67 We also make recommendations elsewhere in this paper which aim to solve some of the problems outlined above. In particular, a theme which was common to many of the negative experiences of assessments that were shared with us was the focus on safeguarding in assessments, at the expense of consideration of social care needs. Whilst we think that the recommendations set out below will go some way to address this, our recommendations in Chapter 2 are also intended to address this. Recommendations to ensure that the views of children and families are taken into account are found in Chapter 4 and recommendations about joint working are found in Chapter 16.

Proportionate and appropriate assessments

Our provisional proposal

5.68 We proposed a requirement that assessments are proportionate and appropriate to the circumstances of the child and their family.

5.69 This proposal sought to address concerns from local authorities that putting the duty to assess on a statutory footing would lead to more assessments being carried out, where there is not enough resource to do so. Our aim with this proposal was to emphasise that not all assessments need be onerous, complex or time consuming. It also sought to address concerns we heard in the lead up to the consultation that assessments are often completed by unsuitable methods. For example, we were told about an assessment for a short break completed over the phone despite the parent asking for it to be in person as her child is non-verbal.

Consultation analysis

5.70 In total, 149 consultees answered this question. Of those who answered, the majority (132) agreed with the proposal, 12 neither agreed nor disagreed and a small minority (five) disagreed. A key theme raised by consultees in favour of the proposal was that it would save time and resources. For example, the Royal Borough of Greenwich explained that “allowing for lighter touch responses to those families who require only a standard package of care should improve the experiences of families and maximise limited staffing resources within the [local authority]”. Some consultees noted that if assessments were proportionate and appropriate then it is less likely that the safeguarding approach to assessing disabled children would occur. A few consultees who agreed with the proposal mentioned the desirability of aligning the law with the adult social care framework.

5.71 A number of consultees (both in favour and against the proposal) emphasised the need for clarity on what is "proportionate" and "appropriate", with some suggesting that the terms are vague. Others asked for specific guidance or a framework to accompany this proposal.[57] Some consultees asked for "minimum standards" to set out what an appropriate and proportionate assessment should be.

Discussion and recommendations

5.72 To ensure that assessments are not more complex, time consuming or intrusive than they need to be, we recommend that there should be a requirement that assessments are proportionate. Further, to ensure that assessments are carried out by a suitable method, we recommend a requirement that assessments are appropriate to the needs of the child. This will bring the assessment process for disabled children more in line with adult social care and would provide more clarity for assessors. We think that this should be a legal requirement as it will provide for some accountability in the system. If an inappropriate or disproportionate assessment is carried out, then the parents or carers can rely on this requirement to seek redress.

5.73 The Law Commission is an independent statutory body and our recommendations seek to bring improvements to the law that are not dependant on the continuation of a particular Government policy. However, as explained at para 1.13, our terms of reference require us to have regard to the Government's wider work on social care and a number of consultees asked us to clarify how our recommendations would sit with the policy developments in Family Help. We are of the view that this recommendation will align with the Government's policy, which emphasises that assessments under Family Help are proportionate ("tailored to the level of need identified within a family") and appropriate ("adapting appropriately for children with SEND and disabled children and their families").[58] The Department for Education has also recognised in this guide that the type of assessment and support required by a disabled child may differ from that required by a family where there are child protection concerns.[59]

5.74 A number of consultees raised concerns about the definitions of the terms "appropriate" and "proportionate". As we noted in our consultation paper, a guide prepared for proportionate assessment under the Care Act 2014 explains that proportionality means "provid[ing] the right level of response to suit the needs of the person, the situation and the level of risk".[60] We envisage the same meaning, that a proportionate assessment is one that is neither more complicated nor onerous than it needs to be. It is a question that goes to the length, detail, and intrusiveness of an assessment. For example, a child needing a residential overnight short break may need a more complicated assessment with several visits from a social worker as part

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[57] For example, the Council for Disabled Children referred to a briefing note on 'Using a needs-led eligibility framework to provide services to disabled children and their families'. Available at: https://www.researchinpractice.org.uk/children/publications/2024/june/using-a-needs-led-eligibility-framework-to-provide-services-to-disabled-children-and-their-families-strategic-briefing-2024/.

[58] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 25.

[59] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 17.

[60] *Proportionate assessment approaches: a guide from the Chief Social Worker for Adults, principal social workers and principal occupational therapists* (March 2024).

of the assessment. Whereas a child who needs a one-off short break in the form of a supported swimming lesson may only need a short assessment with a social care practitioner.

5.75 As for "appropriate", we mean that the assessment should be conducted in a way which works best for the child. An appropriate assessment means taking into account the child's needs.[61] For example, an assessment of a child with communication difficulties is carried out in a way that allows the child to communicate their views. It is about the appropriateness for the child, for instance conducting the assessment somewhere where they feel comfortable. The *Care and Support Statutory Guidance* provides examples of the different ways an assessment can be carried out for adults. For instance, it suggests that an online or phone assessment can be a proportionate way of carrying out assessments where the person is already known to the local authority and it is carrying out an assessment following a change in circumstances.[62]

Recommendation 9.

5.76 There should be a requirement that assessments are proportionate and appropriate to the circumstances of the child and their family.

5.77 The statutory guidance we recommend in Chapter 2 should provide a framework for assessment and include examples of appropriate and proportionate assessments.

Expertise of assessors

Our provisional proposal

5.78 We proposed that assessors should be required to have appropriate expertise and training. We invited consultees' views on whether assessors should be required to have expertise in specific conditions.

5.79 We made this proposal to address the problems we heard from stakeholders that assessors sometimes lacked the relevant training, experience and understanding of disability, and approach a disabled child's assessment in the same way as for a child with safeguarding concerns. We made a proposal to mirror the legislation regulating adult social care in the hope that it would address the concerns of parents and carers regarding the quality of assessments.[63] The legislation for young carer's needs assessments,[64] and social care in Wales[65] also specifically address the expertise of assessors in legislation.

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[61] See Care and Support (Assessment) Regulations 2014, SI No 2827, reg 3(2).

[62] Department of Health and Social Care, *Care and Support Statutory Guidance* (July 2025) para 6.3.

[63] Care and Support (Assessment) Regulations 2014, SI No 2827, reg 5.

[64] Young Carers (Needs Assessments) Regulations 2015, SI No 527, reg 3.

[65] Care and Support (Assessment) (Wales) Regulations 2015 (W 111), SI No 1305, reg 3.

Consultation analysis

5.80 In total, 154 consultees answered this question. Of those who answered, 136 agreed, only five disagreed and 13 neither agreed nor disagreed with the proposal. Approximately 128 consultees provided views on the second part of the consultation question regarding expertise of specific conditions.

5.81 Those in favour of the proposal were of the view that an expertise requirement would lead to better assessments, avoid inappropriate practice and ensure a more holistic approach to assessing needs. Hertfordshire Children's Services explained that "assessments are better carried out by those trained and experienced in understanding the needs of disabled children and their families". They provided examples of the expertise needed, noting that "understanding of the social model of disability and the impact and intersectional nature of discrimination experienced is critical, as is the capacity to understand different communication methods and features of specific conditions". Those consultees who were against the proposal raised concerns relating to resource constraints, the meaning of "appropriate" and the worry that there will be less emphasis on social work expertise and "children first" practice.

5.82 There were mostly negative views on whether assessors should be required to have expertise in specific conditions. Some consultees explained that this would be helpful for "very complex situations". But a number of local authorities explained that this would be difficult to achieve in practice, Durham Children's Social Care explained that "given the huge complex needs of disabled children and young people we work with it would be incredibly difficult […] nor is this necessary".

5.83 Consultees raised additional considerations relating to both questions on expertise. Irwin Mitchell suggested that "it may be beneficial to have a duty to take into account any available expert reports and the need to seek further expertise". Devon County Council said that there should be "a minimum standard of competence which may be accredited" but also "scope for assessors to have the power to seek expertise as is required to undertake assessment of disabled children and their families". It explained that "it is evident that many will need access to the right knowledge rather than having in depth knowledge of each specific condition".

Discussion and recommendations

5.84 We remain of the view that the law should require assessors to have appropriate expertise and training for the purposes of assessing disabled children's social care. This is consistent with the Government's policy developments in children's social care. For example, the most recent *Working Together* guidance provides that assessments under section 17 should draw in "relevant expertise"[66] and involve a "lead practitioner" who "should have the skills, knowledge, competence, and experience to work effectively with the child and their family".[67] It says that a broad range of practitioners can be the lead practitioner for children and families receiving support and services under section 17 of the Children Act 1989.[68] Similarly, the Government's recent

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[66] HM Government, *Working Together to Safeguard Children 2023* (December 2023) para 162.

[67] HM Government, *Working Together to Safeguard Children 2023* (December 2023) para 157.

[68] HM Government, *Working Together to Safeguard Children 2023* (December 2023) para 121.

Families First Partnership Programme Guide addresses expertise in relation to Family Help explaining that the lead practitioner should have "the right knowledge, skills and experience".[69] Our recommendation would strengthen these requirements and elevate them to a statutory footing, to promote compliance, consistency and accountability.

5.85 We do not think the recommendation should include a requirement to have expertise in specific conditions. As consultees pointed out, this would be difficult to achieve in practice. It would also make the legislation very prescriptive. However, some consultees suggested that legislation could address situations where assessors can or should seek expertise that they may not have, when undertaking an assessment of disabled children and their families. The Care and Support (Assessment) Regulations 2014 provide for this in relation to adult social care, requiring local authorities to "consult a person who has expertise in relation to the condition or other circumstances of the individual whose needs are being assessed in any case where it considers that the needs of the individual concerned require it to do so".[70] We think that this requirement, as well as promoting consistency with the adult social care system, could encourage assessors to seek expertise on specific disabilities, making it more likely that needs will be identified and described accurately. This requirement is also a tool to promote co-operation between health, education and social care during an assessment, and is a more proportionate approach than requiring assessors to have expertise in particular conditions themselves.

Recommendation 10.

5.86 A person assessing the social care needs of a disabled child should be required to have the skills, knowledge and competence to carry out the assessment in question and be appropriately trained.

5.87 The assessor should be required to consult a person who has expertise in the child's condition, or other aspects of the child's circumstances, where they consider that the child's needs require it.

Copies of the assessment

Our provisional proposal

5.88 We proposed that local authorities should be required to provide disabled children and their families with a copy of their assessment. We made this proposal to make the law in this area more consistent and transparent. This is already the law for parent carer assessments[71] and for EHC plans under the Children and Families Act 2014.[72] We were not able to identify a reason for a different approach in relation to disabled children's social care.

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[69] Department for Education, *Families First Partnership (FFP) Programme Guide* (March 2025) p 19.

[70] Care and Support (Assessment) Regulations 2014, SI No 2827, reg 5.

[71] Children Act 1989, s 17ZD(13).

[72] Children and Families Act 2014, ss 39 and 40.

Consultation analysis

5.89 In total, 148 consultees answered this question. A majority (145) agreed, no consultees disagreed and three neither agreed nor disagreed. The key themes raised by consultees in favour of the proposal were transparency and accountability and better collaboration and family involvement. A number of local authority consultees noted that this is good practice, and that they already provide disabled children and their family with a copy of their assessment.

Discussion and recommendation

5.90 This issue is not controversial, and the clear consensus among consultees affirms the view that this requirement should be placed in the legislation. It will ensure better transparency and provide disabled children with the same right as that which their parents and carers have in relation to their assessments, and which adults being assessed under the Care Act 2014 have.

Recommendation 11.

5.91 Local authorities should provide disabled children and their families with a written copy of the child's social care assessment.

Delegating assessments

Consultation question

5.92 We invited consultees' views on whether it is necessary and appropriate to give local authorities the power to delegate the assessment of the social care needs of disabled children to trusted third parties, retaining ultimate responsibility for the standard of the assessment.

5.93 We made this proposal to address concerns from stakeholders that the necessary expertise is not always available in the local authority. The proposal aimed to complement the proposal we made on expertise of assessors. We were of the view that delegating could make the assessment process more flexible, increasing the options available to local authorities. For example, it would allow assessments to be carried out by a body (for instance an NHS body, or a specialist charity) with greater expertise in a child's particular condition. It could, however, mean that local authorities have less control and oversight over this important function. It is arguable that the power to delegate already exists in relation to children,[73] but it is not clear.

Consultation analysis

5.94 In total, 136 consultees answered this question. It was an open question, and responses have been categorised as either in favour of delegating assessments, against delegating or neither for nor against.

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[73] This was the view we took in relation to assessments of adults in our Adult Social Care project. See Adult Social Care (2011) Law Com No 326 para 5.122.

5.95 Consultees in favour of delegating stated that this could lead to better assessments due to the expertise available outside of the local authority. Better expertise was a theme raised by a number of the consultees in favour of the proposal, specifically for assessments of those with complex needs or multiple sensory needs.

5.96 A number of consultees agreed with delegating assessments in principle but only if the proper controls were in place. For example, the Disabled Children's Partnership thought it should be allowed "if subject to clear statutory guidance, as well as robust quality control". They pointed to the example of EHC plans where "outsourcing has led to poor quality plans". Irwin Mitchell had similar concerns, suggesting that "the assessments are undertaken by persons with relevant experience and expertise and that there are no conflicts of interest in the delegating of assessments". The Council for Disabled Children suggested that delegating assessments "may support to reduce the stigma that families report as a barrier for engaging with social care services and promote families receiving help earlier, preventing avoidable crisis". But they also emphasised the importance of accountability remaining with the local authority.

5.97 Those who were against delegating assessments suggested that it devalues social work and carries risks that those who are assessing would not have the knowledge and skills of a social worker. They were worried that this could lead to a lack of accountability. Some consultees mentioned that delegating assessments does not work in the adult social care context. For example, Professor Luke Clements said that "there is little or no evidence that the delegation of the assessment process to 'trusted' third parties (in the Act 2014) has had a positive impact on the quality (or cost effectiveness) of assessments". He also raised "a point of principle", that "the assessment process should be discharged by public bodies – not least to ensure that they retain 'ownership' of this core function of the state".

5.98 The Department for Education, in its consultation response, was of the view that local authorities "already have the power to delegate assessments of need to a partner or other agency".

Discussion and recommendation

5.99 Consultees highlighted the benefits of delegating assessments in some circumstances, but strongly emphasised the need for regulations or guidance to ensure the proper controls and accountability mechanisms are in place. We did not make a proposal that legislation clarify or create a power to delegate. Instead, we asked an open question to hear consultees' views on, and examples of, how delegating assessments could or do work in practice. In light of the Department for Education's response to this question, that the power to delegate already exists, we recommend the Government clarifies this in guidance and provides examples of the circumstances where it is appropriate for local authorities to delegate assessments. This will provide an opportunity for the Department for Education to consider the examples provided by consultees to this question, to determine whether regulation is needed.

Recommendation 12.

5.100 The statutory guidance we recommend in Chapter 2 should clarify the legal position in relation to delegating assessments in disabled children’s social care and provide examples of when it is appropriate to delegate.

Chapter 6: Assessing the needs of parents, carers and siblings

INTRODUCTION

6.1 In this chapter we consider the legal duties owed to the families of disabled children.[1] In the first half of the chapter we consider the duties to assess the social care needs of parents and other adult carers. In the second half of the chapter, we discuss the equivalent duties owed to siblings, some of whom may themselves be carers.

PARENTS AND CARERS

The problem

6.2 Assessing and meeting the needs of parents and carers is an essential part of the disabled children's social care system. If parents' and carers' needs are not accurately identified, then the correct support cannot be provided to enable them to continue effectively to provide care for their disabled children. For that reason, the law includes duties to assess the needs of parents and carers of disabled children. However, a distinction is drawn between parent carers[2] and carers without parental responsibility,[3] meaning that the law treats these two groups differently when it comes to assessing their needs.

6.3 In our consultation paper, we identified problems with the law on assessing parents' and carers' needs. To help us evaluate whether the issues we heard about prior to the consultation reflected a general trend in the assessment of their needs, we invited consultees to tell us about their experiences, both positive and negative. Approximately 122 consultees answered this question. Of those, most parents and carers shared negative experiences of assessments. Below we set out the problems we identified with the law on assessing parents' and carers' needs prior to the consultation, and the experiences shared with us by consultees in response to our consultation question.

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[1] Our proposals on assessing the needs of parents, carers and siblings, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 chs 5 and 6.

[2] Under the Children Act 1989, s 17ZD(2) a "parent carer" is an adult "who provides or intends to provide care for a disabled child for whom the person has parental responsibility". The Children Act 1989, s 3(1) defines parental responsibility as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and [their] property".

[3] We use this term to describe adult carers of disabled children who do not have parental responsibility and who are not providing care under a contract or on behalf of a voluntary organisation. For example, grandparents. The *Working Together* guidance uses the term "non-parent carers" instead of "carers without parental responsibility". The term "non-parent carers" does not appear in any statute.

(1) First, while there is an express duty in the legislation to assess the needs of both parents and carers with or without parental responsibility, the law, which is spread across three statutes, is inaccessible.[4]

(2) Second, there are inconsistencies in the legal frameworks for assessing parent carers' needs and assessing the needs of carers without parental responsibility. Some of these are set out below.

    (a) There are different thresholds for an assessment. Local authorities can assess parent carers' needs where it appears that there is a need to do so, but in the same situation are limited to informing carers without parental responsibility of their right to ask for an assessment.[5] The latter is a more convoluted route to an assessment.

    (b) Parent carers have a right to a copy of their assessment,[6] whereas carers without parental responsibility do not. Having a copy of the assessment allows the recipient to see whether their needs have been identified correctly and to understand the local authority's decision as to what services, if any, should be provided to them.

    (c) A parent carer's needs assessment must cover a wider range of factors than an assessment for a carer without parental responsibility. In particular, the carer's well-being (as defined in section 1 of the Care Act 2014) must be considered when conducting a parent carer's needs assessment.[7] There is no equivalent statutory requirement when assessing a carer without parental responsibility.

(3) Third, we were told both before and during the consultation that assessments were not being offered or undertaken even when they were requested. One parent carer said that "my needs have been mostly overlooked as social workers have seen my daughter as entirely separate to her family context". Another had "no experience" of parent carer assessments because their "needs were never considered". Many said that they were refused assessments, with one parent carer telling us that "I asked for a carer's assessment and was told my local authority don't do it".

(4) Fourth, several parents and carers described how, even when they were assessed, they were not offered any services or support afterwards. Some were offered inappropriate or insufficient services to meet their assessed needs. For example, one parent carer said that "once having a carer's assessment I have not been offered or advised on any services/provision available to support me and meet my needs". The same parent carer explained that "there is a lack of support, understanding, and access to services and provision for carers, and this needs to change".

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[4] The Children Act 1989, the Care Act 2014 and the Carers (Recognition and Services) Act 1995.

[5] Carers (Recognition and Services) Act 1995, s 1(2).

[6] Children Act 1989, s 17ZD(13).

[7] Children Act 1989, s 17ZD(10) and (11).

(5) Finally, we heard prior to the consultation that there was often a focus on whether the child's needs are being met, at the cost of considering other relevant matters. For example, we heard that factors such as sleep deprivation and the emotional toll of looking after a disabled child were not always taken into consideration. Some parents and carers we heard from during the consultation were also concerned about having a needs assessment for fear of being blamed or judged. For example, the Disabled Mothers' Rights Campaign & Support Not Separation said that "mothers don't ask for assessments as they know they will be judged" and shared that its network:

> […] overwhelmingly reported that they wished they had never asked for help, because of the devastating consequences for their families. Nearly all were met with child protection or family court, they have been labelled anxious, accused of fabricated or induced illness and/or of just wanting benefits. Consequently, their children did not receive the care or support they needed. All felt their mental health had been negatively impacted during the course of being assessed.

The solution

6.4 The recommendations we set out in the remainder of this half of the chapter go some way to addressing the problems explained above. However, the solutions to some of the issues are dealt with elsewhere in this report. For example, our recommendations in Chapters 7, 8 and 15 are intended to assist in dealing with the problems with lack of services and support provided for parents and carers. Further, the statutory principles we recommend in Chapter 4, such as the need to consider the views, wishes and feelings of the child's parents and carers, are intended to ensure that the voices of parents and carers are heard during assessments and that their views are given appropriate weight.

Duty to assess the needs of carers

6.5 As explained at paragraph 6.3(2) above, the law on assessing the needs of parents and carers of disabled children differs depending on whether they have parental responsibility or not. We recap the key legal principles below.

KEY LEGAL PRINCIPLES: PARENTS' AND CARERS' NEEDS ASSESSMENTS

Parent carers

- A parent carer is entitled to have their own needs for support assessed if:

  (1) they have asked the local authority for an assessment; or

  (2) it appears to the local authority that the parent may have support needs;

  providing that the child and their family are persons for whom services under section 17 of the Children Act 1989 may be provided.[8]

- This assessment is called a "parent carer's needs assessment" and must include an evaluation of whether it is appropriate for the parent carer to provide, or continue to provide, care for the disabled child, in light of the parent carer's own needs for support, other needs and wishes.[9]

- During the assessment, the local authority must have regard to the parent carer's well-being,[10] as well as the need to safeguard and promote the welfare of the disabled child and any other children for whom the parent carer has parental responsibility. The parent carer must be given a written copy of the assessment.[11]

Carers without parental responsibility

- Carers who do not have parental responsibility but who provide care to a disabled child are also entitled to an assessment of their needs. This duty is triggered where a carer provides or intends to provide "a substantial amount of care on a regular basis" for the disabled child.[12]

- If they meet this threshold, they may request the local authority to carry out an assessment of their ability to provide, and continue to provide, that care, alongside the assessment of the child's needs.[13] Where the carer does not ask for an assessment, but it appears to the local authority that they may be entitled to, the local authority should inform them of their right to make such a request.[14]

- This assessment should consider whether the carer is working or undertaking training, education or leisure activities, or wishes to do any of these things.[15]

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[8] Children Act 1989, s 17ZD(1), (3) and (4).

[9] Children Act 1989, s 17ZD(5) and (9)

[10] As defined in the Care Act 2014, s 1(2).

[11] Children Act 1989, s 17ZD(10) to (13).

[12] Carers (Recognition and Services) Act 1995, s 1(1)(b).

Our provisional proposals

6.6 We proposed that there should be a single duty to assess the needs of a carer for a disabled child, which should arise upon:

(1) request by the carer; or

(2) it appearing to the local authority that the carer may have needs for support.

There were two reasons for making this proposal. The first was the complexity and inaccessibility of the law as it relates to parents and carers. We wanted to make it clearer to all carers, including those kinship carers who do not have parental responsibility, that they are entitled to an assessment.[16] The second was that we had not been able to identify a particular justification for the fact that carers without parental responsibility have to satisfy a more onerous test to have an assessment than parent carers. The difference between the thresholds appeared to be the result of historical accident rather than a deliberate policy decision. For that reason, the threshold we proposed for all carers was the same as it currently is for a parent carer's needs assessment under the Children Act 1989.[17] This proposal would remove the "substantial and regular" test, which is the current threshold for assessment for carers without parental responsibility. It would also remove the convoluted route to getting an assessment described at paragraph 6.3(2)(a) above, thus making it easier for all carers to get an assessment.

6.7 We made two other proposals to address the inconsistencies identified between assessments for parent carers under the Children Act 1989 and for carers without parental responsibility under the Carers (Recognition and Services) Act 1995.

(1) *In assessing the needs of a carer for a disabled child, the local authority should be required to have regard to the well-being of the carer.* We were of the view that having regard to the well-being of the carer is just as relevant to the needs of carers without parental responsibility as it is to parent carers.

(2) *All carers should have a right to a copy of their assessment.* We made this proposal because the legislation gives parent carers the right to a copy of their assessment, whereas carers without parental responsibility do not have this right. Being entitled to a copy of the assessment allows the recipient to see whether their needs have been identified correctly and to understand the local authority's decision as to what services, if any, should be provided to them. We

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[13] Carers (Recognition and Services) Act 1995, s 1(2). The duty does not apply to those who provide care under a contract or for a voluntary organisation: Carers (Recognition and Services) Act 1995, s 1(3).

[14] Carers (Recognition and Services) Act 1995, s 1(2B).

[15] Carers (Recognition and Services) Act 1995, s 1(2C).

[16] Some kinship carers, such as those in informal kinship care arrangements, do not have parental responsibility, while others, such as kinship carers with a Special Guardianship Order do. For the definitions of different types of kinship care, see Department for Education, *Championing Kinship Care, The National Kinship Care Strategy* (December 2023) pp 14 and 44.

[17] Children Act 1989, s 17ZD.

were not able to identify a reason of principle why carers without parental responsibility should not also be entitled to a copy of their assessment.

Consultation analysis

6.8 In total, 145 consultees answered our question on bringing the duties to assess carers with and without parental responsibility together into one assessment duty. Of those, a majority (117) agreed, five disagreed and 21 consultees answered ‘other’.

6.9 A number of consultees in favour of the proposal thought it would lead to greater clarity and consistency. Steve Broach KC supported the proposal because it “would solve one of the most stark and difficult problems with the current statutory scheme”. Not all consultees focused on the reason for this proposal, which was to bring the duty to assess carers with and without parental responsibility together into one duty. Some, instead, emphasised the importance of having a duty to assess parents and carers in the first place and highlighted some of the problem with assessments.

6.10 Some consultees highlighted the importance of clarifying and promoting awareness of the rights and responsibilities relating to assessments. For example, Professor Luke Clements and Cerebra suggested that there should be an additional duty on local authorities to inform carers, in writing, of their right to request an assessment. Others suggested that clearer guidance was necessary to accompany this duty. One local authority consultee, for example, said that it “would welcome clearer guidance on this that builds on our current approach that makes things clearer for parent /carers and local authorities”.

6.11 Points raised by those who disagreed with the proposal included that the threshold for assessing was not low enough, or that the focus should be on the child and their needs. Some consultees who were neither for nor against the proposal raised concerns about the idea that there would be separate assessments for the child, and the parent or carer. They argued for an assessment of the family as a whole rather than having these carried out separately. For example, Dame Christine Lenehan explained that:

> As legislation developed and a separate parent carer assessment duty was introduced, this hasn’t always been helpful. Families should have access to a single, holistic assessment which would include the whole family including siblings and parents. Separate assessments rarely lead to different provision and families continue to have to repeat stories. Good holistic assessments should be clear in their actions, what is needed and for whom with what goal. I see no need for separate assessments unless family circumstances dictate otherwise. I am therefore not clear why a separate duty to assess carers is needed. There may be additional information provided/requested by a carer as circumstances change but this should be a supplement to an overall assessment, not a new one.

6.12 A number of other consultees, mirroring Dame Christine Lenehan’s concerns about assessments being done in isolation, mentioned the need for the parent or carer’s needs assessment to be combined with the child and sibling’s assessments. Irwin Mitchell, a law firm, suggested that there should be “an automatic assumption that the carer’s assessment will take place at the same time as the child’s needs assessment, unless specifically rejected by the carer”.

6.13 One hundred and forty-four consultees answered our question on whether local authorities should be required to have regard to the well-being of the carer. Of those who responded, 130 agreed with our proposal, one consultee disagreed and 13 neither agreed nor disagreed. Many consultees in favour of this proposal explained that assessing parents' and carers' well-being is key to meeting the child's needs. We were provided with many examples of the impact of caring for a disabled child on the well-being of parents and carers. The North West Association of Directors of Children's Services were against our proposal because of concerns that the "creation of a distinct requirement could create undue emphasis on one aspect and create a de facto expectation of services of support to promote the wellbeing of carers which is not matched by current resources".

6.14 In total, 143 consultees responded to our proposal that all carers should have a right to a copy of their assessment. Of those who answered, a majority (141) agreed, no one disagreed and only two consultees neither agreed nor disagreed. A number of consultees were in favour of the proposal because it would lead to greater transparency and accountability. Many local authority consultees responded that this is already standard practice in their areas.

Discussion and recommendations

6.15 Having considered the consultation responses our view is that there should be a single duty to assess the needs of a carer for a disabled child – irrespective of whether they have parental responsibility – which should arise upon:

(1) request by the carer; or

(2) it appearing to the local authority that the carer "may have needs for support"[18].

This is in keeping with the current duty to assess parent carers in the Children Act 1989. The threshold for an assessment will remain the same, meaning that the duty set out above will only apply if the child and their family are persons for whom services under section 17 of the Children Act 1989 may be provided.

6.16 The current legal framework creates unnecessary complexity and inconsistency, as assessments for parent carers, and carers without parental responsibility, are governed by separate statutes. Consultation affirmed our view that there is no clear rationale for maintaining distinct assessment duties applying different thresholds, highlighting the need for consolidation. By merging these duties into a single provision in a unified framework, the law will be simpler, clearer and fairer. It will, in particular, make the law clearer for some kinship carers who do not have parental responsibility and (as Coram Voice suggested during a consultation event) for foster carers where parental responsibility lies with the state.

6.17 A key element of this recommendation is the removal of the "substantial and regular" test, which currently serves as a threshold for assessments of carers without parental responsibility. As explained in the consultation paper, retaining this test was not a

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[18] This is based on the language of the Care Act 2014, s 10 and the Children Act 1989, s17ZA.

deliberate policy choice, but rather an unintended consequence.[19] The authors of the leading textbook on disabled children's law described this distinction as a "drafting oversight", which was preserved by the decision not to repeal the Carers (Recognition and Services) Act 1995.[20] If our recommendation is implemented this Act could now be repealed.

6.18 We note the points raised by Professor Luke Clements, local authority consultees and others about the importance of clarifying the responsibilities of local authorities, and ensuring parents and carers are aware of, or are informed of, their rights. In our view both of these objectives can be achieved through clear guidance, rather than placing a duty on local authorities to inform parents and carers of their right to an assessment. Whilst we agree with the aim of consultees in suggesting the creation of this duty, we do not think it is necessary, and instead the guidance we recommend in Chapter 2 should make it clear to parents and carers that they are entitled to a needs assessment and the requirements of such an assessment. A consistent theme to emerge from our consultation events was that clear guidance was viewed as desirable by families and by local authorities as an effective means of ensuring that everyone is aware of their rights and responsibilities.

6.19 Many consultees, including Dame Christine Lenehan, emphasised the importance of holistic assessments. We agree with this sentiment: the importance of avoiding families having to retell their stories has been a recurrent theme since we started this review. The law already provides for an assessment of a parent carer's needs to be combined with the assessment of the disabled child's needs and any young carer's assessment.[21] Under our recommendation this would continue to be the case. The fact that the assessment duties are in separate sections of the legislation does not mean that the assessments themselves have to be separate. We think it would be useful for this to be spelt out and encouraged in guidance. This is in keeping with the aims of the Government's Families First Partnership Programme which emphasise the need to assess and support "families", rather than individuals, and have "one assessment and one plan".[22]

6.20 Our two other proposals were about simplifying the legal provisions and making sure they are consistent. Assessing and supporting the well-being of parents and carers is essential to meeting children's needs and as several consultees pointed out, providing adequate support to carers ultimately reduces long-term costs to the state by preventing crises. Our recommendation clarifies the existing legal duty to consider well-being in parent carers' needs assessments and extends this requirement to all carers. Despite the statutory requirement, we heard that well-being is not always considered, so we propose strengthening the guidance to ensure practitioners actively

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[19] For a more detailed discussion see Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 5.19 to 5.22.

[20] S Broach and L Clements, *Disabled Children: A Legal Handbook* (3rd ed 2020) p 371, para 8.15. See further L Clements, The 'grandparent' problem (January 2016), http://complexneeds.org.uk/modules/Module-1.2-The-legislative-context-edition2/All/downloads/m02p010c/carers-assessments-grandparents-clement-2015.pdf.

[21] Children Act 1989, s 17ZE(3).

[22] Department for Education, *The Families First Partnership (FFP) Programme Guide: Delivery expectations for safeguarding partners in England* (March 2025) p 24.

engage with carers on this issue. The only principled objection to this proposal came from the North West Association of Directors of Children's Services, who were of the view that this would lead to an expectation of services. However, as with the current law, requiring local authorities to consider well-being does not create an entitlement to services. Many parents value the opportunity to discuss their well-being, which helps local authorities better support families. We also note the experiences of consultees that some parents hesitate to speak up for fear of stigma. This concern should be addressed in the guidance we recommend in Chapter 2. Specifically, the recommendation we make at paragraph 2.17 should guide local authorities on balancing the needs of disabled children and their families with safeguarding, in a non-stigmatising way that encourages open discussion of parental well-being.

6.21 As we argued in the consultation paper, without a written copy of their assessment parents and carers cannot reasonably be expected to understand what (if any) services they are to be provided with and why. Our impression was that, in practice, copies of the assessment are provided to most carers in any event and that making this mandatory in all cases would not change what is happening on the ground in many areas. We remain of this view and make this recommendation to remedy the inconsistency between parent carers and carers without parental responsibility. It also brings consistency with our recommendations in relation to children in Chapter 5.

Recommendation 13.

6.22 There should be a single duty to assess the social care needs of the parent or carer for a disabled child, which should arise upon (a) request by the parent or carer or (b) it appearing to the local authority that the parent or carer may have needs for support.

6.23 In assessing the needs of a parent or carer, the local authority should be required to:

(1) have regard to the well-being of the parent or carer; and

(2) provide the parent or carer with a written copy of their assessment.

6.24 The statutory guidance we recommend in Chapter 2 should:

(1) clarify the rights of parents and carers to have their needs assessed and the requirements of such assessment; and

(2) clarify that assessments of parents and carers can be combined with the assessment of their child's needs, and that of their siblings, if applicable.

Proportionate and appropriate assessments

Our provisional proposal

6.25 We proposed that there should be a legal requirement that carers' assessments are proportionate and appropriate to the circumstances of the carer. We made this proposal to reflect the fact that a carer's assessment need not necessarily be a resource intensive or time-consuming task. Rather, the breadth and depth of the assessment should reflect the extent of the carer's needs. This was to bring consistency with our proposals on the assessment of the social care needs of disabled children (see Chapter 5).

Consultation analysis

6.26 One hundred and forty-two consultees responded to our proposal that there should be a legal requirement that carers' assessments are proportionate and appropriate to the circumstances of the carer. Of those, 132 were in favour, four were against and six neither for nor against. Some consultees in favour of the proposal mentioned that practice is variable in relation to parent carers' needs assessments and that this proposal could help standardise it. Other consultees mentioned that it would save local authority time and resources. Northumberland County Council emphasised the need for flexibility and that "there should not be a one size fits all approach".

6.27 Consultees who were against or indifferent to this proposal raised concerns about the language of "proportionate and appropriate" and suggested that better training for assessors is the solution to improving assessments of parents and carers. For example, the Association of Lawyers for Children explained that:

> There is a danger that in straitened times it is in this proportionality test that assessment of need will become an initial screening tool to assess what kind of assessment is required […]. Thorough and comprehensive assessment need not be intrusive for the family. The training of social work professionals and equipping them with the skills to undertake a robust assessment is a separate issue that requires resourcing. These skills provide confidence to social workers to evaluate which parts of an assessment require closer interrogation than others: it is an art, not a science. The answer to intrusion is better training for assessors, we suggest.

Discussion and recommendation

6.28 In Chapter 5, we recommend that assessments for disabled children should be proportionate and appropriate. This reflects the idea that an assessment need not necessarily be a resource intensive or time-consuming task. Rather, the breadth and depth of the assessment should reflect the extent of the needs of the person being assessed. Further, the assessment should be carried out in a way that is appropriate to the child's circumstances: for example, in-person or in a particular location. We think that for consistency with children, parents' and carers' assessments should also be proportionate and appropriate to the circumstances of the parent or carer. We think this recommendation could address some of the issues with assessments explained to us by parents and carers in their consultation responses.

6.29 We recognise the concerns about the use of the terms proportionate and appropriate. We discuss such concerns in relation to assessing the needs of children in Chapter 5.[23] We emphasise here that use of the term proportionate does not mean cutting corners. It means an assessment should be as short or as long as is needed. The Association of Lawyers for Children also suggested that better training is the answer to some of the problems we identified with assessments for parents and carers. We

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[23] See paras 5.68 to 5.77.

do not make any recommendation about training. It is not something upon which we have consulted and so we do not have a clear idea of the need for training or how to meet it. But we record the point here for the Department for Education to consider when deciding whether and how to implement our recommendations.

Recommendation 14.

6.30 The assessment of the social care needs of the parent or carer of a disabled child should be proportionate and appropriate to their circumstances.

SIBLINGS

The problem

6.31 The charity Sibs estimate that there are over half a million siblings of disabled children and young people in the UK, and that 5.1% of children under 16 are siblings of disabled children.[24] Siblings play a vital role in the lives of disabled children. But we also heard about the challenges they face. Many provide care to their sibling as young carers. Others may not be caring for their sibling but may still experience sleep deprivation, physical violence from their sibling, or face challenges in school.

6.32 There is no single legal provision which explicitly addresses the needs of siblings. In our consultation paper, we identified three situations in which the needs of a non-disabled sibling of a disabled child might need to be assessed:

(1) where meeting the sibling’s needs may be necessary to meet the needs of the disabled child;

(2) where the sibling is a “child in need” in their own right; and

(3) where the sibling is a “young carer” to the disabled child.

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[24] Sibs (undated), https://www.sibs.org.uk/about-sibs/media/.

KEY LEGAL PRINCIPLES: YOUNG CARERS' NEEDS ASSESSMENTS[25]

- A "young carer" is a "person under 18 who provides or intends to provide care for another person and is not doing so under a contract or as voluntary work".[26]
- Young carers are entitled to a needs assessment from their local authority if:[27]

  (a) it appears to the authority that the young carer may have needs for support; or

  (b) the local authority receives a request from the young carer or a parent of the young carer to assess the young carer's needs for support.
- If either criterion is met and the young carer is within the local authority's area then the local authority is under a duty to assess whether they have needs for support and, if so, what those needs are.[28]
- A young carer's needs assessment may be combined with an assessment of the person cared for, but only if the young carer and the person cared for agree.[29]

6.33 In the lead up to, and during, the consultation, we heard that siblings' needs can be overlooked irrespective of whether meeting those needs would benefit the disabled child. We heard that this could be the case regardless of whether the sibling was a young carer or a child in need themselves. To gain a better understanding of the issues with the law on assessing siblings' needs, we invited consultees' views and experiences on:

(1) the extent to which siblings' needs are considered during the assessment of a disabled child's social care needs; and

(2) the conduct of young carers' needs assessments.

6.34 In total, 120 consultees answered the first question and 99 answered the second. In answering the first question, Sibs explained that "the needs of siblings are often invisible, and their expertise is too often overlooked". Carers Trust provided quotes from sibling carers they support, with one saying that "young carers will have different needs to adult carers", and that "often we are overlooked due to our age, despite the key role we play in supporting and caring for our siblings". Consultees also mentioned that siblings were not often considered to be children in need themselves. For

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[25] See Children Act 1989, ss 17ZA, 17ZB and the Young Carers (Needs Assessments) Regulations 2015, SI No 527.

[26] Children Act 1989, ss 17ZA(3) and 17ZB(3).

[27] Children Act 1989, s 17ZA(1)(a) and (b). This is known as a "young carer's needs assessment" (s 17ZA(2)).

[28] Children Act 1989, s 17ZA(1).

[29] Children Act 1989, s 17ZB(7).

example, Steve Broach KC commented that “it is important that the question of whether siblings are children 'in need' in their own right is considered in appropriate cases”.

6.35 In response to the second question, many consultees responded that siblings’ needs are not considered where the sibling themselves might be a young carer, entitled to a young carer’s needs assessment. For example, Special Needs Jungle explained that “distinct assessments of the needs of young carers are not routinely taking place, even if they are explicitly identified as such”. Special Needs Jungle commented further that “confusion is caused by rolling up assessments together, resulting in a lack of clarity about entitlements”. Parent and Carer Alliance expressed the view that:

> Society’s view of what a young carer is needs addressing and their needs to be national guidance that runs alongside this. All siblings of disabled children become young carers within their households. Many of our families are told that if their other children have disabilities then they cannot be young carers and yet disabled adults who care for others are not discriminated in this way. Many neurodivergent families are especially impacted.

6.36 Some consultees criticised the process of young carers’ assessments. Carers Trust emphasised that “the language around carers’ assessments is not accessible for young people, which may be a barrier for sibling carers accessing a carer’s assessment”. Sibs also drew our attention to the All-Party Parliamentary Group (APPG) for Young Carers and Young Adult Carers Inquiry which considers further issues faced by young carers and specifically considers young carers’ needs assessments.[30]

6.37 Another potential problem we identified in the consultation paper was that there are separate assessment duties for young carers and other carers (parent carers and carers without parental responsibility). We were of the view that having separate statutory frameworks for these assessments, which mostly have the same requirements and cover the same questions, might be regarded as unnecessarily complex or fragmented.

The solution

Our provisional proposals

6.38 To respond to the problems identified above, we proposed that:

(1) guidance should direct local authorities to consider siblings’ needs during the assessment of the needs of the disabled child; and

(2) there should be a single duty to assess the needs of all carers, whatever their age.

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[30] All-Party Parliamentary Group for Young Carers and Young Adult Carers, *Inquiry into the life opportunities of young carers and young adult carers* (November 2023).

Consultation analysis

Guidance directing local authorities to consider siblings' needs

6.39 In total, 136 consultees answered this question. Of those who answered, a majority (125) agreed with the proposal, four disagreed and seven neither agreed nor disagreed. Most consultees in support of the proposal thought it would provide more clarity and ensure a more holistic approach is taken to assessments. Sense agreed, with the caveat that guidance should make clear that "any assessment of siblings must be separate to the assessment of the disabled child". The Court of Protection Bar Association noted that "article 8 of the European Convention on Human Rights[31] may make this an important consideration in relevant cases and agrees that statutory guidance in this respect is likely to be helpful".

6.40 Some consultees who disagreed with the proposal were of the view that it does not go far enough. For example, one consultee suggested stronger language should be used: "I think it should be they must take the needs into account, not consider. By using the term consider, [local authorities] have a get out option and parent carers are unable to enforce anything". Professor Luke Clements explained our proposal would not be sufficient and advocated more specific requirements, he said that:

> The default position in any disabled child's assessment must be that 'consideration be given as to the likely impact any failure to provide appropriate care and support may have on the child's siblings (regardless of whether they are considered to be 'young carers')'.

A single duty to assess all carers

6.41 In total, 131 consultees responded to our proposal that there should be a single duty to assess the needs of all carers, whatever their age. Of those who answered, the majority of consultees (111) agreed with the proposal, with six against and 14 neither explicitly agreeing nor disagreeing. A number of consultees who supported the proposal highlighted that a combined duty would promote simplicity, clarity and could result in smoother processes for families. The Challenging Behaviour Foundation said that "this approach would also facilitate a smoother transition for young carers as they move into adulthood, ensuring that they continue to receive the support they need without unnecessary disruptions".

6.42 Some consultees against the proposal expressed the concern that a combined duty would result in young carers being overlooked and have other unintended consequences. The Association of Directors of Children's Services and the Local Government Association explained that "having young carers explicitly referenced in legislation helps to ensure focus on this often-overlooked group of young people and recognises that their needs will be quite different to those of adult carers". The charity Sibs held similar views, noting that:

> […] We recognise that this consultation is about simplifying the law - a mission we support - however, we feel it needs very careful attention. All caring is not the same but all carers should have rights to support regardless. Sibling carers have often

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[31] Article 8 of the European Convention on Human Rights provides the right to respect for private and family life.

been overlooked and there is a danger in this recommendation, that their needs yet again will fall off the edge, whilst the needs of other carers, such as parents, are prioritised.

Discussion and recommendations

Guidance directing local authorities to consider siblings' needs

6.43 We think our proposal that guidance direct local authorities to consider siblings' needs was the right one.[32] This is not an area where we recommend a change in the law. But guidance is needed to ensure the law, and the changes to it we recommend in this report, are clear. Specifically, guidance is needed to clarify the relevance of siblings' needs and emphasise that they must be taken into account during assessments of disabled child. We agree with Professor Luke Clements' suggestion that during a disabled child's assessment there should be consideration as to the likely impact any failure to provide appropriate care and support may have on the child's siblings. This an important and relevant consideration and one that could usefully be highlighted within the guidance we recommend.

6.44 We heard that siblings' needs are not always considered even where the impact of the needs of the disabled child is such that the sibling themselves may be a child in need or a young carer, or both. The guidance we recommend should direct local authorities to consider the possibility that a sibling is a child in need in their own right and clarify siblings' rights to young carers' needs assessments and the legal framework for young carers more generally.[33] Having guidance on this subject, which local authorities have to take into account, will make it clearer to local authorities that in order to complete a holistic assessment they must take account of siblings' needs.

A single duty to assess all carers

6.45 A minority of consultees raised some important concerns regarding the unintended consequences of merging assessment duties for all carers, regardless of age. Chief among these concerns is the risk that young carers may be overlooked if they are grouped together with other carers under the umbrella of a single assessment duty. The vital role played by young carers in looking after their disabled siblings is not universally known and having a distinct legal category of young carers, and a separate assessment duty, helps to give prominence to this role. If we remove this category and this duty and deal with all carers together, irrespective of age, we would be giving less prominence to the role. Although this would simplify the law there is, we accept, a risk that it would exacerbate one of the other problems we are trying to deal with, which is that the needs of siblings are not always taken into account.

6.46 In addition, there are important differences between the assessment duties for young and other carers. For example, the young carer may not be caring (or caring solely) for a disabled child; many care for adults, or both adults and siblings in their family. The assessment thresholds differ for that reason and, on reflection we did not give

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[32] See paras 1.18 and 2.21 for an explanation of the legal status and effect of such guidance.

[33] Contained in Children Act 1989, ss 17ZA to 17ZD and the Young Carers (Needs Assessments) Regulations 2015, SI No 527.

sufficient weight to this point in our proposal.[34] Given these considerations, we do not recommend introducing a single duty to assess the needs of all carers, irrespective of age. Instead, we propose maintaining separate assessment duties to ensure that young carers are given sufficient prominence within the legislative scheme, and that their circumstances and needs are recognised as distinct.

Young carers' needs assessments

6.47 As explained at paragraph 6.36 above, in response to our question on the conduct of young carers' needs assessments, consultees drew our attention to a number of issues with these assessments, such as lack of guidance, training and appropriate framework. Sibs and Carers Trust specifically mentioned examples from submissions to the APPG inquiry[35] which described inconsistencies in whether a young carer receives an assessment or any follow-up support from such assessments. We do not make any specific recommendations to change to the process or content of young carers' needs assessments. It is beyond the scope of our review to do so, as some of the young carers covered by that legal framework will not be caring for a disabled child. However, the points that have been raised are important ones, and we record them here for completeness in the event that the Department for Education wishes to consider them further.

Recommendation 15.

6.48 The statutory guidance we recommend in Chapter 2 should direct local authorities to consider the relevant needs of any siblings as part of the assessment of the needs of a disabled child.

6.49 This guidance should also direct local authorities to consider whether the sibling is a child in need, or a young carer for the disabled child.

6.50 Siblings who are young carers of disabled children should continue to have their needs assessed under the existing legal framework for young carers. The duties owed to young carers should not be subsumed within the legal framework that applies to other carers.

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[34] For young carers, a local authority must assess their needs for support if: (1) it appears to the authority that the young carer may require support; or (2) a request for assessment is made by the young carer or their parent. A parent carer's needs assessment requires an additional requirement, that the local authority is satisfied that the disabled child and their family are persons for whom they may provide or arrange for the provision of services under section 17.

[35] All-Party Parliamentary Group for Young Carers and Young Adult Carers*, Inquiry into the life opportunities of young carers and young adult carers* (November 2023). See also the subsequent report: All-Party Parliamentary Group for Young Carers and Young Adult Carers, *Children and Families Act and Care Act 2014 – 10 years on for young carers and young adult carers* (May 2024).

Chapter 7: The powers and duties to meet the needs of disabled children and their families

INTRODUCTION

7.1 In this chapter we discuss the powers and duties that local authorities should have in order to meet the social care needs of disabled children and their families. As part of this discussion, we look at short breaks,[1] charging and disabled facilities grants. We also consider the idea of national eligibility criteria: a standardised set of criteria, which apply across the country for the purposes of deciding whether a local authority should be required to meet the social care needs of a disabled child.[2]

THE PROBLEM

KEY LEGAL PRINCIPLES: THE MAIN POWERS AND DUTIES TO HELP DISABLED CHILDREN AND THEIR FAMILIES[3]

Local authorities have a number of powers and duties which can be used to provide social care to disabled children and their families. Chief among them are the power under section 17 of the Children Act 1989 and the duty under section 2 of the Chronically Sick and Disabled Persons Act 1970. These two provisions can be used to provide an array of social services including personal care in the home, adaptations to the home and certain types of "short break" provision. Other legal provisions which can be used to provide social care to disabled children include sections 20(1), (4) and 22(3)(b) of the Children Act 1989 and section 117(2) of the Mental Health Act 1983.

7.2 The overlapping relationship between the various powers and duties to provide help to disabled children is complicated, and not well-understood. In addition, a feature of the duty under section 2 of the Chronically Sick and Disabled Persons Act 1970 is that local authorities are entitled to take into account their resources in deciding whether the duty is owed. This means that local authorities can devise their own eligibility criteria, setting out more or less stringent conditions for what is an eligible need, depending on the financial resources they have available. This results in a postcode lottery of provision, whereby a disabled child may be eligible to have their needs met in one area but not another. That was not the original intention behind section 2 of the

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[1] Explained in "Key Legal Principles" below at para 7.4.

[2] Our proposals on the powers and duties to meet the needs of disabled children, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 chs 7, 8 and 12.

[3] See Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 7.3 to 7.17 and 8.6 to 8.26 for a comprehensive account of the law.

Chronically Sick and Disabled Persons Act 1970 but is a consequence of the way it has been interpreted by the courts.[4]

7.3 This system of localised eligibility criteria is inconsistent with the adult social care system. Prior to 2015, adults who needed care and support experienced a similar postcode lottery, but that changed when the Care Act 2014 came into force, introducing national eligibility criteria. Concerns have also been raised in the academic literature that many local criteria that have been adopted for disabled children are either not fit for purpose, or are discriminatory, in the way that they deal with autism.[5]

7.4 In the autumn of 2024 and the early spring of 2025, we conducted our own research into eligibility criteria used by local authorities.[6] We reviewed a total of 104 local authorities across the country, including authorities in rural and urban areas. We were unable to find eligibility criteria for 14 of the authorities suggesting either that they do not have them, or that if they do exist, these are not publicly available. Of the remaining 90, no two sets of criteria were the same. Some used a definition of disability which differed from that contained in section 17 of the Children Act 1989. Others excluded children with particular conditions or disabilities from accessing specialist services; for example, children with ADHD or a mild learning disability. Criteria of this nature are not necessarily consistent with the Equality Act 2010.

KEY LEGAL PRINCIPLES: SHORT BREAKS

A short break is a service designed “to assist individuals who provide care for [disabled] children to continue to do so, or to do so more effectively, by giving them breaks from caring”.[7] They can be provided under section 17 of the Children Act 1989 or section 2 of the Chronically Sick and Disabled Persons Act 1970. Short breaks, in the form of accommodation away from home (sometimes referred to as respite care), can also be provided under section 20 of the Children Act 1989, which contains both duties and powers to provide accommodation to children in need.

Where accommodation is provided, there are different benefits and safeguards available, depending on whether the accommodation is provided under sections 17 or 20 of the Children Act 1989, and for how long the accommodation is provided.[8]

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[4] Disabled Children’s Social Care (2024) Law Commission Consultation Paper No 265 paras 7.9, 7.23 and 7.41.

[5] P Bahri, L Clements, A L Aiello and T Hutchinson, *Unlawful restrictions on the rights of disabled children with autism to social care needs assessments* (July 2020) ch 3.

[6] This research will be published as a separate appendix to this report.

[7] Children Act 1989, Sch 2, para 6(1)(c).

[8] Disabled Children’s Social Care (2024) Law Commission Consultation Paper No 265 paras 8.17 to 8.26.

- Disabled children who are provided with longer-term[9] short break accommodation under section 20 are entitled to a care plan and oversight of their case by an independent reviewing officer. They are also subject to various procedural requirements and safeguards, relating to visits by the local authority, record keeping and reviews of their case. If they are accommodated for 13 weeks or more, beginning on or after their 14th birthday and ending on or after their 16th birthday, they will be entitled to additional support. This additional support is often referred to as “leaving care rights” – reflecting the fact that the local authority has, for a time, stepped into the shoes of the child’s parents or carers.

- Disabled children who are provided with shorter-term,[10] short break accommodation under section 20 are not entitled to leaving care rights, and the other benefits and safeguards we refer to are modified. For example, the topics that need to be covered in their care plans are different, and their cases are reviewed less frequently.

- Disabled children who are provided with short break accommodation of any duration under section 17 are not entitled to leaving care rights, or any of the other benefits and safeguards.

7.5 In our consultation paper we described short breaks as being “uniquely important in terms of the impact they can have on families”.[11] This description was based on the experiences of families and local authorities we had met with in the lead up to the consultation. They explained that short breaks can provide a lifeline for parents and carers, enabling them to continue caring for their children and averting a family breakdown, preventing the need for a more costly intervention.

7.6 However, the law that must be navigated to access or provide a short break is complex and fragmented. Further, the different benefits and safeguards which are available to disabled children who are provided with a short break in the form of accommodation away from home means that there is some inconsistency in the services that families receive.

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[9] In this paragraph we use the phrases “shorter-term” and “longer-term” short break accommodation. We use “shorter-term” to refer to the situation where a child is: placed in a series of short break placements with the same person or in the same accommodation; no single placement is intended to last for longer than 17 days; the child returns to the care of their parent or carer at the end of each such placement; and the short breaks do not exceed 75 days in total in any period of 12 months. By “longer-term” we refer to short break accommodation which does not meet these requirements. See Children Act 1989, Sch 2, para 19B(3)(b) and Care Planning, Placement and Case Review (England) Regulations 2010, SI No 959, reg 48.

[10] See fn 9 above.

[11] Disabled Children’s Social Care (2024) Law Commission Consultation Paper No 265 para 8.5.

KEY LEGAL PRINCIPLES: DISABLED FACILITIES GRANTS

In addition to social services' powers and duties under the Children Act 1989 and the Chronically Sick and Disabled Persons Act 1970, there is a separate statutory regime under the Housing Grants, Construction and Regeneration Act 1996 for funding home adaptations, known as disabled facilities grants. Grants can be made up to a statutory maximum of £30,000. They are administered by local housing authorities, whereas the other functions described above are exercised by social services.

7.7 The problems with disabled facilities grants reported to us in the lead up to the consultation tended to arise in cases where a family sought funding for a home adaptation in excess of £30,000. In those cases, families generally needed to approach social services to ask them to top-up the amount covered by the grant. In areas which have a unitary local authority (such as a London Borough Council) this requires families to approach two different departments within the same local authority. In areas which have two tiers of local government (such as a county council and a district council) it requires families to approach two different local authorities. In both scenarios we were told that the different departments and authorities did not always work effectively together and accessing the money needed to finance the adaptation that was needed could be a struggle.

THE SOLUTION

7.8 To mitigate these problems, in our consultation paper we provisionally proposed that:

(1) there should be a single statutory duty to meet the social care needs of disabled children subject to national eligibility criteria;

(2) short breaks should be one of the services that could be provided under this duty;

(3) the duty should take priority[12] over the other duties and powers that might be used to help a disabled child; and

(4) there should be a power to meet the needs of disabled children that do not satisfy the eligibility criteria, as well as powers to meet children's needs pending assessment, and to meet the needs of parents and carers.

7.9 We also asked open questions to seek views on whether disabled facilities grants should fall under the single duty to meet the social care needs of disabled children, and what residence requirements should apply to the duty. We discuss these proposed solutions and questions in more detail below.

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[12] We explain what we mean by "priority" at paras 7.79 and 7.82 below.

A single statutory duty to meet the social care needs of disabled children subject to national eligibility criteria

Our provisional proposals

7.10 As noted above, we provisionally proposed that:[13]

(1) there should be a single statutory duty to meet the social care needs of disabled children; and

(2) the single statutory duty should be subject to national eligibility criteria.

7.11 We did not make any proposals about what the eligibility criteria should be, recognising that this is inextricably linked with exclusively political questions about how much money should be spent on disabled children's social care, and which disabled children should be prioritised for support. Those are not appropriate questions for us to answer and are the province of central and local government, who should work together to design the eligibility criteria. Nevertheless, we asked for examples of local eligibility criteria and sought consultees' views on what the essential features of any national eligibility criteria might be, to inform this process.[14]

Consultation analysis

7.12 In total, 137 out of 176 consultees responded to the proposal that there should be a single statutory duty to meet the social care needs of disabled children. Of these, the majority (115) agreed with the proposal and a relatively small minority (five) disagreed, with 17 consultees who were neither for nor against. The responses to the proposal that the single duty should be subject to national eligibility criteria followed a similar pattern, with 113 in support of the proposal, ten against, and 20 who were neither for nor against.

7.13 Many of those in favour of the proposals felt that they would make the law clearer and more accessible. For example, East Sussex County Council remarked that a single duty would "support consultees, including parents and carers to have a clear understanding of roles and responsibilities when it comes to meeting need". Similarly, the Local Government and Social Care Ombudsman, who regularly deals with complaints about eligibility for services, agreed that the proposals "would help to streamline and clarify processes".

7.14 Another recurrent theme among responses in favour of the proposals was that the reforms would promote consistency across the country. For example, Walsall Council Social Care endorsed the premise that the proposed reforms would "stop the postcode lottery that exists in accessing support" and the Challenging Behaviour Foundation noted that the proposed reforms "should ensure that all children, regardless of their location, receive consistent access to necessary services and support". This was viewed by many as a way of tackling the unfairness associated with the current system.

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[13] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 7.44 and 7.51.

[14] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 7.52 to 7.53.

7.15 Some consultees noted that the consistency which national eligibility criteria would bring would make it easier for families of disabled children to move home when they need to, without having to worry about losing access to their package of support. Others noted that as well as promoting consistency across the country, the introduction of national eligibility criteria would bring a degree of consistency with the adult social care system, under the Care Act 2014. Steve Broach KC expressed the view that "there is no basis for treating disabled children differently from disabled adults under the Care Act in this regard" as "there is nothing about being a child which should make you subject to a 'postcode lottery' in terms of varying eligibility thresholds across different areas". Commenting favourably on the legal framework that applies to adults, the Community Care Lawyers Group noted that the introduction of national eligibility criteria for adults under the Care Act 2014 had been a "significant achievement" resulting in a system which was "clear and transparent and highly effective".

7.16 Co-production was another theme which featured in a number of the responses in support of the proposals. In response to our suggestion that central government should consult with local government in designing the national eligibility criteria, a number of consultees (including local authorities, families and members of the third sector) highlighted the importance of families being involved too.

7.17 Among those who supported either or both of the proposals, a number of consultees sounded a note of caution, highlighting that the proposed reforms – while desirable in principle – would need to be adequately resourced in order to be implemented effectively. For example, the Royal Borough of Greenwich were in favour of a single duty but warned that "there is potential for significant increase in demand for provision with this approach" and that "meeting more need with the same amount of resource could mean families actually end up with less provision than currently". Similarly, Central Bedfordshire Council's Children with Disabilities Service endorsed the proposal for a single duty but called for "financial sustainability and a flexible approach which recognises that additional funding will be required as the gradual impact of any changes is understood", characterising this as "imperative in order to not further destabilise Local Authority finances and resources". Relatedly, several consultees in favour of the proposals were concerned that implementing the reforms without sufficient resources could lead to the introduction of national eligibility criteria that are very high. This could make it more difficult for disabled children in some areas to access services than is currently the case.

7.18 This same concern about resourcing was a central theme among those who opposed the proposals, as well as consultees who were neither for nor against them. The response of the North West Association of Directors of Children's Services encapsulated the views of a number of consultees:

> Despite strong support for rationalisation of legislation in this area, particularly repeal of the significantly outdated Chronically Sick and Disabled Persons Act, there was significant unease about the implications of a single duty. Unequivocal views included describing this as attempting to 'fix a problem with the wrong solution' in a way which would financially 'crush' local authorities. Taken as a package, the combination and extension of duties alongside a single duty to meet need without any reference to local resources was felt to be undeliverable and place financial

sustainability of many local authorities at significant risk. If accepted, this would constitute a significant shift in policy, rather than a clarification of the legal position.

7.19 This concern about the financial burden on local authorities is closely linked to the subject of local authority charging. We did not make any proposals about charging in our consultation paper, but we did ask for examples of local authority charging practices, as well as asking whether those practices would be likely to change if our proposals were implemented.[15] The picture that emerged was that, in general, local authorities are not currently charging families for disabled children's social care services. However, 18 of the 23 local authority responses to this question, said that the authority might need to consider charging in future if the proposals in this consultation were implemented.[16]

7.20 As well as these practical concerns, several consultees who were opposed to the proposals felt that national eligibility criteria were wrong in principle, as they would reduce the ability of local authorities to respond flexibly to levels of need in their local area. For example, Durham Social Care observed that "local authority areas differ in terms of population, levels of need and resources available to meet need" and suggested that local authorities are best placed to identify what the levels of local need are, and hence are best placed to determine the appropriate eligibility criteria for the area.

7.21 The Department for Education, in their response to the consultation, raised a further point of principle, noting that "national eligibility criteria for disabled children's social care would create significant misalignment with the rest of children's social care". Concern about the differential treatment of disabled and non-disabled children was a theme echoed by Baroness Hale in a speech given to the Family Rights Group in March 2025.[17] Her starting point was that disabled children are not necessarily "more deserving of help than other children in need" and that taking disabled children out of the scope of the Children Act 1989 and providing them with a legal right to services might "discriminate against other children whose needs are just as great but who don't happen to be disabled". She advocated instead for a legal right to services for all children in need, within the framework of the Children Act 1989.[18]

7.22 Concerns were also raised, among both those who were against the proposals and those who were neither for nor against them, that the reforms might require local authorities to meet needs that were already being met by families or within the community.

7.23 In total, 141 consultees responded to our question seeking views on the "essential features" of the national eligibility criteria. The most common themes from the responses were that eligibility criteria should be:

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[15] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 12.

[16] This includes the response of the North West Association of Directors of Children's Services which represents the views of a number of local authority Directors of Children's Services in that region.

[17] Baroness Hale, *Looking back in order to look forward* (March 2025).

[18] The question of whether disabled children should remain within the scope of the Children Act 1989 forms the subject of ch 2 of this report: we recommend that they should.

(1) based on the needs of the child and the outcomes they can or cannot achieve, as opposed to specifying a particular diagnosis or condition;

(2) focused on the additional needs that the child has, over and above a non-disabled child of the same age, with the objective of supporting them to participate in society on equal terms with other children;

(3) applicable to neurodivergent children;

(4) aligned, to the extent possible, with the national eligibility criteria for adults;

(5) clear, and not open to differing interpretations;

(6) holistic and cumulative, considering the entirety of the child's needs and their combined effect on family life;

(7) designed to allow early intervention, before needs escalate to crisis point; and

(8) capable of encompassing needs relating to trauma and abuse, as well as behaviours that may present a risk to the child or others.

Discussion and recommendations

7.24 Our proposals that there should be a single statutory duty to meet the social care needs of disabled children subject to national eligibility criteria was one of the more divisive issues upon which we consulted. Although there was a clear majority of consultees in favour of the proposals, strong and significant views were expressed in opposition to the proposals, largely united by a concern that they might be undeliverable in practice without sufficient funding*.*

7.25 In evaluating the arguments, we start with the points of principle. We will then return to the practical concerns about funding and deliverability below at paragraphs 7.38 to 7.43.

7.26 A system where the needs of a disabled child will be met in one area but will not be met if they move to another – where a child in one part of the country will have their needs met but a child in another part of the country with identical needs will not – is not a fair system and is not the system that Parliament intended. This is an important factor in favour of reform. One apposite example that was provided to us at a consultation event involved the family of a disabled child who were eligible to have their needs met in their local area, but no longer eligible for services after the family moved home to a location 10 minutes away, within the area of another authority. It was precisely this sort of situation which our proposal sought to deal with and remedy.

7.27 The fact that the legal framework for disabled children's social care is inconsistent with the adult social care system is a further, significant factor in favour of reform. National eligibility criteria for adults who need care and support were introduced in 2015 to remedy the unfairness arising from the fact that people with the same needs received different levels of care depending on where they lived. There is no reason of principle why disabled adults should have the benefit of a fair system, but disabled children should not. Clearly there is a difference between the circumstances of disabled children and disabled adults, in that children will generally have a parent or carer looking after them whereas adults often do not. That distinction is an important one and, as we discuss at paragraphs 7.35 to 7.37 below, one that would need to be reflected in the design and implementation of any eligibility criteria: the idea is to complement and not to replace the care provided by families. However, we agree with Steve Broach KC that this distinction does not justify children facing a postcode lottery when adults do not.

7.28 The fact that no two sets of the eligibility criteria for disabled children's social care that we have seen are the same, and that some criteria are readily available in the public domain, but others are not, are further factors in favour of reform. These factors contribute to a lack of clarity, consistency and accessibility in the system.

7.29 Set against this are the following concerns expressed by some consultees.

(1) That a system of national eligibility criteria overlooks the fact that local authorities are best placed to identify the nature and level of need in their local area and decide how best to meet that need.

(2) That national eligibility criteria are not a feature of the children's social care system more generally and were they to be implemented for disabled children we would be introducing a level of inconsistency into the system – and potentially even discrimination – as between disabled and non-disabled children.

(3) That local authorities should not be required to meet needs that are already being met by families or within the community.

We address these three concerns in turn.

Local authorities are best placed to identify need in the local area and decide how to meet it

7.30 As to the first point we accept that local authorities are best placed to identify the nature and level of need in their areas and decide how best to meet it. However, we think that the proposals we discuss in this chapter are consistent with these objectives for a number of reasons.

(1) Under our proposals, local authorities would remain responsible for identifying need in the local area and commissioning appropriate services to meet that need. We make recommendations in Chapter 16 as to how the law might be changed to enable that task to be performed more effectively.

(2) Under our proposals, central government would work together with local government in drawing up the national eligibility criteria. This will ensure that local authorities' knowledge of need in the local area is taken into account in deciding the types of need that should be met under the criteria.

(3) Further, under our proposals, once it has been established that a disabled child is eligible to have their needs met, local authorities would retain the discretion to decide how best to meet those needs.[19] For example, if a need could be met in

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[19] See chs 8 and 9.

a variety of different ways it would be open to a local authority to choose the least costly option.

Inconsistency with the children's social care system more generally

7.31 As to the second point, that we would be introducing unjustified inconsistency as between disabled children social care law and children's social care law more generally, we do not accept that this is the case. There is already, by design, a significant, and long-standing difference between the law relating to disabled children's social care and the law relating to children's social care more generally. Disabled children have the benefit of the duty under section 2 of the Chronically Sick and Disabled Persons Act 1970, which requires local authorities to make the arrangements necessary to meet the child's needs. Other children in need only have the benefit of section 17 of the Children Act 1989, which provides local authorities with a power to meet their needs.

7.32 This long-standing difference between disabled children social care law and children's social care law more generally, reflects the well-established principle that, to avoid discrimination, people in different situations may need to be treated differently.[20] Disabled children have additional, disability related needs which other children in need do not. They have a "need [for] services, aids and physical/administrative adaptions by virtue of their impairments and the attitudinal and environmental barriers that hinder their full and effective participation in society".[21] For that reason the law treats them differently, imposing additional responsibilities on local authorities – for example, the duty to make arrangements under the Chronically Sick and Disabled Persons Act 1970 and the duty to provide short break services under the Children Act 1989[22] – to try and ensure those additional needs are met.[23]

7.33 Our proposal involves replacing section 2 of the Chronically Sick and Disabled Persons Act 1970 – a duty that applies to disabled children only – with a new duty that is subject to national eligibility criteria. Viewed in this way, the proposals do not seek to give disabled children new legal rights. Instead, these are rights which already exist, and the proposals seek to ensure they can be exercised fairly and consistently. Similarly, the proposals do not introduce inconsistency between disabled children's social care law and children's social care law more generally. Rather, there is already a difference between the two legal frameworks, which exists for deliberate and justifiable reasons of policy.

7.34 Whether the law should go further than this and eliminate this difference by providing greater legal rights for all children in need – the view expressed by Baroness Hale and shared by the Office of the Children's Commissioner (who supported our proposals

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[20] *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 at [47] to [48] by Lord Reed.

[21] L Clements and A L Aiello, *Putting the record straight* (May 2025).

[22] Chronically, Sick and Disabled Persons Act 1970, s 2; Children Act 1989, Sch 2, para 6.

[23] Another instance where the law treats disabled people differently is found in the requirement to make "reasonable adjustments" to avoid the particular disadvantages that affect disabled people (for example, those posed by physical features in a building) but do not affect people who are not disabled: Equality Act 2010, ss 20, 21 and 29. The Act stipulates expressly that treating a disabled person more favourably than a non-disabled person, because of their disability, is not discriminatory: Equality Act 2010, s 13(3).

but suggested that they could also be applied to all children within the children's social care system) – falls outside our terms of reference. We record this view here in deference to those who have expressed it. However, it is not a matter on which we have consulted or in respect of which we have the evidence or remit to make a recommendation in this current review. We highlight the point as one which the Department for Education may wish to consider, where further work, whether by the Law Commission or another body, may be needed.

Local authorities should not be required to meet needs that are already being met by families or within the community

7.35 The third concern raised by consultees was that local authorities should not be required to meet needs that are already being met by families or by services in the local community, and that the introduction of a single duty to meet needs subject to national eligibility criteria might require them to do so. This was not the intention of the proposals. There are undoubtedly situations in which local authorities do need to step into the shoes of the family and provide the care which the family had – until that point – been providing. The most obvious example of this is where the local authority provides a parent or carer with a short break from their caring responsibilities, for example, by providing the child with residential accommodation away from home. But aside from these situations where the family cannot continue to provide care without a significant impact on their wellbeing, the idea behind our proposals was to ensure that local authorities supplement, rather than replace, the care provided by families, on a consistent basis across the country.[24]

7.36 However, the fact that a number of consultees were concerned that the proposals might require local authorities to meet needs which families are themselves willing and able to meet, suggests that we did not explain our policy intention clearly enough or explain how it could be achieved in law. There are two ways in which this policy intention could be achieved.

(1) The first is the model used in the adult social care system in England. Under that model local authorities are required to disregard the care and support that the adult is receiving from their carer in deciding whether the adult meets the eligibility criteria. But if, taking that approach, the adult is found to be eligible for care and support, the local authority itself is not required to meet those needs which are being met by the carer, unless there is a breakdown in the caring relationship.[25]

(2) The second is the model used in the children's social care system in Wales. Under that model, a child's needs will only meet the eligibility criteria if their parents are unable to meet the needs themselves, or with the help of others or the assistance of services in the community which they have access to.[26]

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[24] This issue also arose in consultation responses relating to the threshold for obtaining an assessment. See paras 5.20 and 5.27.

[25] Care Act 2015, ss 8 and 18; Care and Support (Eligibility Criteria) Regulations 2015, SI No 313, reg 2; Department of Health and Social Care, *Care and Support Statutory Guidance* (March 2024) para 6.115.

[26] Social Services and Well-being (Wales) Act 2014 (anaw 4), ss 32 and 37; Care and Support (Eligibility) (Wales) Regulations 2015, SI No 1578 (W 187), regs 2 and 4.

7.37 We did not consult on these options and so are not in a position to say which, in practice, is likely to be more appropriate in this context. The adult social care model is designed to ensure that “should there be a breakdown in the caring relationship, the needs are already identified as eligible, and therefore local authorities must take steps to meet them without further assessment”.[27] A number of the families we have heard from in the course of this review have reported being in this situation, where caring arrangements have broken down suddenly – sometimes due to parental exhaustion – and urgent local authority intervention is required. This feature of the adult social care model would appear to be well-suited to dealing with this situation. However, there may be other equally beneficial features of the model which applies in Wales that we have overlooked. The point for present purposes is that either of the two models could be used to achieve the policy objective that local authority support should generally be available to supplement rather than replace family support.

Conclusions

7.38 For these reasons, viewed solely as a matter of principle, we remain of the view that a single statutory duty to meet the social care needs of disabled children subject to national eligibility criteria is appropriate. However, this is not solely a matter of principle. As we note a paragraph 1.12, we cannot disregard the real and pressing practical concerns that have been raised about the impact that this will have on local authorities. Local authorities (as well as other consultees) who were both for and against the proposals expressed real concern that proposals would not be deliverable without significant extra funding, which may not be available. Throughout the course of this review, we have been urged by families, local authorities and third sector organisations to “learn the lessons of the Children and Families Act 2014”: the main legislation that applies to children with special educational needs and disabilities (SEND). We were told that not enough consideration was given to the implementation of the legislation, and the rights guaranteed to children under that legislation to children with SEND have been difficult to achieve owing to the limited resources of schools and local authorities. By way of context, in March 2025 the County Councils Network, following a survey of its members, warned that 18 county and unitary councils could face “insolvency” in March 2026 when a £5.9bn deficit in funding for SEND appears on their balance sheets.[28] The March 2026 deadline has since been extended, but the underlying financial issue remains.[29] If we disregard this context and these concerns we risk making recommendations that have serious unintended consequences. These include the following possibilities.

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[27] Department of Health and Social Care, *Care and Support Statutory Guidance* (March 2024) para 6.115.

[28] County Councils Network, *Councils warn of financial catastrophe in 12 months time, with ‘unmanageable’ SEND deficits risking bankruptcy* (21 March 2025). The reference to “insolvency”, refers to breach of the statutory requirements on local authorities to set a balanced budget and avoid unlawful expenditure. See the Local Government Finance Acts of 1988 and 1992.

[29] By means of an extension of the Dedicated Schools Grant Statutory Override until the end of 2027/28. This allows local authorities to exclude SEND deficits from their main revenue budgets meaning they do not breach their duty to maintain a balanced budget. See Department for Education, *Fairer funding for councils across the country in major reform* (20 June 2025).

(1) That restrictive national eligibility criteria are introduced out of financial necessity which make it harder for disabled children to access social care than is currently the case in many areas of the country.

(2) That local authorities would start charging for services that are currently free of charge.

(3) That local authorities will be unable to comply with their obligations leading to costly litigation.

7.39 In the draft impact assessment we published alongside our consultation paper, we attempted to evaluate the monetary and non-monetary costs and benefits of adopting national eligibility criteria. The idea behind this was to seek evidence to assist in evaluating the likely impact of our proposals which, in turn, would help gauge the likelihood of the type of unintended consequence we set out above. We received relatively few consultation responses commenting on the draft impact assessment. Of those we did receive, several expressed concern that we had underestimated the costs. Others expressed concern that there is insufficient evidence currently available to evaluate the costs and benefits accurately. Part of the difficulty is that the relative costs and benefits will depend on what eligibility criteria are adopted, and the extent to which they require local authorities to do more than they are already doing to help disabled children. These are unknowns: we are deliberately refraining from making recommendations as to what the eligibility criteria should be as this is a matter of exclusively political policy.

7.40 In light of this, as a matter of principle, we proceed with the recommendation that there should be a single statutory duty to meet the social care needs of disabled children subject to national eligibility criteria.[30] But as a necessary precursor to this, further work will need to be carried out by the Government to:

(1) evaluate the prospective impact of the recommendation;

(2) decide how and when the recommendation is implemented; and

(3) determine what the eligibility criteria should be.

An element of this work will need to involve identifying the current eligibility criteria being applied in each local authority across the country.[31] This is necessary in order to establish the difference national eligibility criteria will make in each area. This further work we recommend would benefit from the involvement of local authorities and the families of disabled children, and those representing their interests. This element of co-production is likely to improve the accuracy of the work, ensure that the full spectrum of social care needs of disabled children are considered, and secure confidence in the end result. It is also in keeping with article 4(3) of the United Nations Convention on the Rights of Persons with Disabilities which requires states to consult

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[30] At paras 7.97 to 7.102 below we discuss the powers that should be available to meet the social care needs of disabled children who do not meet the national eligibility criteria.

[31] This is work that we have started in our research into local authority eligibility criteria. See fn 6 above.

with and actively involve persons with disabilities (including children) in the development and implementation of legislation and policies.

7.41 As an interim measure while this work is carried out, we recommend that statutory guidance on eligibility criteria is published for local authorities to have regard to when drafting their own local criteria. The idea of the guidance would be to set out the essential features of local eligibility criteria, thereby promoting consistency and minimising the possibility of local authorities adopting criteria that are discriminatory or otherwise unfit for purpose. We remain of the view that guidance is not a complete or long-term solution. As we explained at paragraphs 7.26 to 7.28 of the consultation paper, national guidance on eligibility criteria for adult social care was published in 2002.[32] This guidance provided a framework to help local authorities to set their own criteria, but this was not sufficient to eliminate the postcode lottery. We do not anticipate that the result would be different in relation to disabled children's social care. The underlying cause of the variation in eligibility criteria across the country is that section 2 of the Chronically Sick and Disabled Persons Act 1970 has been interpreted so as to permit local authorities to take into account their resources in deciding whether the duty to meet the social care needs of a disabled child has arisen.[33] That cannot be changed through guidance. However, guidance can still promote consistency and reduce the extent of local variation even if it cannot eliminate it completely. This guidance should form part of the comprehensive statutory guidance on disabled children's social care that we recommend in Chapter 2. The views of consultees on the essential features of eligibility criteria which we set out at paragraph 7.23 above, may be of use in formulating this guidance.

7.42 In making our recommendation that there should be a single statutory duty to meet the social care needs of disabled children subject to national eligibility criteria, we do not propose to define the word "need" in statute. In the adult social care legislation, the courts have interpreted this word as meaning "something more than merely 'want'" but falling "far short of 'cannot survive without'",[34] and thereby requiring a degree of evaluative judgement on the part of the local authority. We have the same approach in mind here and think that sufficient clarity can be brought to the legal framework by clearly setting out within the national criteria, what types of need are eligible, without seeking to exhaustively define the word "need".[35]

7.43 As explained above at paragraph 7.35, the policy intention underpinning our recommendation is that support should be provided by local authorities to complement rather than replace the support provided by families, save where parents and carers cannot continue to provide support without a significant impact on their wellbeing. We view that as consistent with the current policy of the law. There are two ways in which that policy intention might be achieved under the changes we recommend. The first is by adopting the model used in the adult social care system in England, as set out at paragraph 7.36(1). The second is by adopting the model used in the children's social

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[32] Department of Health, *Fair Access to Care Services: Guidance on Eligibility Criteria for Adult Social Care* (2002).

[33] *R v Gloucestershire County Council ex p Barry* [1997] AC 584; *R (JL) v Islington London Borough Council* [2009] EWHC 458 (Admin), [2009] 2 FLR 515.

[34] *R (Davey) v Oxfordshire County Council* [2017] EWHC 354 (Admin), [2017] PTSR 904 at [57] by Morris J.

[35] As in the Care and Support (Eligibility Criteria) Regulations 2015, SI No 313.

care system in Wales, as set out at paragraph 7.36(2). On paper, it strikes us that the former may be better suited to dealing with situations where urgent local authority intervention is needed owing to a sudden break down in care arrangements. However, we have not consulted on these options and in practice there may be pros and cons that we have overlooked. For that reason, we present these as options for the Government to consider in deciding if and how to implement our recommendations, and do not recommend one option over the other.

Recommendation 16.

7.44 There should be a single duty to meet the social care needs of disabled children, subject to national eligibility criteria.

7.45 As a necessary precursor to this, further work will need to be carried out by the Government to evaluate the prospective impact of the recommendation, to inform the decisions as to how and when the recommendation is implemented, and precisely what the eligibility criteria should be.

7.46 This work should involve local authorities, the families of disabled children and those representing their interests.

7.47 As an interim measure while this work is carried out, we recommend that statutory guidance on eligibility criteria is published for local authorities to have regard to when drafting their own local criteria.

Whether short breaks should fall under the single duty

Our provisional proposals

7.48 In relation to short breaks we asked consultees, by way of context, to provide their experiences of short break provision in their area. We went on to propose that short breaks should be one of the various services that could be provided under the duty to meet the social care needs of disabled children that we discuss above.[36] We proposed to define short breaks as services to:[37]

(1) provide breaks for the benefit of disabled children; and/or

(2) assist individuals who provide care for disabled children to continue to do so, or to do so more effectively, by giving them breaks from caring.

7.49 We said that these short break services should include:

(1) accommodation;

(2) the provision of care at home or elsewhere;

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[36] We discuss the broader question of what services local authorities should be able to provide by way of social care for disabled children in ch 8.

[37] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 8.40 and 8.46.

(3) educational or leisure activities; and

(4) services to assist parents and carers in the evenings, at weekends and during the school holidays.

7.50 Short breaks in the form of accommodation provided away from the family home, we proposed, should have the same additional benefits and safeguards as currently apply to disabled children provided with a short break under section 20 of the Children Act 1989.[38] These benefits and safeguards are set out at paragraph 7.4 above. They vary depending on whether the short break accommodation is shorter or longer-term. But, either way, they are not available to disabled children provided with a short break under section 17 of the Children Act 1989.

7.51 We also proposed that short breaks be subject to separate eligibility criteria to the other services that could be provided under the single duty. This reflected the fact that there are particular factors that are relevant in deciding whether a short break is needed – such as whether the carer would be unable to continue to provide care unless provided with a break from their responsibilities – which are not necessarily relevant to other services.[39]

Consultation analysis

7.52 Many consultees shared their experiences of short breaks, emphasising how important they are. One representative response from a parent carer explained that short breaks, in the form of activities for her son away from the family home, were "absolutely essential to our continuing to care for him within the family home" and gave him "the opportunity to engage in activities that were difficult for us to do at home and to have role models outside of the family".

7.53 However, many families struggled to access these: one parent carer described the process of obtaining respite care as a "fight" which she found to be "extremely challenging [and] long winded". Another explained that she was only able to access a short break for her child after "numerous letters before action, and a [SEND] tribunal followed by a further letter before action". Others voiced concern about the lack of appropriate short break provision. For example, one local authority consultee spoke of "limited short break provisions available for children, leaving children on waiting list for years before they can actually begin to access short breaks". Other consultees highlighted particular problems in accessing suitable short break provision faced by children with complex needs, children with behaviour that challenges, children who have experienced trauma and children with Down's syndrome. For example, the charity Sense reported that:

> Many families we support say there is a significant lack of provision for short breaks. This is even more acute for children with complex disabilities. Often, a service might say that it supports people with complex disabilities, but when parents and carers arrive support is not available for their child's needs. Research from the Disabled Children's Partnership found that 39% of parents reported delays to short breaks, and Sense polling showed 44% of families are unable to access the respite support

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[38] See para 7.4 above.

[39] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 8.47 to 8.49.

> they are entitled to. As a service provider, Sense provides short breaks. Our holidays are always fully booked, and waiting lists are always long, especially in larger cities. This shows the distinct lack of provision available, and families tell us this service is a lifeline for them. As a provider, these services are becoming increasingly difficult to run and sustain with the level of public funding available. Meaning many specialist providers are cutting back their support, worsening the access crisis outlined above. Outside of services provided by Sense, families tell us that many short breaks providers do not have training for staff to support children with complex disabilities.

7.54 Turning to our specific proposals on short breaks, 132 consultees responded to our question about how they should be defined. Of these, 100 agreed with the proposed definition set out at paragraphs 7.48 to 7.49 above, seven disagreed and 20 neither agreed nor disagreed. Of those who disagreed, the principal objection was to the illustrative list of services set out at paragraph 7.49. In particular, several consultees felt that accommodation and educational facilities should not be included.

7.55 A total of 125 consultees responded to our proposal that short breaks should be provided under the single statutory duty to meet the social care needs of disabled children. Of these, 106 consultees were in favour of the proposal, six were against and 13 were neither for nor against. Simplification of the law was a key theme among those who supported the proposal, although some of those in favour of the proposal expressed concerns – similar to those described at paragraph 7.17 to 7.18 above – about the resource implications of the proposal. Those concerns were shared by a number of those who were neither for nor against the proposal.

7.56 The responses to our proposal that short breaks should be subject to national eligibility criteria followed a similar pattern: we received 128 responses, of which 102 were in favour, ten were against and 16 were neither for nor against. Fairness and consistency were key themes among those who supported the proposal. Those who were against the proposal raised concerns about the resource implications, and the importance of local authorities retaining flexibility to tailor services to the specific needs of children in their area. Several consultees (including those for and against the proposal) questioned our suggestion that there should be separate eligibility criteria for short breaks and for other types of service. For example, Professor Luke Clements remarked that “eligibility should be based on ‘need’ and not the service response to that need” and, consequently, that there was “no reason why a single set of regulations cannot be drafted to encompass all care and support service responses that may be necessary”. He cited the national eligibility criteria contained in regulations made under the Care Act 2014 (for adults in England) and the Social Services and Well-being (Wales) Act 2014 (for Wales) as examples of situations where this had been achieved.

7.57 We received a more mixed response to our proposal that children who are provided with a short break in the form of accommodation away from the family home should have the same benefits and safeguards as currently apply to children provided with a short break under section 20 of the Children Act 1989. Many consultees (56) did not answer the question at all. Of those that did, 91 agreed with the proposal, 17 disagreed and 17 neither agreed nor disagreed. The most prominent theme among those who supported the proposal was simply that the benefits and safeguards under section 20 are important. Those who disagreed with the proposal tended to the view that it would be disproportionate for the benefits and safeguards to apply in all cases, and that local authorities should be able to exercise their judgement as to whether or not they are necessary.

Discussion and recommendations

7.58 We recommend that short breaks should fall within the single duty to meet the social care needs of disabled children. It is clear that they are a vitally important service, and the reasons that we have given at paragraphs 7.24 to 7.40 for making other social care services for disabled children subject to the single duty, apply with equal force to short breaks.

7.59 We recommend that short breaks be defined as set out at paragraphs 7.48 to 7.49 above, subject to two modifications which arise from responses we received to consultation questions we asked about the range of services that local authorities should be able to provide to disabled children.[40] These modifications are that:

(1) the word “care” should be substituted with the phrase “care and support”, as the latter better reflects the need to promote the independence and autonomy of the disabled child;

(2) “services to assist parents and carers in the evenings, at weekends and during the school holidays” should be replaced with the phrase “services to assist parents and carers”. This is to make clear that short breaks should not be restricted to certain times of day.

7.60 Some consultees objected to “educational activities” and “accommodation” being included within the definition as examples of services that can be provided by way of a short break. However, our proposal simply reflects the existing law and does not change the types of service that can be provided.

7.61 We do not, however, recommend that short breaks be the subject of separate, national eligibility criteria to other types of service. Our revised recommendation is that there should be one single set of criteria governing the provision of all types of service. In forming this view we accept the point made by Professor Luke Clements that “eligibility should be based on ‘need’ and not the service response to that need” and that there is no need for separate criteria for short breaks and for other types of service. There are particular factors that are relevant in deciding whether a short break is needed – such as whether the carer would be unable to continue to provide care unless provided with a break from their responsibilities – which are not necessarily relevant to other services. However, it should be possible to draft a single set of criteria encompassing all of the different needs and outcomes that might be relevant to the whole range of disabled children’s social care. We recognise that this has been achieved in the adult social care system and in Wales.[41]

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[40] See paras 8.15 to 8.16.

[41] Care and Support (Eligibility Criteria) Regulations 2015, SI No 313; Care and Support (Eligibility) (Wales) Regulations 2015, SI No 1578 (W 187).

7.62 We do not recommend any changes to the benefits and safeguards (which we describe in full at paragraph 7.4) that are made available to children who are provided with short breaks, in the form of accommodation away from home. There was no clear consensus in favour of doing so; a significant number of consultees did not answer this question. Of those who did answer the question, the main theme that they raised was that the benefits and safeguards are important. This is undoubtedly the case, but it does not mean that every disabled child who is provided with short breaks away from home needs them, and that it would be proportionate to provide them in all cases.

7.63 The benefits and safeguards reflect the idea that a child who is being accommodated by their local authority – whether they are disabled or not – will, in general, have less parental involvement and support in their life than a child who is living at home. Accordingly, the local authority may need to step into the parents' shoes and increase the support and oversight they provide. However, this general rule does not necessarily apply to all disabled children, many of whom will have the benefit of high levels of parental involvement and support, even while they are staying away from home. It is for that reason that the current legal framework allows local authorities to exercise their judgement to decide which disabled children who are staying away from home for a short break need these additional benefits and safeguards.

7.64 The current framework achieves this by allowing local authorities to choose between using their powers to provide accommodation under section 17(1) of the Children Act 1989 (where the benefits and safeguards do not apply) and section 20(4) (where they do apply).[42] The current framework also calibrates the benefits and safeguards so that, in instances where they are needed, and where accommodation is provided under section 20, the level of oversight and support increases where the child is accommodated away from home for a longer period.

7.65 Having considered the consultation responses on this issue, our revised view is that there is no sufficient case for changing this carefully calibrated policy. A significant factor underpinning our proposal for change had been that we were proposing to remove disabled children from the scope of section 17 of the Children Act 1989, and changes to the benefits and safeguards associated with residential short breaks were a consequence of that. However, following consultation, we have now concluded that disabled children should remain within the scope of section 17, and so the impetus for changing the benefits and safeguards has fallen away.

7.66 Drawing the threads together, we make two recommendations which are explained in the preceding paragraphs. First, that short breaks should be provided under the single duty to meet the social care needs of a disabled child that we recommend in this chapter. This means that if a child meets the national eligibility criteria and requires a short break to meet their social care needs, a short break must be provided. Second, that there should be no change to the benefits and safeguards that apply to children who are provided with a short break in the form of residential accommodation, which vary depending on whether the child is accommodated under section 17 or 20 of the

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[42] As we note in the consultation paper at para 7.4, short breaks may in some cases need to be provided pursuant to the duty under Children Act 1989, s 20(1). However, these cases are relatively rare.

Children Act 1989 and (if accommodated under section 20) how long they are away from home.

7.67 In practical legal terms we envision that the simplest way to bring these policy objectives together is for the single duty that we recommend to operate in the same way as section 2(4) of the Chronically Sick and Disabled Persons Act 1970. That is, rather than being a freestanding duty to provide services, it should be a duty that requires a local authority to exercise its functions under Part 3 of the Children Act 1989 – which includes sections 17 and 20 – to ensure that the social care needs of the disabled child are met. This is not as simple a solution as we had originally proposed. However, we have reached the view that, in this instance, the single-minded pursuit of simplification would result in the unwanted loss of some of the nuance and judgement that is built into the current system. In order to promote clarity while retaining this nuance and judgement we suggest that the relationship between the various powers and duties that we propose here could usefully be explained in the statutory guidance we recommend in Chapter 2. The guidance could also usefully cover the different legal options available for providing short breaks, and the benefits and safeguards associated with them.

Recommendation 17.

7.68 One of the ways in which local authorities should be able to discharge the duty to meet the social care needs of a disabled child who meets the national eligibility criteria should be by providing short breaks.

7.69 Short breaks should be defined as services to:

(1) provide breaks for the benefit of disabled children; and/or

(2) assist individuals who provide care for disabled children to continue to do so, or to do so more effectively, by giving them breaks from caring.

7.70 These services should include:

(1) accommodation;

(2) the provision of care and support at home or elsewhere;

(3) educational or leisure activities; and

(4) services to assist parents and carers.

Whether disabled facilities grants should fall under the single duty

Consultation question

7.71 We sought consultees' views on whether disabled facilities grants should fall under the single duty to meet the social care needs of disabled children, effectively transferring responsibility for those grants from local housing authorities to social services.[43]

Consultation analysis

7.72 We received 90 responses to this question. Of these, 51 were in favour of disabled facilities grants being provided under the single duty, 24 were opposed and 15 were neither for nor against.

7.73 Those in favour of providing disabled facilities grants under the single duty identified the transfer of responsibility from local housing authorities to social services as a way of streamlining the system for obtaining funding for home adaptations. A number of consultees also felt that the current statutory limit of £30,000 for a disabled facilities grant was too low, and that transferring responsibility to social services – where there is no such cap – would circumvent this limitation.

7.74 The most prevalent theme among those who were opposed to disabled facilities grants being provided under the single duty, was that the making of a disabled facilities grant requires the specialist expertise of local housing authorities which is not typically found within social services. This was also a recurrent theme among consultees who were neither for nor against the idea.

7.75 Foundations – the national body for disabled facilities grants – endorsed this concern about institutional expertise, observing that “housing teams possess unique technical expertise in managing complex adaptation projects” and that social services “while skilled in family support, lack specific expertise in architecture, surveying and construction”. To this, they added a series of further, practical objections to providing disabled facilities grants under the single duty.

(1) Disabled facilities grants are funded separately by central government, ensuring a ring-fenced budget for home adaptations. Integrating it into a wider social care duty risks these funds being absorbed into general budgets.

(2) Creating a different legal pathway for children rather than adults would complicate the system and create uncertainty about accessing multiple funding sources. Instead, priority should be given to improving collaboration between social services and housing teams.

(3) In 2015, the disabled facilities grant became part of the Better Care Fund Framework, which supports local systems to integrate health, housing and social care. Removing this link would be detrimental to efforts to integrate ways of working between children and adult services, particularly during the transition of children from children into adult services.

Discussion and recommendation

7.76 In light of these concerns, we do not recommend any changes to the legal framework for providing disabled facilities grants. We accept the point that these grants are administered by local housing authorities, rather than social services, because the former have access to specialist expertise relevant to the making of home adaptations

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[43] Disabled Children’s Social Care (2024) Law Commission Consultation Paper No 265 para 7.59.

(such as surveyors) which the latter do not. Bringing disabled facilities grants for disabled children within the scope of the single duty we recommend would also mean breaking up the current legal framework for disabled facilities grants, separating children from adults. We accept that this would increase the fragmentation of the law.

7.77 Those in favour of bringing disabled facilities grants within the scope of the single duty primarily saw it as a way to avoid the practical problems that arise when a grant is sought in excess of the statutory maximum, and the family need to ask social services to top-up the remainder. In these circumstances the local housing authority and social services do not always work together effectively. We accept the validity of these concerns. However, we think that they can be mitigated in other ways which do not require legal change. In particular, the statutory cap of £30,000, which was last updated in 2008, is currently under review.[44] An increase in the cap would reduce the situations where joint working across different departments and authorities is required. In instances where joint working is required it can, we think, be facilitated by clear guidance explaining the respective legal responsibilities for funding home adaptation and the co-operation duties[45] that apply to the respective departments and authorities.

Recommendation 18.

7.78 Disabled facilities grants should continue to be administered by local housing authorities under the separate legal framework in the Housing Grants, Construction and Regeneration Act 1996.

Relationship between the single duty and other powers and duties to help disabled children

Our provisional proposal

7.79 We proposed that the single statutory duty to meet the social care needs of disabled children should take priority over any other powers and duties which could be used to provide services to disabled children. For example, if a disabled child met the eligibility criteria under the new duty, they should be provided with services under that duty, rather than be helped using any other power or duty that might be available.[46] The purpose of this provisional proposal was to ensure there is no ambiguity about which power or duty should be used, thereby avoiding disputes between teams, departments or authorities about who is responsible for the child.

Consultation analysis

7.80 We received 124 responses to this proposal. Of these 82 were in favour of the proposal, 12 were against it and 30 were neither for nor against. The prevalent view

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[44] https://www.irwinmitchell.com/news-and-insights/newsandmedia/2024/october/government-agrees-to-review-policy-on-upper-limit-of-grant-scheme-which-funds-specialist-adaptations.

[45] See ch 16.

[46] Such as Children Act 1989, ss 20(1), (4) and 22(3)(b) or Mental Health Act 1983, s 117.

among the responses in favour of the proposal was that the current system is too complex, and that the proposal would help simplify it.

7.81 Those who were against the proposal or who were neither for nor against it did not object to this view. Rather, they were primarily concerned that the proposal might have unintended consequences, inadvertently excluding disabled children from more appropriate services. The Association of Lawyers for Children gave the example of a sibling group, including a disabled child, who required services in order to protect them from harm. In such a case, they reasoned, the duties to look after the children, accommodate them, maintain them, and safeguard and promote their welfare[47] – which can apply to the whole sibling group – might be more appropriate to meet the children's needs as a whole, than our proposed duty to meet the social care needs of the disabled child alone. Similarly, the Court of Protection Bar Association (although supportive of the proposal) pointed out that in some instances it would be in the best interests of a disabled child to receive support from social services *and* health under section 117 of the Mental Health Act 1983, with a view to reducing the risk of the child requiring readmission to a hospital for treatment for a mental disorder. They were concerned that our proposal should not undermine the ability to provide those services.

Discussion and recommendation

7.82 In making this proposal our intention had been to promote simplicity and clarity in the legal framework and thereby avoid disputes. We had in mind the type of disputes that have arisen in the past between local housing authorities and social services about which department or authority owes the duty to accommodate a homeless 16- or 17-year-old,[48] or between social services and the Home Office about which owes the duty to support destitute asylum-seekers who need care and support.[49] Such disputes, we thought, might be avoided if there was a clear, statutory hierarchy between the duty recommended in this chapter, and the other powers and duties available to meet the needs of a disabled child.

7.83 However, there was no clear consensus among consultees in response to the proposal. Those who agreed with it supported the objectives of promoting simplicity and clarity. Those who disagreed were concerned about unintended consequences citing examples where it might be more appropriate for a disabled child to be assisted under another duty, rather than the single duty we propose in this chapter.

7.84 We accept the view that our proposal might result in unintended consequences if these alternative duties could not be relied on. There may be circumstances where it is more appropriate to help a disabled child under a different duty or power and for that to happen there needs to be some flexibility in the legal framework. The blanket rule we proposed would not achieve this.

7.85 However, an alternative way to promote clarity within the legal framework while retaining some flexibility would be to ensure that the relationship between the single

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[47] Children Act 1989, ss 20(1), 22(3) and 22B.

[48] *R (G) v Southwark London Borough Council* [2009] UKHL 26, [2009] 1 WLR 1299.

[49] *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956.

duty we propose in this chapter and the other functions that a local authority might have in relation to disabled child are clearly defined, but without stipulating which function takes priority over any other. This can be achieved in the manner we describe at paragraph 7.67. The single duty should operate in the same way as section 2 of the Chronically Sick and Disabled Persons Act 1970, as a duty that requires a local authority to exercise its functions under Part 3 of the Children Act 1989 to ensure that the social care needs of the disabled child are met, rather than a freestanding duty to provide services. There should then be no ambiguity or dispute about whether the single duty applies or, for example, whether the child can or should be helped under sections 17 or 20 of the Children Act 1989 instead. Rather, sections 17 and 20 provide two ways in which the single duty can be discharged.

7.86 The relationship between the single duty and section 117(2) of the Mental Health Act 1983 can be left undefined, leaving local authorities to exercise their judgement in determining which allows for the more appropriate response.

Recommendation 19.

7.87 The single duty to meet the social care needs of a disabled child should operate in the same way as section 2 of the Chronically Sick and Disabled Persons Act 1970, as a duty that requires a local authority to exercise its functions under Part 3 of the Children Act 1989 to ensure that the child's social care needs are met, rather than a freestanding duty to provide services.

Residence requirements for the single duty

Consultation question

7.88 We sought consultees' views on the residence requirements that should apply to the single duty to meet the social care needs of disabled children.[50] The duty under section 2 of the Chronically Sick and Disabled Persons Act 1970 applies to any child who is "ordinarily resident" in the area of the authority. The power under section 17 of the Children Act 1989 applies to any child "in the area", which requires only physical presence. The proposals in our consultation, in effect, involved combining these two provisions (in so far as they relate to disabled children) into a single duty, which would form part of a new, standalone framework for disabled children's social care, separate to the Children Act 1989. This raised the question of which of these two residence requirements should apply.

Consultation analysis

7.89 In total, 97 consultees responded to our question. Of these, 15 favoured ordinary residence as the appropriate test, 17 favoured physical presence and 65 did not specify a preference.

7.90 Those in favour of physical presence tended to view it, in the words of Steve Broach KC, as a "simpler and straightforward approach which avoids children falling through

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[50] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 7.57.

the gaps between [local authorities]". The Association of Lawyers for Children cited children from the Gypsy, Roma and Traveller community, or children with separated parents living across local authority boundaries as examples of those who might fall through the gaps if a different test was applied. Others, including Walsall Council Social Care, the Court of Protection Bar Association, the Independent Provider of Special Education Advice (IPSEA) and Special Needs Jungle, pointed to the possibility of protracted disputes if a more complicated test was applied, resulting in delays in service provision.

7.91 Those in favour of the ordinary residence test, such as the North West Association of Directors of Children's Services, Hampshire County Council and Rotherham Metropolitan Borough Council, characterised it as the current legal position, and appropriate for that reason.

Discussion and recommendation

7.92 The question of which residence requirements should apply to the single duty we recommend in this chapter proved a difficult one. A minority of consultees were split between the options of the duty being owed to children who are physically present in the area of the local authority, or ordinarily resident. However, the majority of consultees did not reach a firm view either way or did not answer the question.

7.93 The difficulties in answering this question have, in our view, been largely resolved by our recommendations that disabled children should remain within the scope of section 17 of the Children Act 1989, and that the various recommendations we make in this paper should be introduced into the Children Act 1989. One of the consequences of this is that the simplest, workable answer to the question is that the existing residence requirements under the Part 3 of the Children Act 1989 should apply. That is, the single duty should apply (like section 20 of the Children Act 1989) to any child who is physically present in the area of the local authority. But if the child is ordinarily resident in the area of a different local authority, the local authority meeting the child's needs should be able to recover the costs of doing so under section 29(7) of the Children Act 1989.

7.94 This solution combines:

(1) the policy on residence underpinning section 17(1) of the Children Act 1989, that children should not be passed "from pillar to post"[51] while local authorities argue about where they come from; with

(2) the policy on residence underpinning section 2 of the Chronically Sick and Disabled Persons Act 1970, whereby the local authority that is ultimately responsible for funding mandatory service provision for disabled children is the authority to which the child has the strongest connection.

7.95 This solution represents the minimum change in the current position that is necessary to implement the new duty we recommend. It also minimises the risk, identified by a number of consultees, of children falling through the gaps if they move between local authority areas. Using the example of a disabled child from a Traveller family: the local

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[51] *R (G) v Southwark London Borough Council* [2009] UKHL 26, [2009] 1 WLR 1299 at [28] by Baroness Hale.

authority in which the child is physically present would owe the duty to meet their needs; the duty can be performed by providing the child with services either within or outside of the local authority's area.[52] The costs of doing so could then be recovered from the area where the child is ordinarily resident, which might be where the family have their winter base.

Recommendation 20.

7.96 The single duty to meet the social care needs of a disabled child, should apply to any child who is in the area of the local authority. But if the child is ordinarily resident in the area of a different local authority, the local authority meeting the child's needs should be able to recover the costs of doing so from the authority where the child ordinarily resides.

Powers to meet the social needs of disabled children and their families

Our provisional proposals

7.97 We recognised in the consultation paper that there would be situations where local authorities might want or need to meet the social care needs of a disabled child, even though the single duty we proposed had not (or not yet) arisen. For example, a local authority might need to provide support to a child while their needs are being assessed. Alternatively, a child might have moderate needs which did not meet the national eligibility criteria we proposed, but which a local authority felt it was appropriate to meet in any event to prevent the child's needs escalating. To cater for these situations, we proposed that local authorities should have powers to provide services:

(1) to meet needs that do not satisfy the national eligibility criteria; and

(2) pending an assessment of the child's needs.

7.98 We also proposed that there should continue to be a power to meet the needs of parents and carers. This is in-line with the existing law. There are certain, limited situations where a local authority may be under a duty to provide a service to a parent or carer (or other family member). For example, short breaks, or other instances where the provision of services to a parent or carer is necessary to meet the needs of the disabled child. But outside of these circumstances there is only a power to meet the needs of parents and carers and to recommend changing this position, we felt, would stray beyond law reform and into exclusively political policy.

Consultation analysis

7.99 Of the 126 consultees who responded to our proposal about powers to meet the needs of disabled children a majority (105) were in favour with seven against, and 14 neither for nor against. Those in favour highlighted the importance of such powers as a tool to meet urgent needs before an assessment has been completed. This can

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[52] *R (J) v Worcestershire County Council (Equality and Human Rights Commission intervening)* [2014] EWCA Civ 1518, [2015] 1 WLR 2825.

allow for early intervention which might prevent the child's needs from escalating and, generally, enable local authorities to provide a safety net for disabled children. Points made by those who opposed the proposals included the fact that non-eligible needs could be met in other ways, for example under section 17 of the Children Act 1989 or in the local community.

7.100 Of the 130 consultees who responded to our proposal about the power to meet the needs of parents and carers, 120 were in favour, three were against, and 12 were neither for nor against. The majority viewed the power as an essential mechanism to ensure that parents and carers can continue to meet the needs of their disabled children. Of those who opposed the proposal, one consultee felt that it did not go far enough and that there should be a duty to meet carers' needs, as there is under the adult social care legislation. One felt that our reluctance to go further was inconsistent with the approach we had taken to our other proposals, some of which involve significant changes to the law. The other felt that the focus of the law should be on children and not their parents and carers.

Discussion and recommendations

7.101 There was a clear consensus in favour of the powers we proposed, and consultees endorsed the logic underpinning the proposals to a considerable extent. We accept that our proposals in relation to parents and carers are limited and that a mere power to meet their needs is inconsistent with the duty to meet the needs of carers of adults who require care and support under the Care Act 2014.[53] However, we remain of the view that for us to recommend change to this policy would stray beyond the remit of law reform. Although we highlight our recommendation that short breaks should be one of the services that can be provided under the single duty to meet the social care needs of disabled children. This is likely to ensure that the needs of parents and carers are met in a proportion of cases.

7.102 For these reasons, we proceed with recommendations in line with our original proposals. In light of our recommendation in Chapter 2 that disabled children should remain within the scope of section 17 of the Children Act 1989, this recommendation does not require any legal change. Implementing this recommendation is simply a matter of retaining the existing law. Section 17(1) and (3) provide the requisite powers to meet the needs of disabled children, their parents and carers and indeed the rest of their family, so long as the services are provided with a view to safeguarding or promoting the child's welfare.

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[53] Care Act 2014, s 20.

Recommendation 21.

7.103 Local authorities should continue to have powers to:

(1) meet the social care needs of a disabled child that do not satisfy the national eligibility criteria;

(2) meet the social care needs of a disabled child pending an assessment of whether they satisfy the national eligibility criteria; and

(3) provide services to parents, carers and family members, so long as the services are provided with a view to safeguarding or promoting the disabled child's welfare.

Chapter 8: The range of services that should be available

INTRODUCTION

8.1 In this chapter we consider the range of services that local authorities should be able to provide in order to meet the social care needs of disabled children and their families.[1]

THE PROBLEM

KEY LEGAL PRINCIPLES: THE CURRENT RANGE OF STATUTORY SERVICES

Section 17(1) of the Children Act 1989 permits local authorities to provide a broad range of services. The range of services is not exhaustively defined but it includes accommodation, assistance in kind (which means goods and services other than money) and cash.[2] The range encompasses:

- residential short breaks;[3]
- personal care in the home;
- adaptations to the home;[4]
- monetary payments so that families can purchase services for themselves;[5] and
- a range of other services.

Section 2(6) of the Chronically Sick and Disabled Persons Act 1970 contains an exhaustive list of services that can be provided to disabled children under Part 3 of the Children Act 1989. These include “lectures”, “outings”, the provision of a “wireless”, and things like practical assistance in the home, home adaptations and travel arrangements.

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[1] Our proposals on the range of services that should be available, and a detailed overview of the current law, can be found in Disabled Children’s Social Care (2024) Law Commission Consultation Paper No 265 ch 9.

[2] Children Act 1989, s 17(6).

[3] See further, Children Act 1989, Sch 2, para 6(1)(c); *R (JL) v Islington London Borough Council* [2009] EWHC 458 (Admin), [2009] 2 FLR 515.

[4] See further, *R (Spink) v Wandsworth London Borough Council* [2005] EWCA Civ 302, [2005] 1 WLR 2884.

[5] Children Act 1989, s 17A(1); Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, SI No 1887, reg 4 and Sch 1.

8.2 The list of services contained in section 2 of the Chronically Sick and Disabled Persons Act 1970 is out of date. Most obviously, the provision of a wireless – which is a reference to a wireless radio – is obsolete. Most of the young people we heard from in the run up to our consultation had not heard of a wireless radio and assumed that wireless refers to wireless internet. The phrase “assistance in kind” in section 17 of the Children Act 1989 is also dated and is not universally understood.

8.3 A further reason to consider reform arose from the fact that, within our consultation paper, we proposed a new duty and powers to meet the social care needs of disabled children. For that reason, we needed to identify how the range of services that local authorities can provide under the duty and powers could most effectively be set out in the legislation.

THE SOLUTION

Our consultation questions and provisional proposals

8.4 We proposed that the legal framework for disabled children’s social care should contain a non-exhaustive list of services that local authorities can provide, similar to the approach taken in the legal framework that applies to adult social care.[6] We felt this was preferrable to an exhaustive list which might become obsolete over time and limit the flexibility of social workers to respond innovatively to the individual needs of a disabled child. Conversely, we felt that a non-exhaustive list was preferrable to no list, as a means of promoting clarity and thereby avoiding disputes.

8.5 We proposed that the non-exhaustive list should contain the following examples of services that could be provided:

(1) accommodation;

(2) the provision of care at home or elsewhere;

(3) educational or leisure activities;

(4) services to assist parents and carers in the evenings, at weekends and during the school holidays;

(5) adaptations to the home;

(6) counselling and other types of social work;

(7) goods and facilities; and

(8) information, advice and advocacy.

8.6 We sought consultees’ views on the services that should be included in this list. We also asked two more general, open questions to identify the main services needed by, and available to, disabled children.

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[6] Care Act 2014, s 8. See more generally Disabled Children’s Social Care (2024) Law Commission Consultation Paper No 265 paras 9.15 to 9.25 for our provisional proposals.

Consultation analysis

8.7 The main services consultees identified as being required by disabled children were:

(1) short breaks (including respite care);

(2) direct payments;

(3) personal care/assistants;

(4) specialist equipment;

(5) support in developing independent living skills;

(6) advice and guidance; and

(7) assistance with transport or travel arrangements.

8.8 We received 137 responses to our proposal that the legislation should include a non-exhaustive list of services. Of these, 114 were in favour, 11 were against and 12 were neither for nor against. Those in favour tended to view this approach as allowing flexibility and the tailoring of services to meet individual needs. Those against raised a mixture of concerns, including that a non-exhaustive list offered few benefits over no list at all, that it might still go out of date, that it might raise expectations about the services families would be entitled to, and that guidance would be a better place to set out the types of services that could be provided.

8.9 We received 97 responses to our question about the content of the list. Many of these commented favourably on particular items in the list or suggested amendments. Others highlighted important items that they felt should be included in the list such as cash, support with travel arrangements, specialist equipment and childcare. It was also suggested that the item within the list which deals with “services to assist parents and carers in the evenings, at weekends and during the school holidays” might be read as implicitly excluding the provision of services to parents and carers at other times. It was also suggested that “care and support” (the phrase used in the adult social care legislation) was more appropriate for inclusion in the list than simply “care”.

Discussion and recommendations

8.10 There are three ways in which the legislation could deal with the range of services that can be provided by way of disabled children’s social care:

(1) the legislation could provide an exhaustive list of services;

(2) the legislation could provide a non-exhaustive list of services; or

(3) the legislation could stay silent on this issue.

8.11 There was little support for the first of these options and we rule it out on the basis that it would unduly limit the flexibility of local authorities to adapt to the individual needs of disabled children. We also remain of the view that the third option is insufficiently clear. We return to the example that we gave in the consultation paper: every major piece of children’s social care legislation since 1963 has given rise to a legal dispute that has had to be resolved by the Court of Appeal as to whether social services can use their powers to provide accommodation to homeless children, young people or their families.[7] Such disputes cost a huge amount of money and can result in delay in service provision. Clarity in the legislation, in the form of a detailed list, can help avoid disputes and leave local authorities, parents and carers clear as to what services can be made available. The risk of relying solely on guidance to try and achieve that clarity is that the guidance itself may give rise to disputes, as views may differ on whether the list in the guidance accurately reflects what the legislation permits.

8.12 This leaves the second option, of which the majority of consultees were in favour. We recognise the validity of the concerns raised by those who opposed this option. However, we think they are outweighed by the considerations set out in paragraph 8.11 and, in some instances, can be mitigated in other ways. For example, the concern that a non-exhaustive list might go out of date can be met by avoiding reference to particular technologies and opting instead for more general terms such as "goods and facilities". Similarly, the concern that a non-exhaustive list might raise expectations that a family are entitled to a particular item on the list can be addressed by explaining within the statutory guidance (which we recommend in Chapter 2) that this is not the case. Rather, local authorities will be able to exercise their judgement to decide the most appropriate way to meet a child's assessed needs, choosing from the wide range of services that they are empowered to provide.

8.13 For these reasons we recommend that the legislation should provide a non-exhaustive list of services, covering:

(1) accommodation;

(2) the provision of care and support at home or elsewhere;

(3) educational or leisure activities;

(4) services to assist families;

(5) adaptations to the home;

(6) counselling and other types of social work;

(7) goods and facilities;

(8) specialist equipment;

(9) assistance with travel arrangements; and

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[7] *Attorney General ex rel Tilley v Wandsworth London Borough Council* [1981] 1 WLR 854, [1981] 1 All ER 1162 (whether accommodation could be provided under Children and Young Persons Act 1963, s 1); *R v Tower Hamlets London Borough Council ex p Monaf* (1988) 20 HLR 529 (whether accommodation could be provided under Child Care Act 1980, s 1); *R (W) v Lambeth London Borough Council* [2002] EWCA Civ 613, [2002] 2 All ER 901 (whether accommodation could be provided under Children Act 1989, s 17); *R (O) v Barking and Dagenham London Borough Council* [2010] EWCA Civ 1101, [2011] 1 WLR 1283 (whether accommodation could be provided under Children Act 1989, s 23C).

(10) information, advice and advocacy.

8.14 This incorporates the original list of services that we consulted on, with the addition of specialist equipment and assistance with travel arrangements. We include these additional services, which were specifically identified by a number of consultees as meriting inclusion, as they fall within the most common forms of services that consultees told us disabled children require. As such, it strikes us as particularly important to avoid disputes over the availability of these services.

8.15 Within this list, we refer to "the provision of care and support" instead of "provision of care". The former terminology is consistent with the adult social care legislation and is also more in keeping with the idea that social care for disabled children should seek to promote their independence and autonomy. These objectives are embodied in the statutory principles we recommend in Chapter 4.

8.16 We also refer to "services to assist families" instead of "services to assist parents and carers in the evenings, at weekends and during the school holidays". We accept the point that by specifying that services can be made available at particular times, we might be taken to be implying that they should not be available at other times. That is not our intention. The same point might be made in relation to the specification that services can be made available to parents and carers. By including this specification, we did not intend to exclude other family members who might be provided with services with a view to promoting or safeguarding the welfare of the disabled child. However, the specification might be interpreted as excluding such family members. We have adapted the wording accordingly.

8.17 We have not included "cash" or "financial payments" in the list. The recommendations we make in Chapter 9 relating to direct payments will ensure that local authorities can make financial payments to families in many instances where they are needed. In addition, "cash" already forms a part of the range of services that local authorities can provide to disabled children under section 17(6) of the Children Act 1989.[8]

8.18 We have also not expressly included short breaks within the list of services. This is because the different types of service that can be provided by way of a short break already feature on the list or fall within items that feature on the list.[9]

8.19 Our recommendation does not represent a substantial change in the law. The list we recommend refers to services that can already be provided to disabled children under the Children Act 1989 and the Chronically Sick and Disabled Persons Act 1970. The purpose of our recommendation is simply to make it clear that these services can be made available. In making our recommendation we have deliberately not included

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[8] The range of services that we are considering in this chapter are the services that can be provided pursuant to the duty and powers to meet the social care needs of disabled children that we recommend in ch 7. The duty and powers we recommend require local authorities to exercise their functions under Part 3 of the Children Act 1989 which, in practice, will generally mean providing services under section 17 of the Children Act 1989. Hence, any service referred to in section 17 of the Children Act 1989 automatically forms part of the range of services available to disabled children under the duty and powers we recommend.

[9] Our definition of short breaks includes: accommodation; the provision of care and support at home or elsewhere; educational or leisure activities; and services to assist parents and carers. See paras 7.69 to 7.70.

each and every service which consultees have told us a disabled child might need. However, we have attempted to focus on the principal services disabled children need, as those are the services where clarity is most needed. If necessary, statutory guidance could provide further examples of services that might be provided. The principal virtue of a non-exhaustive list is, by definition, that local authorities are permitted to provide services that are not on the list if they decide it is appropriate.

Recommendation 22.

8.20 The legal framework should include a non-exhaustive list of services that local authorities can provide to meet the social care needs of disabled children.

8.21 This list should cover:

(1) accommodation;

(2) the provision of care and support at home or elsewhere;

(3) educational or leisure activities;

(4) services to assist families;

(5) adaptations to the home;

(6) counselling and other types of social work;

(7) goods and facilities;

(8) specialist equipment;

(9) assistance with travel arrangements; and

(10) information, advice and advocacy.

Chapter 9: The methods for providing services

INTRODUCTION

9.1 In this chapter we consider the different ways in which local authorities can provide social care to disabled children.[1] As part of this, we consider whether there should be changes to direct payments and a right to have a personal budget.

THE PROBLEM

9.2 There are three main ways that local authorities can secure the provision of social care for a disabled child or their family.[2]

(1) By providing services directly, for example, through support from a local authority social worker.

(2) By arranging for another person or organisation to provide the service. For example, the local authority might arrange for personal care to be provided to a disabled child in their home by a carer employed by an agency.

(3) By providing money to the parent or carer of the disabled child, or the child themselves if they are old enough, so they can purchase the service for themselves. These financial payments are referred to as "direct payments".

KEY LEGAL PRINCIPLES: DIRECT PAYMENTS[3]

Direct payments can only be made where the parent or child (if the child is 16 or 17) consents.

The default position is that payments are made at a rate which the local authority estimates as the reasonable cost of securing the service. This is subject to a condition that the payee must reimburse the authority an amount (which could be zero) that the authority decides it would be reasonably practicable for them to pay. Where the payment is not used to pay for the service for which it was provided, the local authority can require it to be repaid in full or in part.

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[1] Our proposals on the methods for providing services, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 10.

[2] Disabled Children's Social Care (2024) Law Commission Consultation Paper 265 paras 10.2 to 10.6.

[3] Children Act 1989, s 17A; Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, SI No 1887, regs 7, 9, 14 and 15.

If the local authority is satisfied that the need which calls for the provision of the service will be secured by the arrangements that the payee has made, then the authority is relieved of the duty to provide the service itself.

There is no statutory duty on local authorities to review direct payments.

9.3 Prior to our consultation, we heard that the method which would seemingly provide the greatest flexibility – direct payments – is not working effectively. Parents and carers shared the following concerns.

(1) Direct payments are not always sufficient to secure services and even if they are, there is a general shortage of carers on whom to spend direct payments.

(2) Local authorities do not always review the provision of direct payments and so do not always recognise when problems arise. Alternatively, when parents raise problems, it does not always result in the local authority assuming responsibility to provide the service itself or arranging for someone else to provide it.

(3) There may be considerable and complex responsibilities associated with spending direct payments on carers. For example, it may involve the parent of the disabled child becoming an employer and having to purchase, pay or administer National Insurance, holiday pay, sick pay, maternity/paternity pay, employers' liability insurance, public liability insurance and VAT.[4]

9.4 The result of this can be that the disabled child's needs are not met and that families are only able to have choice over the services that their child receives if they are willing to take on the administrative burdens of direct payments.

THE SOLUTION

Improving direct payments

Our provisional proposal

9.5 In our consultation paper we proposed that the direct payment regime should be amended as follows.

(1) The payment should be "sufficient" to secure the provision needed, as opposed to an amount that is estimated to be "reasonable". By "sufficient" we meant that the payment should be enough to cover the actual cost of the service.

(2) Payments should be kept under review, so that their sufficiency can be monitored and alternative arrangements made if necessary. For example, if the family have not been able to obtain the service they need this could be

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[4] Department of Health, *Guidance on direct payments for community care, services for carers and children's services England* (October 2010) para 114. This guidance has been withdrawn but the example is still valid.

identified through the review process and the local authority could arrange to provide the service directly.

9.6 These proposals would align the disabled children's social care direct payments regime more closely with the regime in the special educational needs and disability (SEND) system.[5]

Consultation analysis

9.7 Of the 132 consultees who responded to this question, 110 agreed that the direct payment regime should be adapted as we proposed. 18 consultees neither agreed nor disagreed with the proposal and four consultees disagreed.

9.8 Many of those in favour of our proposal supported the general premise and told us that direct payments are often insufficient for families to secure services. This can have various consequences, for example the Challenging Behaviour Foundation told us that families can be "unable to recruit [personal assistants] with the budget available" and therefore need to "reduce the number of hours of support they receive". Contact also reported examples of parent carers having to "top up" direct payments to afford services.

9.9 Several consultees raised issues with the terminology, questioning the difference between "sufficient" and "reasonable". Irwin Mitchell suggested that it could "perhaps help if guidance was provided as to what is considered sufficient to secure the provision needed".

9.10 Other consultees in favour of the proposal emphasised the importance of reviews. For example, the Prader-Willi Syndrome Association UK noted that the review is especially important as there may be changes in costs (such as increases in the living wage) which are outside the control of the individual. The Children's Commissioner's Office stressed that reviews should be "regular" and several consultees said that there needs to be guidance about reviews.

9.11 Several local authorities agreed with our proposal in principle but highlighted the need for adequate funding from central government to ensure that local authorities can meet the proposed duty. For example, the Royal Borough of Greenwich said, "it would require regular uplifts in funding from central government to meet the growing costs associated with inflation and changing markets". East Sussex County Council suggested that funding could be a particular issue in more affluent areas, where the costs of services will likely be higher.

9.12 Consultees who were neither for nor against the proposal raised concerns that our proposal may result in local authorities having to fund premium services. For example, Wakefield Council said that the "local authority will provide services at best value and therefore the rates will be at this level and not at a premium level of service that a parent has identified". Similarly, there were concerns that the proposal could distort the market. The Central Bedfordshire Council's Children with Disabilities Service, suggested that "this will enable carers to disproportionately charge for their services,

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[5] The Special Educational Needs (Personal Budgets) Regulations 2014, SI No 1652, regs 10(1) and 11.

leading to unfair and unequitable allocation of funds, and an increase in private services that are unregulated/monitored".

9.13 The North West Association of Directors of Children's Services, who were against the proposal, echoed the concerns that the proposal could distort the market. Two local authorities objected to the proposal on the basis that the amount paid should be reasonable, with Hampshire County Council commenting that this would "ensure it is sustainable and affordable". Finally, one parent carer was against the proposal, stating that "actual care should be provided".

9.14 Some consultees raised issues relating to consent to parental choice. For example, Special Needs Jungle expressed concerns that families are "being coerced into direct payments where they have been unable to secure provision due to a lack of suitable provision locally, hourly rates being inadequate and difficulties with recruitment". The Community Care Lawyers Group shared similar concerns about families being given direct payments that they do not want, noting that "it should be clearly explained that direct payments are a choice".

Discussion and recommendations

9.15 Consultation reinforced our impression that direct payments are often not enough for families to purchase the services that they need. This can result in families topping up the payments themselves or reducing the amount of support that they receive.

9.16 This can mean one of two things. Either the needs of the disabled child are not met, which would mean that the statutory duty under section 2 of the Chronically Sick and Disabled Persons Act 1970 is not being discharged or the power in section 17 of the Children Act 1989 is not fulfilling its statutory purpose. Alternatively, in order to meet the needs of the disabled child, families are having to contribute to the cost of their child's care, without their financial situation necessarily having been considered. This circumvents the carefully designed charging regime set out in the Children Act 1989.[6] It is, in effect, charging for services but without the statutory safeguards.

9.17 In our view these are foreseeable consequences of a statutory scheme which only requires payments to be of an amount estimated to be reasonable, does not require the efficacy of those payments to be kept under review, and effectively relieves a local authority of its duty to provide services itself if it makes a direct payment. Local authorities do not have to ensure that payments are enough to cover the actual cost of the service, there are no fixed points at which to check whether the direct payments are working, and there are limited incentives and opportunities for local authorities to fix the problems that arise. Consultation has reinforced this view.

9.18 The consultation responses were largely supportive of our proposed adaptions to the direct payment regime. There were, however, two key concerns about the practical implications of our proposal. First, that there would need to be increased funding to ensure that local authorities can meet the amended duty. Second, that there is a risk that the proposal would distort the disabled children's social care market.

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[6] See Disabled Children's Social Care (2024) Law Commission Consultation Paper 265 ch 12 on charging.

9.19 Both concerns can be overstated. Our proposal for direct payments to be "sufficient to secure the provision needed" would not require local authorities to fund premium services. The payment would need to be enough to cover the actual cost of a service that meets the child's assessed needs. However, if there were multiple options available all of which would meet the child's needs, the local authority would be entitled to provide funding at a rate sufficient to secure the least costly option. Accordingly, we suspect the potential for this to distort the market for services is likely to be limited, and no-one suggested that this had happened in the context of SEND, where the proposals on which we consulted already apply.[7]

9.20 However, we are not in a position to rule out the potential for these proposals to affect the market for services to some extent. We could recommend that the Department for Education undertake further research to assess whether this would be the case prior to deciding whether to implement our recommendation. But this could result in the underlying problem being left unaddressed. The alternative approach is to adapt the proposals. As noted, our proposals were based on the regulations that apply in the SEND system and sought to promote consistency between the legal frameworks for disabled children's social care and SEND. Regulation 6 of The Special Educational Needs (Personal Budgets) Regulations 2014 provides a model which would help us to address these concerns, while still tackling the underlying problem.[8] Regulation 6 provides that a local authority can only make a direct payment if it is satisfied that:

(1) the direct payment will not have an adverse impact on other services which the local authority provides or arranges for children and young people with education, health and care (EHC) plans; and

(2) securing the proposed agreed provision by direct payments is an efficient use of the authority's resources.

9.21 Introducing equivalent exceptions into the disabled children's social care direct payment regime should help to mitigate the practical and economic concerns that have been raised. If the cost of the service for which the direct payment is sought is unaffordable, or covering the cost would distort the market and inflate the cost of services, then a local authority could rely on one of the exceptions and decline to make the direct payment. In that scenario the authority would need to provide the service itself or arrange for a third party to provide it. Not getting a direct payment, therefore, would not mean that the child's needs are left unmet, rather it would mean that their needs are met in a different way. The impression we gained in our consultation events is that this would be an acceptable compromise: few families expressed strong views about the right to direct payments and the primary concern of most was simply that, one way or another, their child's needs were met.

9.22 This approach would also help to create consistency between the education and social care direct payment schemes, which ties in with the aims of this review. More fundamentally, this aligns with the policy underpinning our proposals: if direct

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[7] Some consultees did query whether it was appropriate to emulate the SEND framework, given that the SEND system is under severe financial pressure. But no-one suggested that these financial pressures arise from the way in which direct payments work in that system.

[8] SI 2014 No 1652.

payments are not viable for practical reasons, then this should be identified and the local authority should provide services in a different way to ensure that the child's needs are met, and that the underlying legal duty is discharged. The regulation 6 approach requires local authorities to think about the practical barriers to the viability of direct payments before making any payments and thereby identify possible problems before they arise. This is preferable to relying solely on parents and carers to raise issues after things have gone wrong.

9.23 For these reasons, we proceed with the recommendation that direct payments should be sufficient to cover the actual cost of the provision needed. This should put beyond doubt that direct payments must be enough for families to purchase the services required to meet the child's assessed needs. But, to mitigate the unintended economic consequences that might otherwise flow, we recommend that – as in the SEND system – the availability of direct payments should be qualified. This would mean that a local authority should not be required to make a direct payment if it would have an adverse impact on the other services which the local authority provides or arranges for disabled children, or if it would not be an efficient use of the authority's resources.

9.24 We also recommend proceeding with our proposal that payments should be kept under review. Some local authorities told us that they already review direct payments, but this does not appear to be the case across the board. A statutory requirement for a review would ensure consistency between local authorities, help to ensure that payments remain sufficient, and allow for other arrangements to be made if necessary. This review process should be aligned with the review of the disabled child's care plan that we recommend in Chapter 10.

9.25 Finally, as we note above at paragraph 9.14, some consultees reported instances of families being given direct payments that they do not want. The legislation is clear that a direct payment can only be made with the consent of the person to whom the payment will be made.[9] However, guidance could clarify this, to ensure that the law is properly understood.

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[9] Children Act 1989, s 17A(1); Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, SI No 1887, reg 7(1).

Recommendation 23.

9.26 The direct payment regime should be adapted so that the amount of the payment is sufficient to cover the actual cost of the provision necessary to meet the disabled child's assessed social care needs.

9.27 Local authorities should not be required to make a direct payment if:

(1) the direct payment would have an adverse impact on other services which the local authority provides or arranges for disabled children; or

(2) securing the proposed agreed provision by direct payments would not be an efficient use of the authority's resources.

9.28 Local authorities should be required to keep direct payments under review so that their sufficiency can be monitored and alternative arrangements made if the payment is insufficient or the family have not been able to secure the services required. This review process should be aligned with the review of the disabled child's care plan that we recommend in Chapter 10.

9.29 The statutory guidance we recommend in Chapter 2 should clarify that direct payments can only be made with the consent of the person to whom the payment will be made.

Personal budgets

Our provisional proposal

9.30 Our consultation paper proposed that parents, carers and disabled children aged 16 or over should have a right to a personal budget. By "personal budget" we mean an amount of money identified by the local authority to deliver provision for an individual disabled child and/or their family, where the parent or child is involved in securing that provision. The family could receive this money as direct payments, which would allow them to contract, purchase and manage services themselves. Alternatively, the money could be held and managed by the local authority or a third party, and the family would have a say in how the money is spent. For example, a family could ask to have a particular personal assistant work with their child. In summary, a personal budget is the total amount of money available to a particular child, and a direct payment is one way in which a family can access that money.

9.31 There is no right to a personal budget in disabled children's social care law, although there is nothing to prevent local authorities from offering them at present. In contrast, in the SEND system there is a right to a personal budget on request for children with EHC plans, which can include funding for social care.[10] The request can be made by a

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[10] Children and Families Act 2014, s 49(1); Department for Education and Department of Health, *Special educational needs and disability code of practice*: *0 to 25 years* (January 2015) para 9.99.

child aged 16 or 17 or by their parent. Further, there is a right to a personal budget in adult social care.[11] There is no clear justification for this inconsistent approach.

Consultation analysis

9.32 In total, 127 consultees answered this question. Of those who answered, the majority of consultees (101) agreed with our proposal, seven disagreed and 19 were neither for nor against our proposal.

9.33 Those in favour emphasised that this proposal would bring "choice and autonomy" for families. Several consultees also suggested that a right to a personal budget could help young people transition to adulthood, because it would bring greater alignment with the adult social care regime under the Care Act 2014. For example, the North West Association of Directors of Children's Services said that they felt it could be "a suitable bridging arrangement".

9.34 Some consultees questioned whether it was appropriate for children aged 16 to be given this right because they would be "too young". There were also responses which observed that "stage not age is more important" and proposed that those aged 16 to 18 should have a capacity assessment.

9.35 Some consultees raised concerns about the way in which personal budgets can be calculated, in particular the use of resource allocation schemes. Special Needs Jungle highlighted that resource allocation schemes "have resulted in insufficient funding being allocated", while Iris Possibilities said that there needs to be "far more transparency" in how these budgets are calculated.

9.36 Several consultees who were either against, or neither for nor against, questioned the purpose of introducing personal budgets. Cerebra observed that parents "rarely express strong feelings as to the availability of personal budgets". Professor Luke Clements commented that "it is difficult to see what benefit families would gain from having a personal budget (as opposed to a direct payment)" and went on to say, "there is little research or recent evidence to suggest how personal budgets have benefited disabled adults".

Discussion and recommendations

9.37 The main point raised against our proposal was that the benefits of personal budgets are not clear and there is little research on this. We accept that there is little research in this area, however, our consultation process has given us a clearer idea of the issues with current service provision and how personal budgets could address these. Specifically, consultation confirmed our impression that direct payments can place an administrative burden on families which is too much for them to deal with alongside the responsibilities of caring for a disabled child. For example, some families struggle to find services to purchase and find it difficult to deal with the complexities of directly employing staff.[12] Understandably, this deters some families from using direct

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[11] Care Act 2014, s 25(1)(e).

[12] The Employment Rights Bill, which is currently going through Parliament, might have further consequences for parents and carers who directly employ staff once it becomes an Act.

payments, but they may nevertheless still want to have some choice and autonomy in relation to how they receive services.

9.38 In principle, a right to a personal budget for parents, carers and children aged 16 or 17 should help to solve some of these problems. A desire for choice and autonomy were key themes that emerged from our consultation, and a personal budget would help to provide this. Personal budgets can allow families to have a say in what services they receive, without having to take on the administrative burdens of direct payments. These benefits, combined with the fact that introducing a right to a personal budget would create consistency with the SEND and adult social care legislation, provide reasons to proceed with this as a recommendation. We recommend that the right to a personal budget is made available only to those who have the capacity to request and manage a budget, applying the capacity test set out in the Mental Capacity Act 2005. That provides consistency with the recommendations we make in Chapter 11 relating to decision-making by disabled children.

9.39 We acknowledge the point raised by a number of stakeholders that resource allocation schemes – which are tools used to calculate personal budgets – can lack transparency and do not always result in the allocation of sufficient funding. However, these are operational problems rather than problems of principle which the Department for Education may wish to consider investigating further and addressing in guidance, if appropriate.

9.40 Finally, we recognise that there may be circumstances in which preparing a personal budget is not a viable option. In particular, the legal framework governing personal budgets in SEND makes specific provision for cases where a local authority has paid an aggregate sum for a service to be made available to a group of children.[13] In those cases, it may not be possible to disaggregate the cost of providing the service to an individual child, or to allow the child and their family to elect to spend that money differently. Doing so might make it difficult for the authority to continue to fund the wider service for the group. The SEND framework deals with this situation by allowing a local authority to refuse a personal budget in two situations. First, where disaggregating the cost of providing the service to an individual child would have an adverse impact on other services provided or arranged by the local authority for children in similar circumstances. Second, where it would not be an efficient use of the local authority's resources. For reasons of pragmatism, consistency with the SEND system, and consistency with our recommendations in relation to direct payments, we recommend that there should be equivalent exceptions for disabled children's social care.

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[13] The Special Educational Needs (Personal Budgets) Regulations 2014, SI No 1652, reg 4A. Regulation 4A was inserted by the Special Educational Needs (Miscellaneous Amendments) Regulations 2014, SI No 2096, reg 2(3) in response to concerns about this situation raised by the Joint Committee on Statutory Instruments. See Joint Committee on Statutory Instruments, Sixth Report of Session 2014-15 (2014-15) HL Paper 30, HC 332-vi, paras 3.1 to 3.7.

Recommendation 24.

9.41 There should be a right to a personal budget in disabled children's social care, on request by any disabled child aged 16 or 17, or their parent or carer, who has capacity within the meaning of the Mental Capacity Act 2005.

9.42 A local authority should not be required to prepare a personal budget in disabled children's social care where disaggregation of the funds for the personal budget would:

(1) have an adverse impact on other services provided or arranged by the local authority for disabled children; or

(2) not be an efficient use of the local authority's resources.

Chapter 10: The plan to meet the needs of a disabled child

INTRODUCTION

10.1 In this chapter we consider the plan to meet the needs of a disabled child.[1] A plan is a document which sets out what services are to be provided to the disabled child and their family, where, when, how and by whom.

THE PROBLEM

10.2 Legislation does not say expressly that disabled children who receive social care are entitled to a plan. Government guidance and the courts have said that disabled children (and other children in need) are entitled to one.[2] This particular plan is referred to in the guidance as a "child in need plan".[3] We were of the view that as this is not written down clearly in statute, it adds to the lack of clarity in disabled children's social care law, making it difficult for disabled children and their families to know what they are entitled to. There is also a lack of clarity surrounding the contents of a social care plan for a disabled child, with only some requirements set out in case law and statutory guidance.[4]

10.3 There are various other types of plan which must be prepared by local authorities for looked after children,[5] care leavers,[6] and children with special educational needs.[7] These plans are not produced solely for disabled children. Rather, they reflect the requirements of a planning process which applies to children generally whom the local authority is supporting in different ways. But disabled children who are receiving services from their local authority to meet their social care needs may be entitled to one or more of these other plans too. In the consultation paper we expressed the view that the relationship between the various plans set out above is not entirely clear. A child may end up with multiple plans covering the same or very similar material,

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[1] Our proposals on plans, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 11.

[2] *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR 119, 128D by Sedley J; HM Government, *Working Together to Safeguard Children 2023* (December 2023) p 73 (no para number) and para 177.

[3] HM Government, *Working Together to Safeguard Children 2023* (December 2023) p 73 (no para number).

[4] *R (AB) v Nottingham City Council* [2001] EWHC Admin 235, (2001) 4 CCLR 295 at [43] by Richards J.

[5] A "looked after child" is a child in the care of the local authority or who is accommodated under the Children Act 1989, except for ss 17, 23B and 24B, for more than 24 hours: Children Act 1989, s 22(1).

[6] By "care leaver" we mean child who has been looked after for 13 weeks or more, beginning on or after their 14th birthday and ending on or after their 16th birthday: Children Act 1989, ss 23A(2) and 3 and Sch 2, para 19B(2); Care Planning, Placement and Case Review (England) Regulations 2010, SI No 959, reg 40(1); Care Leavers (England) Regulations 2010, SI No 2571, reg 3(1) and (2).

[7] Namely a "care plan" for looked after children, a "pathway plan" for care leavers and an "education, health and care plan" for children with special educational needs and disabilities.

meaning that they may often have to repeat the same information to various professionals.

THE SOLUTION

Statutory entitlement to a plan

Our provisional proposal

10.4 We proposed that disabled children who are eligible to have their needs met by social services should have a statutory entitlement to a plan setting out what services they are to receive, and where, when, and how those services will be provided.

10.5 In proposing this, our intention was to codify the current law. This proposed statutory requirement would clarify that local authorities are under a duty to provide a plan to those disabled children who are eligible to have their needs met by social services. The legislation would stipulate that the plan should include the following information:

(1) what services the child is to receive;

(2) where those services will be provided;

(3) when those services will be provided; and

(4) how those services will be provided (which includes who will provide them).

10.6 Our intention was that disabled children and their families should be given a copy of the child's plan. This is key to ensuring clarity and transparency.

Consultation analysis

10.7 In total, 138 consultees responded to this question. Of those who answered, a majority (128) agreed with the proposal. Only one consultee disagreed with it, and a small number of consultees (nine) neither agreed nor disagreed.

10.8 Consultees who agreed with the proposal saw it as a means of clarifying the current legal position as well as providing better transparency and accountability. For example, Steve Broach KC agreed with our analysis in the consultation paper as to the clarity this proposal would bring. He noted that "placing the current case law and guidance on plans into statute would be extremely welcome, not least to clarify the obligations here". Some consultees in support of the proposal commented that having a statutory entitlement to a plan would promote transparency in the system and ensure better accountability. For example, Birmingham Children's Trust said that "a plan is needed to ensure all parties are clear on what is provided and what purpose". The Local Government and Social Care Ombudsman also noted that more clarity will "help manage expectations and ensure robust accountability if there is a failure to deliver provision detailed in the plan".

10.9 A number of local authority consultees who agreed with the proposal explained that it already reflects standard practice in their area. For example, East Sussex County Council said that providing plans "has the positive effect of supporting parents and carers to know what their child's support plan is and how to put it in place". It added that "the risk of not having a plan, may lead to confusion and mismanagement of support services" and that "the benefit of a plan is it is clear to members of the authority in terms of what support is provided to the child".

10.10 The main concern raised by consultees was that there is a need for a comprehensive review of child in need plans more broadly, not just for disabled children. For example, the British Association of Social Workers (England) (BASW) drew our attention to a recent report from the Children's Commissioner,[8] "which found that 'it is impossible to meaningfully assess how effective child in need plans are as an intervention'". BASW's members recommended that "a comprehensive review of Children in Need assessment and planning is undertaken that involves all stakeholders and has an explicit remit to meet the needs of disabled children and their families". This concern was also raised directly to us by the Children's Commissioner's Office, who welcomed our proposal but urged "a formalisation of what families can expect across section 17 as an intervention more widely".

10.11 Consultees made the following additional points.

(1) It would be helpful for legislation to set out when a review of the plan should take place, and the details and timescales relating to reviews.

(2) Consideration should be given to parents' and carers' rights to enforce the plan and whether there should be a duty to secure the provision in the plan.

(3) Clarity is needed regarding where this proposal sits with the reforms to children's social care and the move towards a "family help" model.

Discussion and recommendations

10.12 Consultation reinforced our view that the law relating to plans needs to be clearer. Such clarity would be achieved by providing disabled children who are eligible for services with a statutory entitlement to a plan setting out what services they are to receive, and where, when, how and by whom those services will be provided. Having a right to a written plan also provides children and their families with a starting point for discussion with their local authority and – if required – a basis for complaint or challenge, if they are unhappy with the services that are to be provided, or the method by which they will be delivered. The need for this accountability was highlighted to us by consultees.

10.13 However, as discussed in the consultation paper and as raised by some consultees, there are concerns that codifying the law for disabled children would introduce inconsistency into the broader legal framework applying to children in need. Our proposal would mean that disabled children would have a statutory right to a plan but other children in need would not. The Children's Commissioner recently examined the current state of child in need plans in England.[9] She found that child in need plans are crucial for supporting children but are inconsistently implemented, poorly monitored,

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[8] Children's Commissioner, '*What is this plan for?' The purpose and content of child in need plans* (October 2024).

[9] Children's Commissioner, *'What is this plan for?' The purpose and content of child in need plans* (October 2024); and Children's Commissioner, *Children on child in need plans* (March 2024).

and difficult to evaluate for effectiveness.[10] Consultees identified similar issues in relation to child in need plans for disabled children and did not suggest that these issues are unique to disabled children. The recommendations we make here, as is the case throughout this report, apply only to disabled children. We have not consulted on whether they could or should apply to children in need more broadly, and to do so would lie outside of our terms of reference. However, we acknowledge the points raised by the Children's Commissioner's Office and BASW, and we record them here as the Department for Education may wish to consider them in deciding whether and how to implement the recommendations in this report.

Reviewing the plan

10.14 Consultees suggested that the legislation should clarify the position on reviewing the plan. We did not propose a right to a review of the plan in our consultation paper. However, the *Working Together* guidance states that child in need plans "should be reviewed regularly to analyse whether sufficient progress has been made to meet the child's needs".[11]

10.15 One of the key themes of our consultation paper was that important requirements relating to disabled children's social care should be set out in legislation. The same applies to reviews. If a child's plan is out of date, it is of little value to the child, their family, or the local authority. Additionally, the other legal frameworks for plans to which a disabled child might also be entitled provide a right to review the plan.[12] We therefore agree with consultees that this important requirement should be included in the legal framework we recommend. Drawing on examples from other legal frameworks on plans, we set out below three options as to how the legislation could provide for reviews.

(1) The legislation could mirror the guidance on child in need plans, which is that the plan should be reviewed regularly.[13] The word "regularly" is not defined in the guidance. We interpret the word in line with the dictionary definition: at uniform intervals of time. The authors of the leading textbook on disabled children's law have suggested that, for children in need, this ordinarily means that the plan is reviewed every 12 months.[14]

(2) The legislation could set out specific timescales, as is done for children with special educational needs and looked after children. For example, legislation requires that children with an education, health and care (EHC) plan have their

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[10] Children's Commissioner, *'What is this plan for?' The purpose and content of child in need plans* (October 2024); and Children's Commissioner, *Children on child in need plans* (March 2024).

[11] HM Government, *Working Together to Safeguard Children 2023* (December 2023) p 64, para 181. It provides further detail about the reviews in paras 181 to 183.

[12] See Care Planning, Placement and Case Review (England) Regulations 2010, SI No 959, regs 6, 33 and 48 and the Children and Families Act 2014, s 44.

[13] HM Government, *Working Together to Safeguard Children 2023* (December 2023) p 64, para 181. The same language is used in the legislation for a pathway plan under the Children Act 1989, Sch 2, para 19B(5).

[14] S Broach and L Clements, *Disabled Children: A Legal Handbook* (3rd ed 2020) p 134, para 3.118. They also note that "where there is a material change in a disabled child's needs, a reassessment should be undertaken without delay".

plan reviewed within 12 months of the plan being made or reviewed.[15] Each review of an EHC plan should include a review of the "social care provision made for the child or young person and its effectiveness in ensuring good progress towards outcomes".[16] Looked after children and children on a series of short breaks also have their plans and cases reviewed at specified timescales.[17]

(3) The legislation could follow the approach in adult social care and provide that a local authority must:[18]

(a) "keep under review generally care and support plans, and support plans, that it has prepared"; and

(b) review them on a "reasonable request" by or on behalf of the adult or carer.

This provision is supplemented by the *Care and Support Statutory Guidance* which makes clear that the local authority should conduct a periodic review of all care plans no later than every 12 months, whether a request is made or not.[19]

10.16 Our initial view is that options one and three may be best suited to disabled children's social care. Disabled children have diverse and changing needs, and the frequency which their plans should be reviewed will vary accordingly. This means that a more flexible approach to the timing of reviews may be appropriate. Similarly, disabled children may also have one or more of the other statutory plans that we refer to above. A flexible approach to the timing of the review of their disabled children's social care plan may make it easier to combine the reviews of the various plans.

10.17 However, we have not consulted on these options and there may be positive and negative features of each option that we have overlooked. Accordingly, we present these as options which the Government can consider if it proceeds with our recommendation that plans should be kept under review.

Enforcing the plan

10.18 Some consultees suggested that we should also recommend a corresponding duty to secure the provision in the plan. We understand that these concerns stem from the

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[15] Children and Families Act 2014, s 44.

[16] Department for Education and Department of Health, *Special educational needs and disability code of practice: 0 to 25 years* (January 2015) para 9.167.

[17] Care Planning, Placement and Case Review (England) Regulations 2010, SI No 959, regs 6 and 33. For looked after children a review should take place within 20 days of child becoming looked after, then no more than three months after the first review, and then in intervals of 6 months. For children on a series of short-term placements a first review should take place within 3 months and then regular reviews every 6 months.

[18] Care Act 2014, s 27.

[19] Department of Health and Social Care, *Care and Support Statutory Guidance* (July 2025) para 10.42. Local authorities also carry out a review when information or evidence arises that suggests that the person's circumstances have changed in a way that might affect the appropriateness of the care plan; and should consider a 'light touch' review 6 to 8 weeks after a care plan is agreed and signed off.

perception among families, and those that represent their interests, that there is lack of accountability in the current system. However, expanding our recommendation to include a further duty to secure the provision in that plan would be at odds with our other recommendations in relation to service provision and eligibility.

10.19 The effect of the recommendations we make in Chapter 7 is that local authorities should be required to meet the social care needs of disabled children that satisfy the requirements of national eligibility criteria. However, local authorities would have a discretion as to how they meet those needs, using the methods and range of service provision we set out in Chapters 8 and 9. Under this model, disabled children have a right – which can be enforced if necessary – to have their eligible social care needs met, rather than a right to a particular service.[20] The discretion that is built into this model is important as it allows local authorities to deploy their resources as they see fit, while also ensuring that the child's needs are met. To move away from this model would be a significant policy departure from that which we consulted on. It could also create inconsistency with the rest of children's social care and adult social care. The usual approach in social care law is to have a duty which requires a local authority to achieve an objective (such as safeguarding or promoting welfare) or to meet a person's needs, not to secure a particular provision.

10.20 We acknowledge that allowing social care plans for disabled children to be enforceable would align our recommendations with the special educational needs and disability (SEND) system more closely. In the SEND system, the special educational provision specified in an EHC plan (which can be amended or supplemented by the SEND Tribunal) is enforceable. However, in this instance the objective of achieving consistency between disabled children's social care and SEND is outweighed by the objective of ensuring that our recommendations are, in practical terms, deliverable. Ensuring local authorities retain discretion in deciding how best to meet the social care needs of disabled children is part of this.

Alignment with Family Help

10.21 Finally, there is the question as to how this proposal would fit in with the Government's social care reforms and move to a model of 'Family Help'. The *Families First Partnership Programme Guide* places an expectation on local authorities, among others, to:

> […] develop family help plans that provide clear, measurable outcomes for the child or young person and set expectations for families, with reviewable actions to track progress. Plans should specify the agencies and practitioners involved, the services available, and how success will be measured. Regular reviews should assess whether progress has been made to meet the child or young person's needs.[21]

10.22 The guide emphasises local flexibility in determining the "process and timeline for reviewing plans" and in naming and determining the title of their plans.[22] We do not

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[20] See for example Children Act 1989, ss 22(3) and 23C(4) or Care Act 2014, s 18(1).

[21] Department for Education, *The Families First Partnership (FFP) Programme Guide: Delivery expectations for safeguarding partners in England* (March 2025) p 25.

[22] Department for Education, *The Families First Partnership (FFP) Programme Guide: Delivery expectations for safeguarding partners in England* (March 2025) p 26.

think it will matter what local authorities call the plan which we recommend in this chapter. As long as the plan sets out what services the child is to receive, and where, when, how and by whom those services will be provided, it will meet the requirements of our recommendation.[23] As such, we are of the view that our recommendation of a statutory entitlement to a plan is in line with the guidance set out above, and the aims of the Family Help reforms, which are to ensure that all children in need have a plan.[24] Our recommendation at paragraph 10.43 below on combining plans also addresses the idea of "one plan" which will "stay and evolve with a family".[25]

Conclusion

10.23 In conclusion, we recommend that disabled children who are eligible to have their needs met by social services should have a statutory entitlement to a plan setting out what services they are to receive, and where, when, how and by whom those services will be provided. The legislation should also provide for the right to a copy and a review of the plan. In our view, this recommendation is consistent with the Family Help reforms.

Recommendation 25.

10.24 Disabled children who are eligible to have their needs met by social services should have a statutory entitlement to a plan setting out what services they are to receive, and where, when, how and by whom those services will be provided.

10.25 Local authorities must provide disabled children and their parents or carers with a copy of their plan.

10.26 Local authorities must keep these plans under review.

Guidance on the content of the plan

Our provisional proposal

10.27 We proposed that the details as to the content of the plan to meet the needs of a disabled child should be dealt with in guidance. In proposing a statutory entitlement to a plan, our view was that the legislation should specify the core requirements: what, where, when, how and by whom. We did not go further, as we thought that providing specifics on the content of the plan is a level of operational detail that is better and more usually dealt with in guidance.

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[23] *The Families First Partnership (FFP) Programme Guide* explains on page 26 that: "local safeguarding partners can determine the title of their assessment and plans [and ...] should continue to be mindful of the language used and this could be reviewed during the co-design process including seeking the views of families on terminology".

[24] See paras 5.56 to 5.56.

[25] Department for Education, *The Families First Partnership (FFP) Programme Guide: Delivery expectations for safeguarding partners in England* (March 2025) p 24.

Consultation analysis

10.28 In total, 131 consultees responded to this question. Of those who answered, the majority (110) were in favour of the proposal, with eight consultees against and 13 neither agreeing nor disagreeing with it.

10.29 Consultees who agreed with this proposal noted that it would bring consistency, both nationally and across local authorities. It was explained to us that this would be particularly beneficial to families if they move area. Several consultees in favour mentioned that guidance on care planning would be useful for social workers, with the London Borough of Sutton explaining that "not all practitioners are familiar with the types of actions and plans that should be in place and considered for a child with disabilities - guidance supporting this would be beneficial". The Local Government and Social Care Ombudsman suggested guidance which sets out expectations on the content of plans will "improve quality". Others were in favour of guidance because of the need for flexibility. For example, one local authority consultee explained that there "needs to be flexibility to adapt to the changing needs of the child and wider social context". Lincolnshire County Council agreed that guidance is needed but said that it "should recognise social care professionals are capable of independent thought. It should not be prescriptive".

10.30 The main arguments made by consultees against this proposal was that it did not go far enough: that guidance is too weak and that some requirements as to planning should be set out in legislation. For example, the Independent Provider of Special Education Advice (IPSEA) drew on its experiences with EHC plans, where the "contents of EHC plans are routinely appealed at the SEND Tribunal due to a lack of specificity, despite legal requirements". IPSEA questioned "whether local authorities are likely to ensure that a child's plan's contents meets the terms of guidance". They suggested that the law should prescribe the content of a plan in legislation instead, in the manner of regulation 12 of the Special Educational Needs and Disability Regulations 2014 (SEND regulations).[26] The National Network of Parent Carer Forums also asked for "statutory guidance and a statutory framework plus regulations". Steve Broach KC made a similar point, noting that "the headline requirements of the plan ought to be detailed in secondary legislation, with the detail dealt with in guidance".

Discussion and recommendation

10.31 We remain of the view that guidance on care planning for disabled children is necessary. Few disagreed with this as a starting point. However, a number of consultees suggested that some of the requirements as to the process and content of the plan should be set out in secondary legislation as well as guidance. This approach is used in relation to plans in other legal frameworks.[27] Those frameworks cover details such as how reviews are to be carried out, the form of the plan and the process of preparing a plan. For example, the SEND regulations provide for (among other

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[26] SI 2014 No 1530.

[27] Care Act 2014, s 25; Special Educational Needs and Disability Regulations 2014, SI No 1530, regs 12 and 13; and Care Planning, Placement and Case Review (England) Regulations 2010, SI No 959, regs 5 and 43 and Schs 1 and 8.

things) the “preparation”, “form”, “reviews” and “timescales” of the EHC plan, including what must be included in each section of the EHC plan.[28]

10.32 However, in the context of disabled children’s social care, we do not think it would be appropriate for legislation to go beyond setting out the core requirements of what services the child is to receive, and where, when, how and by whom those services will be provided. The plan – like the assessment that precedes it – needs to be flexible, as the needs and circumstances of disabled children vary widely. A disabled child who is to receive a one-off short break in the form of an activity in the community is likely to need a much shorter, simpler plan than a child receiving long-term residential care with intensive support. Any statutory requirements that go beyond the core requirements outlined above run the risk of being overly prescriptive. This may make it harder to ensure the plan is proportionate and to align the plan with other plans, such as an EHC plan or a pathway plan.[29]

10.33 We do not completely rule out the possibility that there may be requirements relating to the content of plans and the process for preparing them which could appropriately be set out in legislation, whether primary or secondary. But as we did not consult on those requirements, we are not in a position to say what they should be. There was no clear consensus among the consultees who sought further detail in the legislation about what that detail should be.

10.34 This may be a matter which the Department for Education wish to revisit once it has considered what additional requirements (if any) are needed beyond the core requirements we recommend. At present, however, our recommendation is that, in the interests of flexibility, guidance is the appropriate vehicle to contain any additional requirements.

Recommendation 26.

10.35 The statutory guidance we recommend in Chapter 2 should set out requirements as to the process and content of the plan to meet the needs of a disabled child.

Combining plans

Our provisional proposal

10.36 We proposed that the plan to meet the social care needs of a disabled child should be combined, where appropriate, with other plans for the child such as their EHC plan, care plan or pathway plan.

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[28] Special Educational Needs and Disability Regulations 2014, SI No 1530, regs 11 to 13 and 18 to 22.

[29] See paragraph 10.42 below.

Consultation analysis

10.37 In total, 138 consultees responded to this question. Of those, the majority (105) agreed with the proposal. A small number of consultees (12) disagreed, with a larger group (21) neither agreeing nor disagreeing with the proposal.

10.38 Several consultees were in favour of the proposal because it will lead to better joint working and cooperation between the different agencies involved in a child's life. For example, the Batten Disease Family Association noted that "families we support would welcome some simpler methods to join up the different plans, it encourages a better understanding between professions/professionals". Others supported the proposal because it would avoid the need for families to repeat their stories over and over. In particular, we were told in consultation events that this is important for disabled children in care and disabled care leavers, who, according to Coram Voice, often complain about having too many plans to keep track of.[30] A number of parent and carer consultees noted that, at present, plans are not often combined or cross-referenced and a number of them mentioned that they are fed up of "repeating [the] same thing to multiple teams". Laniwyn Care Services summarised all the different benefits to combining plans:

> Integrating these plans into a single, cohesive document ensures a more holistic and coordinated approach to meeting the child's needs, reducing duplication and administrative burdens for families and service providers. A unified plan fosters better communication and collaboration between agencies, ensuring that all aspects of the child's development, health, and social care are aligned and effectively addressed. This approach enhances the efficiency and consistency of service delivery, providing families with greater clarity and confidence in the support available to their child.

10.39 Consultees who were against the proposal raised a number of practical concerns. For example, East Sussex Council explained that "plans are managed, written and updated by different departments to meet different ends". Staffordshire County Council asked, "who would have oversight of this", explaining that "the document [could end up] potentially too big and overwhelming for parents or carers". Another local authority consultee noted that each plan has a differing focus: "[the EHC plan] focusses on education. Pathway plan is about transition and independence". North Yorkshire Council explained that "each plan has its own legislative guidelines on timescales and it would be very challenging to get these to align". A variation on this last point was also raised by IPSEA who explained that there would be implications of the proposal which specifically relate to combining the disabled child's social care plan with an EHC plan. They were concerned that the guidance we proposed on the process and content of the plan would need to align or be subject to SEND law when

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[30] They shared recently published research with us specifically focusing on disabled children in care. The research explains that for care leavers, "there may also be lots of other changes happening around the same time", which includes "moving from one assessment process to another ([for example] looked after child plan to Care Act assessment/support plan and/or Pathway Plan)". See C Baker and L Briheim-Crookall, *Disability, disparity and demand: Analysis of the numbers and experiences of children in care and care leavers with a disability or long-term health condition* (October 2024).

combined with an EHC plan which has specific requirements as to process and content.[31]

Discussion and recommendations

10.40 Consultation has reinforced our view that the plan to meet the needs of a disabled child should be combined with any other plans where practical and appropriate to do so. This makes it clear that the plans can be combined: if the legislation were silent on this, the point might be open to debate, resulting in ambiguity and unnecessary disputes. But it leaves local authorities with a degree of discretion as to whether to combine the plans. This allows local authorities to align with the Children's Commissioner's recommendation that every child should have one single plan, or as a minimum, all children with a dedicated support plan should have a single plan rather than multiple plans.[32] As we explained at paragraphs 10.21 to 10.22 above, this is the Department for Education's policy intention in relation to Family Help which aims for "one assessment and plan which will stay and evolve with a family, and will be accessed by all practitioners and agencies working with them".[33] This approach may be of particular benefit to those working with disabled children in care and disabled care leavers, as it clarifies that the different plans applying to those children can be combined.[34]

10.41 We do not recommend an absolute requirement that plans are combined. We limit our recommendation to combining plans where it is appropriate and practical to do so, to address the concerns raised by consultees that it will not always be possible or appropriate to combine plans.

10.42 We recognise the practical concerns raised by stakeholders about the potential difficulties in combining plans across different statutory contexts, where different requirements about process and content apply. It is for that reason, among others, that we are not recommending a detailed set of legislative requirements about the process and content of the social care plan for a disabled child. This will make it easier to combine the plans. A plan which meets the legal requirements that apply in another statutory context – for example the social care section of an EHC plan[35] – could properly serve as the social care plan for a disabled child that we recommend, providing it sets out what services the child is to receive, and where, when, how and by whom those services will be provided. Other operational matters, such as who should contribute to the plan, and who should oversee it can, in our view, be dealt with best in guidance.[36] These matters are important. But it is not possible to be

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[31] Specifically mentioning Children and Families Act 2014, s 37(2) and Special Educational Needs and Disability Regulations 2014, SI No 1530, reg 12.

[32] Children's Commissioner, *Children on child in need plans* (March 2024) p 41.

[33] Department for Education, *The Families First Partnership (FFP) Programme Guide: Delivery expectations for safeguarding partners in England* (March 2025) p 24.

[34] See para 10.38 above.

[35] Which meets the statutory requirements that apply under SEND law, namely: Children and Families Act 2014, s 37(2); Special Educational Needs and Disability Regulations 2014, SI No 1530, reg 12.

[36] See paras 1.18 and 2.21 for an explanation of the legal status and effect of such guidance.

prescriptive about them, as they will vary depending on which plans the local authority seeks to combine.

Recommendation 27.

10.43 The plan to meet the needs of a disabled child should be combined with other plans for the child if it is appropriate and practical to do so.

10.44 The statutory guidance we recommend in Chapter 2 should provide examples of when it may be appropriate and practical to combine plans, and how this can be done effectively for each of the different plans a disabled child may have.

10.45 The statutory guidance we recommend in Chapter 2 should set out who has oversight of a combined plan and who should contribute to a combined plan.

Chapter 11: Decision-making by disabled children

INTRODUCTION

11.1 In this chapter, we discuss the actions and decisions which disabled children should be allowed to take in relation to their social care needs, and the legal tests which local authorities should apply to determine whether the child is able to take those actions or make those decisions.[1]

THE PROBLEM

11.2 Over the past 30 years, there has been an increasing recognition of the importance of children participating in decisions made about their care. The law in this area has attempted to keep pace with this change in attitudes in two ways. First, it requires local authorities to take the views and wishes of children into account. Second, it enables children to make certain decisions for themselves. In this chapter, we discuss the ways in which the law enables children to make decisions about their own care.[2] As we discussed in our consultation paper, our view was that, in practice, it can be difficult to secure the participation of disabled children as there is a lack of clarity and consistency relating to:[3]

(1) which decisions disabled children can take for themselves; and

(2) the legal test to determine whether the child has the ability to make the decision.

THE SOLUTION

A framework setting out which decisions a child can take and when

Our provisional proposals

11.3 Our provisional view was that we should build on the approach that applies in special educational needs and disability (SEND) law under the Children and Families Act 2014,[4] and that the law should set out expressly which decisions disabled children should be able to make in relation to their social care needs. Adapting this approach to disabled children's social care, we proposed that a disabled child should be able to:

(1) request an assessment of their social care needs;

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[1] Our proposals on children's decision-making, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 21.

[2] We discuss the first method, and the practical support necessary to make it effective, in ch 5 (assessments), ch 4 (statutory principles) and ch 12 (advocacy).

[3] See Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 21.6 to 21.13.

[4] See Children and Families Act 2014, ss 36(1), 38(2)(b)(i) and (ii), 49(1), 51(1) and 80(5) and Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 21.6.

(2) make representations during the assessment;

(3) make representations about the plan to meet those needs;

(4) opt out of advocacy support where a duty to provide such advocacy is engaged;

(5) request that services are provided by way of direct payments; and

(6) make use of relevant remedies.

11.4 Two of these scenarios involve the child making a request, either for an assessment or for direct payments. However, our proposal was not intended to give rise to a right to have an assessment or direct payments on request. There are separate legal tests which need to be satisfied in order to obtain an assessment or direct payments, which we discuss in Chapters 3 and 10 respectively. In proposing that children should have a right to make a request we were not proposing to circumvent those tests. Rather, we were proposing that a local authority that receives a request should be obliged to consider whether the relevant test is satisfied.

KEY LEGAL PRINCIPLES: THE MAIN LEGAL TESTS FOR DECISION-MAKING ABILITY

The capacity test. This test is found in the Mental Capacity Act 2005. It applies to persons aged 16 and over in the context of certain decisions relating to care, treatment and other aspects of personal welfare, and property and affairs. It involves two stages. The first stage – sometimes referred to as the "functional" element – looks at a person's ability to understand, retain, use and weigh the information relevant to the decision that they need to take, and to communicate their decision. If the person cannot do one of these things, the second stage – sometimes referred to as the "diagnostic" element – is whether that inability is caused by an impairment of or disturbance in the functioning of their mind or brain.[5] If it is, then the person will lack the capacity to make the decision. There is a statutory presumption that the person has the capacity to make the decision.[6]

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[5] Mental Capacity Act 2005, ss 2 and 3. See also *A Local Authority v JB* [2021] UKSC 52, [2022] AC 1322 at [47] to [79] by Lord Stephens.

[6] Mental Capacity Act 2005, s 1(2).

The *Gillick* test. In *Gillick v West Norfolk and Wisbech Health Authority*,[7] the House of Lords held that a child with sufficient understanding, maturity and intelligence[8] to make the decision is "competent" to consent to the proposed intervention. Although the test has been used "loosely to describe the age and maturity of young people who are seen as being capable of making informed decisions as to their future in a range of situations", strictly, it only applies to decisions about medical treatment.[9] An assessment of whether a child is *Gillick* competent will factor in whether they can truly understand what is in their interests,[10] but it is also possible for a competent child to seek to make a decision that is against their best interests.[11]

11.5 The Children and Families Act 2014 provides that actions and decisions of the type set out at paragraph 11.3 can be taken by children who are over compulsory school age,[12] who have capacity within the meaning of the Mental Capacity Act 2005.[13] This involves the application of both an age and an ability based test to determine whether a child is able to make a particular decision.

11.6 In contrast – recognising that age is used in the Children and Families Act 2014 as a simple proxy for decision-making ability – we proposed to use a purely ability-based test for disabled children's social care. In relation to over-16s, we proposed using the capacity test contained in the Mental Capacity Act 2005: that is, any child aged 16 or over should be allowed to make the decision if they have capacity to make it.

11.7 In respect of under-16s there is no equivalent statutory test, and the best-known approach is the common law test of *Gillick* competence. However, several Judges and the *Mental Health Act 1983: Code of Practice* have suggested that the functional element of the capacity test could be used as a method to decide whether a child is *Gillick* competent.[14] Acknowledging this, we asked for consultees' views on the following options.

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[7] *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112.

[8] Their Lordships talked of all three of these terms, although subsequent guidelines have often only referred to two out of three (for instance maturity and understanding).

[9] *Re S (Wardship: Removal to Ghana)* [2025] EWCA Civ 1011 at [40] to [47] by Sir Andrew McFarlane.

[10] *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 at 26E by Lord Donaldson MR; *Re E (a minor) (wardship: medical treatment)* [1993] 1 FLR 386 at 391 by Ward J.

[11] *Re S (A Child) (Child as Parent: Adoption: Consent)* [2017] EWHC 2729 (Fam), [2019] Fam 177 at [59] and [62] by Cobb J.

[12] A child ceases to be of compulsory school age at the end of the academic year in which they turn 16: Children and Families Act 2014, s 83(2) and (7); Education Act 1996, s 8(3).

[13] Children and Families Act 2014, s 80; Special Educational Needs and Disability Regulations 2014, SI No 1530, regs 64 and 65.

[14] Department of Health *Mental Health Act 1983: Code of Practice* (January 2015) para 19.36; *Re S (child as parent: adoption: consent)* [2017] EWHC 2729 (Fam), [2019] Fam 177 (cited in *Re S (Wardship: Removal to Ghana)* [2025] EWCA Civ 1011 at [44] and [46] by Sir Andrew McFarlane); *An NHS Trust v ST (Refusal of Deprivation of Liberty Order)* [2022] EWHC 719 (Fam). Note however, the link between the capacity test and *Gillick* competence was downplayed in *Bell & Anor v The Tavistock and Portman NHS Foundation Trust*

(1) Using the common law test of *Gillick* competence and allowing a disabled child to make the decision if they are "competent" to do so. Adopting this approach, competence would not be defined in the legislation and local authorities would be required to apply the *Gillick* test, as developed by the courts. This approach is used, for example, in the Mental Health Act 1983 in relation to decision-making about mental health treatment in the community.[15]

(2) Using the functional element of the capacity test[16] and allowing a disabled child to make the decision if they can understand, retain, use and weigh the information relevant to the decision, and to communicate their decision. This is very similar to the approach adopted in Scotland in the Education (Additional Support for Learning) (Scotland) Act 2004.

11.8 Finally, we proposed that the law should, in one particular situation, allow for a local authority to override or disregard a child's decision, in order to protect them from harm. Specifically, we proposed that a local authority should be required to carry out an assessment of the social care needs of a disabled child where the child is seeking to opt out of the assessment but is experiencing, or is at risk of, abuse or neglect. This is similar to the approach that applies under the adult social care legislation and that which applies in Wales.[17]

Consultation analysis

The decisions that children should be able to make

11.9 In total, 120 consultees responded to our proposal that children, who have the ability to do so, should be allowed to make the decisions or take the actions set out at paragraph 11.3. Of these, the majority (91) agreed that they should. Those who gave reasons for supporting the proposal primarily did so on the basis that such an approach maximised the rights of children. Birmingham Children's Trust, for instance, suggested that "the young person should have the right where able to do all of these things". Some consultees,[18] whilst agreeing with our proposal, sought to emphasise that it should not be used to exclude "a mother or carer's point of view, particularly as she will be concerned about the needs of the whole family".

11.10 Of the two consultees who expressly opposed elements of the proposal, the Community Care Lawyers Group were concerned primarily about the unintended consequences and risks in relation to children under 16. These included the possibility that younger children might make decisions about service provision which are not in their interests, that direct payments may not be manageable by under-16s, and that

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[2021] EWCA Civ 1363, [2022] PTSR 544 at [83] by Lord Burnett. We discuss this further at paras 11.30 to 11.32.

[15] Mental Health Act 1983, ss 64E and 64F. See also Care Act 2014, s 12(6) in relation to the "consent condition" for carrying out assessments involving children.

[16] For clarity, under this proposal it is only the functional element of the capacity test that would apply. The presumption of capacity would not apply as there is no sufficient basis for applying the presumption to younger children. Further, the diagnostic element would not apply as the reason why the child cannot make the decision may not be because of any impairment of, or disturbance in, the functioning of their mind or brain, but simply because they are too young to understand it.

[17] Care Act 2014, s 58(4); Social Services and Well-Being (Wales) Act 2014 (anaw 4), s 24(a).

[18] Such as the Disabled Mothers Rights Campaign & Support Not Separation.

opting out of advocacy might be detrimental. This last concern was shared by the South West Regional Directorate, NHS England, who expressed the view that, currently, advocacy provision is “inadequate”, and since its purpose is to support children to exercise their rights, the opportunities to opt out should be limited.

11.11 More broadly, the North West Association of Directors of Children’s Services and a local authority consultee both questioned (in different ways) why we were limiting our proposals solely to disabled children. Building on this more expansive approach, Professor Emma Cave also suggested that it would be valuable to undertake a broad review of children's participatory and decision-making rights in health and social care, along with the tests used to assess those rights. Such a review, she suggested, could help “improve clarity, consistency, and practical application”.

The test for whether a child can make a decision

11.12 We asked two separate questions about the test for whether a child had the ability to make decisions. The first question related to the test that should be applied to children aged 16 and over. 113 people replied to this question. Of those 92 agreed that the test should be that contained in the Mental Capacity Act 2005, and four disagreed. The main reason given by those in favour of the proposal was the consistency with other areas of the law. For example, Rotherham Metropolitan Borough Council emphasised how, amongst other benefits, this would offer a consistency of approach as the child transitioned into adult services.

11.13 Those who were against the proposal, together with some of those who were neither for nor against it, identified some of the problems that arise in applying the Mental Capacity Act 2005. Its application in relation to persons with Foetal Alcohol Spectrum Disorder, Prader-Willi Syndrome and in cases where the capacity of the person fluctuates[19] were identified as having the potential to pose particular difficulties in practice.

11.14 The second question related to the test for those under 16:

(1) 13 of the 110 consultees who answered the question favoured using the common law test of *Gillick* competence (with no further statutory definition). Most did not give a reason for favouring this approach. However, Birmingham Children’s Trust and the Association of Lawyers for Children explained that they felt that the *Gillick* test was better suited to the needs of younger children than the functional element of the capacity test. In a similar vein, one academic participant at a consultation event expressed the view that the functional element of the capacity test, which looks at whether an individual has the ability to understand, retain, use and weigh information, focuses on an ability of individuals to take rational decisions. This, she explained, may not be appropriate when considering younger children, who might validly make decisions based upon their wishes and feelings. The *Gillick* test on the other hand does not have the same focus on rationality. The fact that younger children may not take rational decisions should not mean that they are

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[19] A situation where the person’s ability to make decisions appears to vary over time.

incapable of taking decisions, particularly when they are able to clearly express their wishes and feelings with regard to that particular decision.

(2) 73 consultees favoured using the functional element of the capacity test. Two main themes emerged from consultation responses in favour of the capacity test. First, concerns were raised that the test of *Gillick* competence (without any statutory definition) is too vague, being open to a range of possible interpretations. Second, consultees were in favour of consistency with the Mental Capacity Act 2005. A number of local authority consultees suggested that the approach contained in the Mental Capacity Act 2005 is, in practice, already applied to determine the competence of children under 16.

Restrictions on decision-making where a child is at risk of abuse or neglect

11.15 A total of 113 consultees responded to our proposal that children should not be permitted to opt out of an assessment if they were experiencing, or at risk of, abuse or neglect. Of these, 89 were in favour of such an approach and 3 were against. The main reason given by those in favour of the proposal was the need to ensure that disabled children were kept safe from harm. However, a number of consultees – including some who were against the proposal and some who were neither for nor against – questioned how the proposal would interact with the duty to make inquiries in cases where a child is at risk of abuse or neglect, under section 47 of the Children Act 1989. As Steve Broach KC put it, “it is vital that disabled children remain part of the general child safeguarding system; we do not want a separate disabled children's safeguarding scheme”.

Discussion and recommendations

The decisions that children should be able to make

11.16 Consultation has affirmed our view that disabled children should be able to make certain requests, representations and decisions with regard to their social care. This was widely supported by those with whom we consulted, as it would ensure that children’s rights were maximised. It is also in line with the statutory principles we recommend: in particular, the principle that when making decisions about disabled children, local authorities should have regard to the importance of the child participating as fully as possible in the decision.[20]

11.17 When determining whether or not a child can take a particular action or decision in relation to their care, our recommendation is that local authorities should apply an ability-based test rather than an age-based test. In our view, age does not always provide a reliable approximation for ability. For example, some 15-year olds may have more advanced decision-making abilities than other children who are aged 16 or 17. A test which is focused purely on ability will better achieve the policy of facilitating participation among those who able to make decisions for themselves.

11.18 We accept that this will result in some inconsistency as between SEND law and disabled children’s social care law. However, in this instance consistency is a secondary goal to effectively facilitating participation in decision-making that is in the

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[20] See ch 4.

best interests of the child. In addition, consultees did not suggest that this relatively minor inconsistency between the two regimes will result in operational difficulties.

11.19 Some stakeholders expressed concerns that if children were given the right to make certain requests, representations and decisions with regard as to their care, this may result in decisions being made that were contrary to their own best interests. Whilst recognising this concern, as we set out below at paragraph 11.23, these concerns can be managed within the framework we recommend.

11.20 Consultation also reinforced our view that the law should set out expressly which decisions disabled children can take in relation to their social care needs. If the law is to effectively promote the participation of disabled children in decisions that are made about them, a necessary first step is to be clear about when and how these children may participate.

11.21 The list of actions and decisions set out at paragraph 11.3 encapsulates the key stages in the social care decision-making process where the participation of the child may be needed. This will enable a disabled child to request an assessment, to make representations during that assessment and in relation to the plan to meet their needs following the assessment. In addition, a disabled child would be able to opt out of advocacy support providing during the assessment and planning process and to request that the services set out in the plan are provided by direct payment. Finally, children would be able to make use of relevant remedies if they were unhappy with the conduct of any element of this process.

11.22 Consultees broadly agreed with our list of actions and decisions, and did not suggest that we had missed any relevant action or decision. We therefore recommend that disabled children should have a right to take the steps and make the decisions set out at paragraph 11.3. However, we note here that our recommendations in this report do not include the creation of a distinct remedy for disabled children’s social care. Consequently, our recommendation is limited to the ability to make use of current remedies.

11.23 We acknowledge the concerns raised about the potential for unintended consequences arising from our recommendation. For example, we recognise the valid concern that children might make representations about service provision that run counter to their interests, or that they may request direct payments in circumstances where they are unable to manage them. However, in both cases the decision of the child would not be determinative. We are recommending that disabled children should have the right to make requests and representations as to their care and that these representations and requests are considered by their local authority. We are not proposing an absolute right to have those representations and requests acceded to. The local authority would be entitled to weigh up requests and recommendations against valid concerns when deciding how best to proceed.

11.24 We also acknowledge concerns regarding a disabled child deciding to opt out of advocacy support. First, we make wider recommendations to improve access to advocacy in Chapter 12. Greater access to advocacy support may enable a disabled child to exercise an informed choice about advocacy, with a greater awareness of their ability to access these services. Second, for the avoidance of doubt, we are not suggesting that a child, once they opt out of advocacy support, lose their ability to obtain advocacy support should they later wish to receive it.

11.25 We note the suggestion that our recommendation could be applied to children in need more generally, and not solely to disabled children. This is not a matter which we have consulted on and doing so would exceed our terms of reference. However, we record the suggestion here for completeness as the Department for Education may wish to consider it in deciding whether and how to implement our recommendation.

Recommendation 28.

11.26 Any disabled child who has the ability to take the relevant action or make the relevant decision should be entitled to:

(1) request an assessment of their social care needs;

(2) make representations in the course of that assessment;

(3) make representations about the content of any plan to meet their needs;

(4) opt out of advocacy support, where a duty to provide such advocacy is otherwise owed;

(5) request that services are provided by way of direct payments; and

(6) make use of relevant remedies.

The test for whether a child can take an action or make a decision

11.27 Turning to the test to be applied to determine whether the child can take the action or make the decision in question, for those aged 16 and 17 we consider that the capacity test in the Mental Capacity Act 2005 is appropriate. There was a consensus among consultees in favour of this option. In addition, this will promote consistency and clarity in the law. The test is already applied to those aged 16 and 17 in relation to decisions about care, treatment and other aspects of personal welfare, as well as property and affairs, that fall within the scope of the Mental Capacity Act 2005. Both the Children and Families Act 2014[21] and the Mental Health Act 1983 also apply the capacity test to 16 and 17 year olds.[22] Additionally, applying the test would support a consistency of approach as the child makes the transition to the adult social care system under the Care Act 2014, where the capacity test set out in the Mental Capacity Act 2005 is also applied.[23] Furthermore, the test is already applied to those aged 16 and 17 by the

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[21] Children and Families Act 2014, s 80(5).

[22] See, for example, Mental Health Act 1983, s 131.

[23] See, for example, Care Act 2014, ss 11(2), 58(3) and 80(2).

Court of Protection in relation to the ability of individuals to make a range of decisions relating to their care and treatment.[24]

11.28 We are conscious that some consultees raised concerns about the application of the Mental Capacity Act 2005 in practice. In particular, consultees highlighted that capacity may fluctuate for some disabled children, as well as recognising the difficulty of applying the capacity test to those who have impaired executive functioning. These concerns are not limited to the application of the test to 16- and 17-year-olds. Similar issues have been raised in relation to adults.[25] In our view, these concerns can be mitigated by guidance and training in the application of the test.

11.29 In relation to children under the age of 16, our view is that a test based on the functional element of the capacity test is preferrable. Specifically, for children under the age of 16, the local authority should regard the child as able to make the decision if they are able to understand, retain, use and weigh the relevant information, and communicate their decision. This test is clear and easy for local authorities to apply and, by virtue of those attributes, will help to promote consistency in decision-making.

11.30 The functional element of the capacity test is, in our view, clearer than the *Gillick* test. This is an issue which has recently been discussed in Parliament in the context of the Mental Health Bill.[26] As Lord Meston observed during the Parliamentary debates, *Gillick* requires decision makers to evaluate the maturity and intelligence of a child, but does not provide any "method for such assessment" or any "indication of how the broad notions of maturity and intelligence were to be assessed".[27] The functional element of the capacity test, on the other hand, does provide a clear method, which involves answering a set of well-defined questions (such as whether the child can communicate their decision). We think that a clear method is important in this area.

11.31 It is important to highlight in this context that views differ on how the test of *Gillick* competence should be applied.[28] As we note above at paragraphs 11.7 and 11.14, there have been several cases in which the test has been interpreted as requiring an approach that mirrors the functional element of the capacity test.[29] That is also the approach set out in the *Mental Health Act 1983: Code of Practice*[30] and a number of consultees told us that is how they apply the *Gillick* test. For example, we were

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[24] See, for instance, *Re KL (A Minor: deprivation of liberty)* [2022] EWCOP 24 and *Manchester University Hospitals NHS Foundation Trust v JS & Anor (Schedule 1A Mental Capacity Act 2005)* [2023] EWCOP 33.

[25] For instance, in Mental Capacity Act 2005: Post-legislative Scrutiny, Report of the House of Lords Select Committee on the Mental Capacity Act 2005 (2013-14) HL 139.

[26] In that context the Government has favoured the *Gillick* test. See *Hansard* (HL), 31 March 2025, vol 845, col 113 and Hansard (HC), 12 June 2025, vol 768, col 195.

[27] *Hansard* (HL), 31 March 2025, vol 845, col 107.

[28] See *Independent Review of the Mental Health Act 1983: supporting documents* (December 2018) p 296; *Final Report of the Independent Review of the Mental Health Act 1983* (December 2018) p 174; Draft Mental Health Bill, Report of the Joint Committee on the Draft Mental Health Bill (2022-23) HC 696 / HL Paper 128 para 216.

[29] *Re S (child as parent: adoption: consent)* [2017] EWHC 2729 (Fam), [2019] Fam 177 (cited in *Re S (Wardship: Removal to Ghana)* [2025] EWCA Civ 1011 at [44] and [46] by Sir Andrew McFarlane); *An NHS Trust v ST (Refusal of Deprivation of Liberty Order)* [2022] EWHC 719 (Fam).

[30] Department of Health, *Mental Health Act 1983: Code of Practice* (January 2015).

informed that it is the approach taken by the South London and Maudsley NHS Foundation Trust, one of the largest mental health trusts in the country, when assessing competence. On the other hand, the Association of Lawyers for Children were clear in their consultation response that *Gillick* competence should not be equated with the functional limb of the capacity test. They regarded this point as having been settled definitively by the Court of Appeal in *Bell & Anor v The Tavistock and Portman NHS Foundation Trust*.[31]

11.32 We do not seek here to resolve this difference in views on how the *Gillick* test should be applied, and whether it requires something different to the functional element of the capacity test. Rather, our concern is that recommending a test which different people interpret and apply differently is not conductive to clarity and may cause real difficulty in this context. Busy social workers making these decisions, in our view, need a test which is clear and easy to apply. *Gillick* competence may be more suitable in circumstances where the test has to be applied by a judge[32] or experienced mental health professionals.[33] But in this particular context we think that the functional element of the capacity test is preferrable.

11.33 Adopting a test which is similar, though not identical, to the test which we recommend for 16- and 17-year-olds will also promote consistency in approach and outcomes and facilitate the transition towards adulthood. As we note above, this approach is similar to the approach adopted in Scotland in the Education (Additional Support for Learning) (Scotland) Act 2004 in the context of appeals to the equivalent of the SEND Tribunal.[34] From speaking to those with experience of the Scottish legislation in the lead up to our consultation, we formed the impression that it is a test which has worked well since it came into force in January 2018 and without unintended consequences.

11.34 Although a majority of consultees were in favour of adopting a test based on the functional element of the capacity test, several expert groups and bodies preferred the option of adopting the test of *Gillick* competence, characterising this as a more appropriate test for younger children. In recommending a test based on the functional element of the capacity test we do not dismiss these views lightly. However, in the context of disabled children's social care we take the view that clarity in the law, and ease of application are of decisive weight.

11.35 Endorsing this approach means that there will not be a uniform approach across the board to assessing the decision-making abilities of children. For example, as we note above, in the context of Mental Health Bill the Government regards *Gillick* competence

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[31] *Bell & Anor v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363, [2022] PTSR 54. Lord Burnett observed at [83] that the court did not "think that the comparison between the exercise of assessing *Gillick* competence and the process envisaged under the Mental Capacity Act 2005 … assists". However, the comments of the court appear to have been directed at the diagnostic limb of the capacity test – which we agree is not appropriate for under-16s – rather than the functional limb of the test.

[32] As we recommend in Modernising Wills Law, Volume 1: Report (2025) Law Com No 419 paras 10.69 to 10.90.

[33] This is the scenario that arises under the Mental Health Bill.

[34] The Education (Additional Support for Learning) (Scotland) Act 2004, s 3(1)(b) sets out a statutory test for determining the ability of a child under 16 to make relevant decisions which mirrors the definition of capacity for those aged 16 and above in the Adults with Incapacity (Scotland) Act 2000, s 1(6).

as being more appropriate. However, we are concerned here only with identifying the most appropriate solution for disabled children's social care. The identification of a legal solution which is appropriate for children in all contexts would be better dealt with in the type of broader review sought by Professor Cave in her consultation response, and for which we advocated in our Mental Capacity and Deprivation of Liberty project.[35]

Recommendation 29.

11.36 In deciding whether a child aged 16 or 17 has the ability to make a decision or take an action of the type described in paragraph 11.26, a local authority should apply the capacity test in sections 2 and 3 of the Mental Capacity Act 2005.

11.37 For children under the age of 16, the local authority should apply a test based on functional element of the capacity test in section 3 of the Mental Capacity Act 2005, and should regard the child as able to make the decision if they are able to understand, retain, use and weigh the relevant information, and communicate their decision.

Restrictions on decision-making where child is at risk of abuse or neglect

11.38 There was a consensus in support of our proposal that children should not be permitted to opt out of an assessment if they were experiencing, or at risk of, abuse or neglect. In light of this, we are content that this is an appropriate recommendation to make. Participation is important but no-one has suggested to us that it should come at the expense of keeping children safe from harm. We think that the right balance is struck by the approach adopted in the context of "transitional" assessments under the Care Act 2014,[36] which formed the basis of our proposal. For completeness, in making this recommendation we are not proposing any new or separate safeguarding duties for disabled children, and our recommendation would not affect the existing safeguarding duty under section 47 of the Children Act 1989.

Recommendation 30.

11.39 A local authority should be required to carry out an assessment of the social care needs of a disabled child where the child is seeking to opt out of such an assessment if the child is experiencing, or is at risk of, abuse or neglect.

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[35] Mental Capacity and Deprivation of Liberty (2017) Law Com No 372 para 7.40.

[36] Care Act 2014, s 58(4). Applying to children making the transition from children's services to adult social care.

Chapter 12: Advocacy

INTRODUCTION

12.1 In this chapter, we discuss and make recommendations about advocacy for disabled children when assessing and planning to meet their social care needs.[1] We also discuss advocacy for parents and carers when assessing their needs.

THE PROBLEM

12.2 Advocacy in social care refers to a particular role, distinct from advocacy in legal proceedings. The role of the advocate is to assist a disabled person to speak up for themselves, or if the disabled person is unable to do so, to communicate and represent the disabled person's needs and wishes.

12.3 There is a range of statutory entitlements to advocacy for children. These entitlements are legally complex and spread across a number of statutory provisions.[2] The most important provisions in this context are found in the Children Act 1989.[3] They require a local authority to make arrangements for advocacy services so that disabled children (among others) can make representations about the discharge of the authority's functions under section 17 of the Children Act 1989. Views differ on whether this requires local authorities to provide advocacy to disabled children when assessing and planning to meet their needs, or whether advocacy is intended to be limited to the making of complaints. The statutory guidance on advocacy is focused on the situation where a child wishes to make a complaint.[4] However, in our consultation paper we suggested that the legislation could be read as permitting the provision of advocacy more generally, for example during the assessment and planning process.[5] We inferred from this ambiguity that the law is insufficiently clear.

12.4 In addition, whatever the scope of advocacy provision under the Children Act 1989, there is no requirement that any advocate secured by a local authority for a child is independent of the authority. In contrast, independent advocacy is available to children or adults in a number of similar situations. For example, independent advocacy is available to the following groups.

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[1] Our proposals on advocacy, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 20.

[2] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 22.4 to 22.15.

[3] Children Act 1989, ss 26 and 26A.

[4] Department for Education and Skills, *Providing Effective Advocacy Services for Children and Young People Making a Complaint under the Children Act 1989* (2004) para 2.1.

[5] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 22.4 to 22.7. Advocacy services are available to those making "representations"; that word is not defined in the statute but is said to "include", and therefore is not limited to, the making of complaints: Children Act 1989, ss 26(3) and 26A(3). Further the representations may relate to any function under the Children Act 1989, Pt 3 and not solely the complaint mechanisms: Children Act 1989, s 26(3) and (3A).

(1) Children who are making the transition to the adult social care system, whose needs are being assessed under the Care Act 2014. They are entitled to an advocate if they would otherwise experience substantial difficulty in understanding, retaining or using information or communicating their views.[6]

(2) The carers of children who are making the transition to the adult social care system, when they are having their own needs assessed to identify if they need support in their caring role. Again, they are entitled to an advocate if they would otherwise experience substantial difficulty in understanding, retaining or using information or communicating their views.[7]

(3) Children who provide care for adults with care and support needs (young carers), who may themselves need support in their caring role when they reach the age of 18. They are also entitled to an advocate when their needs as a carer are being assessed, if they would otherwise experience substantial difficulty in understanding, retaining or using information or communicating their views.[8]

(4) Children detained under certain provisions of the Mental Health Act 1983.[9]

(5) 16- to 17-year-olds who lack capacity within the meaning of the Mental Capacity Act 2005, whom the local authority proposes to accommodate.[10]

12.5 Parents and carers do not currently have any statutory right to advocacy support under the Children Act 1989 in relation to either the assessment of their own needs or their child's needs.[11] They do, however, have a right to advocacy under the Care Act 2014, as set out at paragraph 12.4(2) above, when their child is making the transition to the adult social care system.

THE SOLUTION

Advocacy for children

Our consultation question and provisional proposal

12.6 To help us identify the appropriate solution to these problems we asked consultees to tell us about instances where independent advocacy had been provided in the course of assessing the needs of a disabled child under section 17 of the Children Act 1989. In asking this question we were trying to get a clearer picture of advocacy provision on the ground. We were also trying to understand the impact of the ambiguity we highlight at paragraph 12.3 above. We wanted to know whether, in practice, advocacy

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[6] Care Act 2014, ss 58 and 67.

[7] Care Act 2014, ss 61 and 67.

[8] Care Act 2014, ss 63 and 67.

[9] Mental Capacity Act 2005, s 39.

[10] Mental Health Act 1983, s 130A.

[11] Advocacy services in this context are expressly limited to children: Children Act 1989, s 26A(1)(b).

is limited to the complaints process or whether it is made available in relation to other functions, such as the assessment of need.

12.7 However, working on the basis that the law appeared to us to be ambiguous, we also proposed modifications to the advocacy duties under the Children Act 1989, in so far as they apply to disabled children. We proposed that there should be a right to independent advocacy for any disabled child who would otherwise have difficulty participating in the assessment and planning process around their social care needs. This right would not require a local authority to arrange an advocate if:

(1) there was already an appropriate person who could represent and support that child; or

(2) a child with the "ability" to refuse an advocate, does so.

"Ability" in this context refers to whether the child has the requisite competence or mental capacity to make the decision: a subject we explore in Chapter 11.

12.8 Our proposal was modelled on the approach to advocacy under the Care Act 2014 that applies to children making the transition to the adult social care system.

Consultation analysis

12.9 A relatively small number of consultees (16) directly answered our question about the availability of advocacy during the assessment process. The Potato Group noted that in a recent survey of over 400 children, all of whom qualified as children in need, none were provided with advocacy support in respect of assessments under section 17 of the Children Act 1989. However, responses from Coram Children's Legal Centre and three local authorities reported that advocacy is, in some areas, provided during the assessment process.

12.10 We received 126 responses to our proposal about advocacy provision for disabled children. Of these, 97 agreed, three disagreed, and 26 neither agreed nor disagreed. Some of those who supported the proposal identified the benefits of advocacy as a way of ensuring that the child's voice is heard. Others, for example the National Working Group on Safeguarding Disabled Children, emphasised that a failure to hear the voice of the child can lead to abuse being overlooked. Others, such as the Law Society, specifically highlighted the importance of advocacy being independent.

12.11 Some of those who supported the proposal emphasised the need to carefully consider the practical implications, including the skills required of an advocate and the need for adequate funding. For example, Birmingham Children's Trust noted that advocacy can be ineffective where it is carried out by those who lack suitable, specialist skills and do not spend enough time communicating with the child, meaning that effective advocacy may be costly. Some consultees, including those who agreed with the proposal and those who neither agreed nor disagreed, questioned why it only applied to disabled children.

12.12 A consistent theme amongst consultees, including those who agreed with the proposal and those who disagreed, was the need for sensitivity toward the role of the child's parents or carers. The Parent and Carer Alliance expressed the concern that a wider role for advocacy could undermine the role of the parent or carer. Others highlighted the potential for divergence between the views and wishes of the child and their parents or carers. They observed that care and clarity would be needed to avoid conflicts of interest when deciding whether a child already has an appropriate person to represent and support them.

Discussion and recommendations

12.13 Before discussing and making recommendations about advocacy provision for disabled children the subject must be placed in context. Our terms of reference require us to review social care law for disabled children and to consider whether the law sufficiently meets the specific needs of disabled children and their families. It would go beyond the scope of our terms of reference to make recommendations about children's social care more generally. This is outside our remit generally, and in any event, we do not have the evidence that would be needed to make such recommendations, as we did not consult on them.

12.14 Nevertheless, as we discuss at paragraph 1.14, there are a number of legal provisions that we consider in this report that apply to children in need generally, and not just to disabled children. Further, there are a number of problems that we identify that apply to disabled children – for example, lack of clarity in the law – that undoubtedly apply to the other children in need to whom the same law applies. In the main we have sought to deal with this situation by highlighting the fact that the problem and solution might apply to children in need more generally. In doing so, we bring this to the attention of the Government to consider when deciding if and how to implement our recommendations.

12.15 That position is a little more complex when it comes to advocacy. The provision of advocacy to children in need, in various situations, has been considered in a number of reports both before and during our review, and Government policy on advocacy continues to develop.[12] For example, the Independent Review of Children's Social Care made recommendations about advocacy for children in care.[13] The Child Safeguarding Practice Review Panel made recommendations about advocacy for children with disabilities and complex health needs in residential settings.[14] The Children's Commissioner has published a wide-ranging report highlighting a number of problems with advocacy for children and young people generally.[15] Further, in April 2025, the Home Office announced that the Government would introduce, during the course of 2025, new national standards for advocacy for children and young people and revised statutory guidance on providing effective advocacy for those making complaints.[16] This was announced as part of the Government's progress report on responding to the Independent Inquiry into Child Sexual Abuse. All of these findings,

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[12] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 22.16 to 22.24.

[13] J MacAlister, *The independent review of children's social care – Final Report* (May 2022) p 183.

[14] Child Safeguarding Practice Review Panel, *Safeguarding children with disabilities and complex health needs in residential settings: Phase 2 report* (April 2023) recommendation 1.

[15] Children's Commissioner for England, *The state of children and young people's advocacy services in England* (December 2023) p 4.

[16] Home Office, *Tackling Child Sexual Abuse: Progress Update* (April 2025) para 47.

recommendations and developments apply, at least to some degree, to disabled children with social care needs.

12.16 In making further, distinct recommendations about advocacy, which are specific to disabled children's social care, we are not seeking to contradict earlier recommendations or consciously diverge from the development of Government policy in this area. It would undermine what we set out to achieve in this review if our recommendations made advocacy provision for disabled children less consistent or more complicated.

12.17 Our discussion and recommendations should be read in this context. Our recommendations constitute the change that we think is necessary to deal with the problems that we identify at the beginning of this chapter. We recognise that consideration of the wider context that we highlight here may lead the Government to decide that adaptations or developments are needed to our recommendation. However, whatever wider policy the Government decides to pursue, we recommend that, as a minimum, it should secure advocacy for disabled children in the circumstances we recommend below.

12.18 Turning now to the recommendation itself, consultation affirmed our view that there is a lack of clarity in the law relating to advocacy and that this is leading to a divergence in approach. In some areas advocacy is limited to the making of complaints. In others it is available in relation to other social care functions relating to disabled children, such as the assessment of need. We are satisfied that our proposed right to advocacy provision, which was supported by a majority of consultees, will make the law clearer and thereby promote consistency.

12.19 Turning to the constituent parts of the proposal, it is appropriate and, in our view, consistent with the current policy of the Children Act 1989, for advocacy services to be available when assessing and planning to meet the social care needs of a disabled child. Advocacy should not be limited to the making of complaints as one of the important functions of advocacy is to avoid the need for complaints in the first place. It achieves this function by ensuring that children are able to participate effectively in decisions that are made about them. This enables local authorities to take into account the child's voice and obtain a fuller and more accurate picture of the child's needs, thereby promoting better decision-making. This can also, as the National Working Group on Safeguarding Disabled Children observed, reduce the risk that signs of abuse are overlooked.[17] This may be particularly important for children who are not accommodated in family-based care, for example children in custody or residential care.

12.20 The promotion of participation is one of the overarching policies running through the recommendations we make in this report[18] and advocacy is an important tool to achieve this policy. In keeping with our wider policy on participation, our view is that

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[17] For example, abuse of the type that occurred in the residential settings provided by the Hesley group in the Doncaster area between 2018 and 2021. See the Child Safeguarding Practice Review Panel, *Safeguarding children with disabilities and complex health needs in residential settings – phase 1 report* (October 2022) and *phase 2 report* (April 2023).

[18] See for example ch 4 (statutory principles) and ch 11 (decision-making by children).

children who have the requisite decision-making ability[19] should be able to opt out of advocacy provision if they do not want it. An "opt-out" model is, in our view, preferable to an "opt-in" model as disabled children who are most in need of advocacy are, by definition, those who may struggle to identify that they need an advocate or ask for one, without help.

12.21 Importantly, the approach we recommend for disabled children's social care is consistent with the approach that applies to disabled children making the transition to the adult social care system. Consistency may help ease the transition from one system to the other. Further, in this instance we have not been able to identify any good reason for inconsistency between the adult and children's social care.

12.22 We acknowledge that, in some areas, the approach we recommend will require an increase in the scope of advocacy provision, outside of the situation where a disabled child seeks to make a complaint. However, this expansion is offset by the fact that we recommend advocacy provision is focused on those children who really need it. That is, the children who would otherwise have difficulty in participating in the assessment and planning process. More specifically, in line with the approach in the Care Act 2014[20] and our approach to children's decision-making more generally,[21] our recommendation is that advocacy should be available where the child would otherwise experience substantial difficulty in understanding, retaining or using and weighing information, or communicating their views, wishes and feelings.

12.23 As in the Care Act 2014[22] our recommendation is that advocacy should only be available where the child does not already have an appropriate person to represent or support them. We agree with consultees that care will need to be taken to avoid subverting the vital role that so many parents and carers play as advocates for their disabled child. Care will also be needed to avoid conflicts of interest on the rare occasions they may arise. In our view this can be best achieved by means of guidance on the circumstances in which it might not be "appropriate" for a parent or carer to represent and support their child's interests. One such situation raised at a number of consultation events was where the parent or carer is at risk of burnout and cannot effectively advocate for their child. Another is the situation where there is a risk of a conflict of interest between parent or carer and a disabled child.

12.24 Finally, our recommendation is that advocates should be independent of the local authority. This is in keeping with the approach in the other legal frameworks that we set out at paragraph 12.4. More fundamentally, we do not think that the role of an advocate in representing the interests of a disabled child can be effectively performed if there is any risk that the interests of the child and the advocate may conflict. If the advocate is not independent of the authority, this risk is hard to avoid.

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[19] See ch 11 on decision-making by children

[20] Care Act 2014, s 67(4).

[21] See ch 11.

[22] Care Act 2014, s 67(5).

Recommendation 31.

12.25 A disabled child should have the right to an independent advocate when the local authority is assessing and planning to meet their social care needs if they would otherwise experience substantial difficulty in understanding, retaining or using and weighing information, or communicating their views, wishes and feelings.

12.26 This should not require a local authority to arrange an advocate if: there is already an appropriate person to represent and support the child; or a child with the ability to refuse an advocate, does so.

Advocacy for parents and carers

Our provisional proposal

12.27 For parents and carers, we made a similar, but more limited, proposal. We proposed that advocacy should be available in respect of the assessment of their needs where, without such support, they would have difficulty participating in the assessment and where there is no appropriate person who can represent and support them. This was more limited than the proposal we made for disabled children, on the basis that the statutory rights of the parents and carers of disabled children are more limited than the rights of the child. The principal statutory right available to parents and carers is to have their needs assessed, and we proposed that advocacy should be available for this function.

Consultation analysis

12.28 In total, 126 consultees answered this question. Of these 96 were in favour of the proposal, six were against it and 24 were neither for nor against. Those in favour of the proposal primarily saw it as a means to secure the proper consideration of the needs of parents and carers. Two local authorities told us that, for that reason, they already provided advocacy to parents and carers for the same reason, and in a similar manner, to our proposal.

12.29 Parents of Children with Additional Needs, Kirklees, noted not only that parents struggle to access carer's assessments, but also that such problems were heightened where the parents had disabilities themselves or had language issues. The Carers Trust told us how carer's assessments "can often be an emotional and technically complex experience, and an advocate that the carer trusts may be able to help this process". The Carers Trust suggested that carers should be able to access advocacy support upon request, even if they did not meet the criteria we had been suggesting.

12.30 Of those who opposed the proposal, Lancashire County Council and the North West Association of Directors of Children's Services both cited the example of advocacy in the special educational needs and disabilities system as having the potential to create an adversarial environment. Both consultees also highlighted the difficulties that would arise if sufficient resourcing was not provided to fund the advocacy provision we proposed.

Discussion and recommendations

12.31 The reasons underpinning our recommendation that advocacy should be available to disabled children apply with equal force to their parents and carers. Advocacy is an important tool in promoting good decision-making. By ensuring that parents and carers are able to effectively participate in their own assessments, it is more likely that local authorities will be able to accurately identify their needs. Looking at it the other way, if a parent or carer has substantial difficulty in understanding, retaining or using and weighing information, or communicating their views, wishes and feelings, it will be very difficult for local authorities to discharge the assessment duty effectively. In contrast to children, parents and carers are less likely to have someone who can speak up on their behalf. Recommending that advocacy is available for parents and carers in the circumstances we propose will ensure consistency with the treatment of carers under the adult social care system and consistency with our recommendations in relation to children.

Recommendation 32.

12.32 The parent or carer of a disabled child should have a right to an independent advocate when the local authority is assessing their needs as a parent or carer, if they would otherwise experience substantial difficulty in understanding, retaining or using and weighing information, or communicating their views, wishes and feelings.

12.33 This right would not require a local authority to arrange an advocate if: there is already an appropriate person to represent and support the parent or carer; or a parent or carer with the ability to refuse an advocate, does so.

Chapter 13: The transition to adult social care

INTRODUCTION

13.1 In this chapter, we consider whether there should be a statutory age at which local authorities should start planning for disabled children to make the transition from children's services to adult social care and, if so, what that age should be.[1] In the context of social care, this transition takes place at the age of 18, when the legal duties under the Children Act 1989 are replaced by the duties under the Care Act 2014.

THE PROBLEM

13.2 In 2015 the law in this area underwent a substantial change, drawing in large part upon our work on adult social care.[2] The law is intended to make sure that local authorities identify:

(1) whether a child is likely to have needs for care and support after turning 18;

(2) if so, what those needs are likely to be; and

(3) whether they are likely to meet the adult social care eligibility criteria.[3]

There is no set age at which this process must start. Rather, it begins at the point the local authority judges it to be of "significant benefit" to the child.

13.3 In the work we carried out leading up to our consultation, we were told that the law does not always work effectively and that disabled children often face a "cliff-edge" at the age of 18. We were told that the support they receive either stops or changes fundamentally, and the child and their family are not prepared for this. This was reported to be a significant problem. Many of the disabled children and young people to whom we spoke reported that they felt unprepared for adulthood and independent living. We were also told that parents and carers were not always prepared for the fact they would no longer have decision-making authority by virtue of parental responsibility when their child turned 18. In addition, safeguarding adults reviews[4] have identified a number of cases where adequate arrangements have not been put

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[1] Our proposals on the transition to adulthood, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 15.

[2] Adult Social Care (2011) Law Com No 326, in particular paras 11.38 to 11.68.

[3] Care Act 2014, ss 58 and 59.

[4] A statutory review carried out when an adult with care and support needs has died as a result of potential abuse or neglect, or is alive and is suspected to have experienced serious abuse or neglect: Care Act 2014, s 44.

in place to keep disabled children safe from harm when making the transition to adulthood.[5]

THE SOLUTION

A statutory age at which transition planning should start

Our questions and provisional proposal

13.4 To help us evaluate whether the problems we describe above could be alleviated by law reform, we asked consultees for their views on the causes of these problems. Based on the experiences people had shared with us in the lead up to the consultation, we formed the initial view that the law could operate more effectively if the Care Act 2014 were amended to provide a statutory age at which transition planning should start for disabled children. This would bring disabled children's social care law closer in line with special educational needs and disability (SEND) law. In that context, the statutory reviews of the education, health and care plan of a child in or beyond year nine,[6] must "consider what provision is required to assist the child or young person in preparation for adulthood and independent living".[7] Accordingly, we made a proposal that there should be a statutory age at which transition planning should start for disabled children in the social care context, and sought consultees' views on what the age should be.

Consultation analysis

13.5 A total of 121 consultees responded to our question about the causes of the problems faced by disabled children in making the transition to adult social care. The biggest single theme was that problems were caused as the process of transition to adult social care did not start early enough. This was identified as a problem by local authorities, as well as parents and carers. Consultees also highlighted the challenges caused by differences in approach to eligibility for services under the Children Act 1989 and the Care Act 2014. Devon County Council suggested that a further issue was that "we find that the Children Act approaches families as a unit, while the Care Act approaches individuals as such. This creates a subsequent flaw in compatibility, undermining the transition to adulthood". Other consultees stressed not only the differences between children's social care and adult social care, but also the added complexities involved where a child also has health needs. We address this further in Chapter 14.

13.6 A number of consultees highlighted the problems that can be posed by the different frameworks for decision-making by children involved in the change from *Gillick* competence[8] to the Mental Capacity Act 2005 at the age of 16. We discuss this further in Chapter 11. Another aspect of the different legal frameworks in play was

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[5] See Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 15.21 to 15.23.

[6] Year nine is typically for children aged 13 and 14.

[7] Special Educational Needs and Disability Regulations 2014, SI No 1530, regs 20(6) (where the child attends a school or other institution) and 21(6) (where the child does not attend a school or other institution); Department for Education and Department of Health, *Special Educational Needs and Disability Code of Practice: 0-25 years* (January 2015) para 8.10.

[8] See 11.4.

highlighted by consultees such as West Sussex County Council who identified that having different regulatory bodies in the form of Ofsted and the Care Quality Commission “can lead to changes in provision based on legislation which does not account well for need”.

13.7 Finally, some local authority consultees identified the challenges posed by parental views and expectations, both in relation to the services that should be provided to their children upon reaching adulthood, and in relation to the ongoing decision-making role that they felt that they should have regarding their children. A perspective on this was given by the independent social worker, Justin Simon, who suggested that:

> Children's services need to be more child centred from the age of 16 years. When children become adults, parents are often shocked by the way they are left out of the conversation about what their child needs, because although they will always be a parent’s child, they are also adults in their own right.

13.8 In total, 137 consultees responded to our proposal that there should be a statutory age by which transition planning should have started. Of those who responded, a majority of 116 were in favour of the proposal, identifying it as a way to ensure that transition planning starts in a timely fashion. As Hertfordshire County Council Children’s Services noted, “starting planning at an earlier age helps address gaps and confusion in services, providing a smoother and more supported transition process”. Other consultees observed that having a statutory age could support greater consistency between local authorities. However, a number of consultees took the view that the introduction of a statutory age should be accompanied by additional cultural and legal changes, such as embedding the age in practice across teams within local authorities and between local authorities and the NHS, and creating reciprocal duties between children’s and adult social care.

13.9 Those who opposed the proposal were primarily concerned that it would result in a loss of flexibility. For example, Ofsted expressed the view that a minimum age would not be helpful, on the basis that “children need an individualised response in the context of an overall cultural shift to always think about preparation for adulthood throughout a child’s life”. The Principal Social Workers Network, North West Association of Directors of Adult Social Services expressed a similar view, suggesting that “all young people are different, and we believe that to impose a rigid age target would be counterproductive”. They considered that “guidance which puts forward an age range for planning for transition should be sufficient to ensure that this function takes place at the appropriate time for each young person”. They also noted that the “difficulties in planning for transition are often around commissioning and sourcing appropriate resources and placements for people with complex needs. It is difficult to see how a statutory age for support planning would have a positive impact on this”.

13.10 We received 125 responses to our question about what the statutory age should be. We received a range of responses. The most common ages chosen by consultees were for planning starting by the age of 14 (a total of 51)[9] or 16 (a total of 32). Not all

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[9] This includes those who advocated for school year nine.

consultees gave reasons for supporting the relevant age. Those who provided reasons focused on the following justifications.

(1) A number of those who favoured 14 as the appropriate age highlighted the alignment with SEND. In consultation events, some health care professionals also identified that 14 is the age which the National Institute of Health and Care Excellence provides should be the start of transition work in the health care context.[10]

(2) Some of those advocating for the age of 16 highlighted that this age has significance in relation to other legislative frameworks. For example, the framework contained in the Mental Capacity Act 2005 applies to those aged 16 and over, and some welfare benefits (such as personal independence payment) are available to 16-year-olds.

Discussion and recommendations

13.11 Evidence provided by consultees demonstrates that the policy goal of the Care Act 2014 of securing a smooth transition from children's services to adults' services is not being achieved. This is having an adverse impact on disabled children. The achievement of this policy goal depends on the early identification of those disabled children who will require social care services upon reaching adulthood. Consultation reinforced our provisional view that one of the barriers to this being achieved was the degree of discretion as to when transition planning should begin.

13.12 The majority of consultees were in favour of the introduction of a statutory age at which transition planning should start and we are satisfied that this is an appropriate recommendation for disabled children's social care. We do not suggest that this legal change will remove all of the barriers that disabled children face in making the transition to adulthood and independence, which are many and varied, but consultation has reinforced our view that it will help.

13.13 The main argument against this recommendation was that it would result in a loss of flexibility. However, we would characterise that as a positive: it is the flexibility inherent in the current legal framework that allows for transition planning to start at a very late stage. This is precisely the problem we are trying to solve. The flexibility in the current framework can delay planning which, if it had been started earlier, would have enabled a smoother transition to adult social care.

13.14 Having said that, our recommendation is not intended to eliminate the flexibility in the current system entirely. Under our recommendation, the statutory age would represent the latest point at which transition planning should start. Local authorities would, however, be free to start transition planning at an earlier stage if the needs of the individual child demanded it. This discretion would be guided by the statutory principles we recommend in Chapter 4, which would require local authorities in discharging their functions to continually have regard to "the need to prepare the child

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[10] NICE Guideline NG43, *Transition from children's to adults' services for young people using health or social care services* (February 2016), provides at para 1.21 that "for groups not covered by health, social care and education legislation, practitioners should start planning for adulthood from year 9 (age 13 or 14) at the latest. For young people entering the service close to the point of transfer, planning should start immediately".

for adulthood and independent living". This feature of our recommendation should be made clear within the guidance we recommend in Chapter 2.

13.15 We recommend that transition planning should start, at the latest, in the school year in which the child turns 14 (year nine). This would mean that there is a consistent approach across disabled children's social care, SEND and health care: the three main areas of state support for disabled children. We note that the age of 16 is an important milestone for disabled children in other contexts, such as assessment of mental capacity and eligibility for personal independence payments.[11] However, the age limit in those contexts is not being used for the purpose of preparing the child for adulthood. Alignment with SEND and health care, where the age limit is used for that purpose, strikes us as more important. Consistency across the different sources of care for disabled children will better facilitate a holistic approach to the transition to adult social care.

Recommendation 33.

13.16 The assessment of whether a disabled child is likely to have needs for care and support after becoming 18 and, if so, what those needs are likely to be, should begin by the school year in which they turn 14.

13.17 The statutory guidance we recommend in Chapter 2 should clarify that this process can begin earlier if the local authority regards that as appropriate. In deciding whether it is appropriate to start the process earlier, local authorities should have regard to the need to prepare the child for adulthood and independent living.

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[11] The Government has recently consulted on changing the age at which personal independence payment can be claimed from 16 to 18. See Department for Work and Pensions, *Pathways to Work: Reforming Benefits and Support to Get Britain Working* (March 2025) paras 258 to 265.

Chapter 14: The intersection between disabled children's social care and health care

INTRODUCTION

14.1 In this chapter we consider how to change the law to clarify whether, in any given case, a child's needs should be met by a local authority or by the National Health Service (NHS). We also consider the guidance that might be required to accompany such a change. Finally, we consider a technical change to the route to assessment of social care needs for those children who have been detained under the Mental Health Act 1983.[1]

THE PROBLEM

14.2 Whether a child's needs should be met by a local authority or by the NHS is not always an easy question to answer.[2] In part, this depends on whether they are understood to have social care needs or health care needs. But the boundary between health and social care is not always clear. Whether the care provided to a disabled child in their home is classed as health or social care will depend on the nature and extent of the care. The answer matters not just in terms of who provides the service, but whether it is free or potentially chargeable.

14.3 There is therefore considerable scope for overlap between the responsibilities of local authorities and the NHS when it comes to health care needs. For adults, the dividing line is now set out in statute.

KEY LEGAL PRINCIPLES: THE DIVIDING LINE FOR ADULTS

Section 22(1) of the Care Act 2014 states that, if a service or facility is the responsibility of the NHS under the National Health Service Act 2006, a local authority cannot provide such a service or facility unless:[3]

(1) doing so would be merely incidental or ancillary to doing something else to meet needs under those sections; and

(2) the service or facility in question would be of a nature that the local authority could be expected to provide.

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[1] Our proposals in relation to these issues, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 14.

[2] See *R (Royal Borough of Kensington and Chelsea) v NHS North West London Integrated Care Board* [2025] EWHC 889 (Admin) for a recent illustration of the difficulties in answering this question.

[3] Care Act 2014, s 22(1) codified the decision of the Court of Appeal in *R v North and East Devon Health Authority ex p Coughlan* [1999] EWCA Civ 1871, [2001] QB 213. This provision is accompanied by statutory guidance.

14.4 For children, the courts have adopted the same approach that underpinned section 22 of the Care Act 2014 and said that the starting point is to look at the "scale and type" of care required by the child.[4] In our report on adult social care, which led to the enactment of section 22, we referred to this as the "quality and quantity" test.[5] Should the quality and quantity test be codified for children too?

14.5 Separately, there is a complicated route to the assessment of a disabled child's social care needs where they have been detained under the Mental Health Act 1983. This can be a barrier to such children being assessed in a timely fashion to determine whether they should receive social care services under section 17 of the Children Act 1989.

THE SOLUTION

Introducing the equivalent of section 22 of the Care Act 2014 for children

Our provisional proposal

14.6 Our consultation suggested that the current lack of clarity in the law was an obstacle to meeting the needs of disabled children. The more complex their needs, the greater an obstacle this lack of clarity appeared to become. We therefore proposed that the current dividing line between social care and health care in respect of children, based upon the scale and type of the care being provided – the quality and quantity test – should be placed on a statutory footing, with a regulation-making power to enable that line to be changed in future.

Consultation analysis

14.7 In total, 122 consultees answered the question, with the majority (97) of those in favour of the proposal. The main themes underpinning the responses were a need for clarity and accountability. A further theme also emerged from the response, warning of possible unintended consequences.

The need for clarity

14.8 Those in favour of the proposal primarily saw it as a way of bringing clarity to an area which causes frequent disputes in practice. The Council for Disabled Children said that the current position was "leading to serious disputes between partners and creating a lack of clarity for parent carers about how their children's health and social care needs should be met". They did not consider that the concerns were sufficiently addressed by the non-statutory Children's Continuing Care Framework.

14.9 From a local authority perspective, Devon County Council suggested that it would "assist local authorities, Integrated Care Boards and families to have clarity on the provisions which are to be made under social care and that which can be provided by health".

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[4] *R (T, D and B) v Haringey LBC* [2005] EWHC 2235 (Admin), [2006] CCLR 58 at [62] by Ouseley J.

[5] Adult Social Care (2011) Law Com No 326 Part 11 (Overlap Issues) pp 147 to 152.

14.10 In consultation events, participants explained how the problems with identifying whether needs related to health or social care seemed to be particularly acute for children with mental health conditions.

Accountability

14.11 Closely linked to the theme of clarity was that of accountability, with a range of consultees, including Ofsted, identifying how a statutory dividing line could bring about greater accountability on the part of both local authorities and health bodies for the discharge of their responsibilities towards disabled children.

Unintended consequences

14.12 Some consultees thought that we were proposing a framework which might have the unintended consequence of undermining the principle that the NHS is free at the point of need. For that reason, some consultees strongly disagreed with our proposal. The Challenging Behaviour Foundation, in particular, emphasised that they were "deeply concerned" about the unintended consequences of the proposal:

> Unlike the Care Act, the Children Act 1989 does not say that there are limits to what can be provided by local authorities ([for example] social care) compared to what can be provided by the NHS - NHS services are provided free at the point of need, compared to social care which can be charged for. Because of this, the proposal to put the current dividing line between health and social care on a statutory footing and to include a regulation-making power to enable that line to be changed opens the door to services that are currently the responsibility of the NHS being made the responsibility of local authorities/social care (and therefore meaning families can be charged for these), and this undermines the right to health care that is free at the point of need. The Children Act needs to be amended so that it includes this limit (which can be done by using the same wording that is in the Care Act) to make sure that this right is protected.

14.13 Others were concerned that our proposal might undermine attempts to promote and secure joint working. Some of the participants in our consultation events work with children with mental health conditions and neurodiverse children. They expressed a concern that an inadvertent consequence of expressing the dividing line in statute would be to signal that a child should fall into either the social care or health care "box". They suggested that this risked the child being looked at through one specific perspective as opposed to the holistic perspective required to take account of their best interests.

14.14 Not all consultees endorsed the aim of achieving consistency with the approach taken to the dividing line in relation to adults, given the different needs of children.

14.15 Many consultees took the opportunity, while responding to this proposal, to indicate specific issues that they considered required particular attention in the context of the intersection between health care and social care, for example relating to the delivery of mental health care, and children with complex disabilities.

Discussion and recommendation

14.16 Consultation made clear to us just how complicated and difficult the divide between social care and health care can be. That complexity and difficulty arises in (at least) two different ways, as set out below.

(1) The first is the categorisation of whether a particular need is a social care need or a health care need. This engages issues of social work and clinical expertise as much as it does of law.

(2) The second is identifying whether it is the responsibility of a local authority or the NHS to meet health care needs. The fundamentally political nature of this issue was reinforced for us by the observations from the Challenging Behaviour Foundation (which reflected objections framed in similar terms by Professor Luke Clements) about the potential implications of the regulation-making power that we proposed.

14.17 Consultation has reinforced our view that there is merit to reproducing the equivalent of section 22(1) of the Care Act 2014 in the new legal framework within the Children Act 1989 that we recommend in Chapter 2. It would, in effect, complete the task of codification of case law into statute that was achieved for adults. It would not, itself, change either the current characterisation of needs, or the responsibility for meeting those needs, but it would bring about greater clarity and accountability in relation to both tasks.

14.18 Some consultees made clear that they would have liked us to go further and to address where the dividing line between social care and health responsibilities should lie. This strikes us as a political judgement rather than a law reform issue. However, we highlight the point for the Department for Education to consider in deciding whether and how to implement our recommendation.

The effect of section 22 of the Care Act 2014 for adults

14.19 The general rule is that where the NHS has a clear legal responsibility to provide a particular service, a local authority may not do so. Section 22 of the Care Act 2014 prevents a local authority from meeting an adult's care and support needs by healthcare services that the NHS is responsible for delivering.

14.20 However, there are exceptions to this rule as set out above, contained in section 22(1) which codifies the quantity and quality test from the *Coughlan* case.[6] Under this test, a local authority may provide services that would otherwise fall under NHS responsibility if both of the following conditions are met:

(1) that the provision is merely incidental or ancillary to something else the local authority is doing to meet the adult's needs under sections 18 to 20 of the Care Act 2014; and

(2) that the service or facility is of a nature that the local authority could reasonably be expected to provide.

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[6] *R v North and East Devon Health Authority, ex p Coughlan* [1999] EWCA Civ 1871, [2001] QB 213.

Should there be an equivalent to section 22 for children?

14.21 Our consultation paper noted that the quantity and quality test has been applied by the courts when considering the boundary between health care and social care for children.[7] That means that when dealing with children, local authorities and NHS providers are left to consult the case law which, in relation to adults, section 22 codified into statute.

14.22 Consultees did not endorse consistency for consistency's sake between disabled children's social care and adult social care. However, there was strong support for equivalent legislation for children, based on the need for clarity and accountability. We are therefore minded to recommend that the existing line between health and social care for children should be placed on a statutory footing, as it has been in the adult social care context.

14.23 This is a further instance of a legal problem and solution which does or could apply to children generally and not just to disabled children. Elsewhere in our report, we have dealt with these situations by restricting our recommendations to disabled children only, as they are the subject of this review. We have also highlighted that the recommendation could equally be applied to children more broadly, if the Government thought that appropriate. In this instance, exceptionally, we think it unduly artificial to restrict our recommendation to disabled children. It would result in the partial codification, in relation to disabled children, of a principle that currently applies to all children. This may give rise to the inference that different rules apply to disabled and non-disabled children. That would potentially give rise to a lack of clarity in the law and inconsistency in its application. Moreover, our recommendation will primarily be relevant to disabled children in practice. As consultees have told us, supporting children with disabilities is more likely to involve difficult issues of overlap between health care and social care. As such, we think a slightly more expansive approach to this recommendation may be justified. This will primarily affect disabled children, the subject of our report, and minimise the risk of decision-makers coming away with the (erroneous impression) that different rules apply to disabled and non-disabled children.

Is a regulation-making power needed as a corrective mechanism?

14.24 Consultees' warnings about unintended consequences gave us an opportunity to consider whether it would be appropriate to recommend a regulation-making power to enable the children's care equivalent of section 22(1) of the Care Act 2014 to be amended.

14.25 Section 22(2) of the Care Act 2014 adds a power to make regulations which may specify services that may (or may not) be provided by the local authority despite the test above, or to specify types of services or facilities that meet the conditions above. It is a wide power, but we are not aware of it being used to affect the meaning and

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[7] *R (T, D and B) v Haringey LBC* [2005] EWHC 2235 (Admin), [2006] CCLR 58 at [62] by Ouseley J, using the terms "scale and type" of care required by the child.

interpretation of section 22.[8] Rather, detailed guidance on the boundary between care and support and NHS responsibilities is available in statutory guidance.[9]

14.26 Should an equivalent power accompany the codifying provision we recommend as relates to children? It seems to us that the section 22(2) power, while it is very wide, did not envisage dramatic resetting of boundaries between social care and health care as it relates to the categorisation of types of facilities or services. We are not aware of that power having been used with the result that some service provision for adults has moved from free NHS provision to chargeable or means-tested social care provision.

14.27 On the other hand, which side of the line specific types of facilities or services fall has important repercussions, including the significant question of whether the parents or carers are charged. That is a political judgement and not a law reform issue.

14.28 On balance, we do not think that we need to recommend an equivalent power for children's services. We accept that this could, in future, mean that there is some divergence between adult social care law and disabled children's social care law, if the power to shift the boundary between adult social care and health care is exercised. However, our primary objective here is to clarify the law as it relates to disabled children and consistency with the adult social care regime is a secondary goal. For the present, our recommendation is that the quality and quantity test should be codified in statute for children as it has been for adult social care.

Recommendation 34.

14.29 Legislation should set out the existing dividing line between social care and health care for children, based upon the quality and quantity of the care being provided, emulating section 22(1) of the Care Act 2014.

Guidance on the dividing line between social care and health care

Our provisional proposal

14.30 Our consultation paper proposed that the statutory guidance accompanying a new legal framework for assessing and meeting the social care needs of disabled children include a specific section on the intersection between social care and health care. We also proposed that it should be co-produced between local authority and NHS representatives and should make the following matters clear.

(1) How children with health care needs are to be identified.

(2) Local authority responsibilities to meet the health care needs of disabled children.

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[8] As opposed to updating the references to appropriate responsible bodies. See Care and Support (Provision of Health Services) Regulations 2014, SI No 2821, as amended.

[9] Department of Health and Social Care, *Care and Support Statutory guidance* (July 2025) paras 15.29 to 15.36.

(3) NHS responsibilities to meet the health care needs of disabled children.

(4) Expectations for joint working and joint accountability where local authority and NHS responsibilities overlap in the meeting of such needs.

(5) Mechanisms for dispute resolution, including an expectation that “internal” disputes between local authority and NHS organisations should not affect meeting the needs of the child in the interim.[10]

Consultation analysis

14.31 Of the 128 consultees who answered this question, a majority (108) agreed with the proposal, with many identifying the potential for our proposal to result in greater accountability.

14.32 One of the reasons many thought co-produced guidance would be effective is because they thought it would be clear. For example, Hertfordshire County Council Children’s Services suggested that adopting this approach “could significantly enhance the clarity, coordination, and effectiveness of services provided to disabled children”. It added:

> [B]y explicitly outlining the responsibilities of local authorities and the NHS in meeting the health care needs of disabled children, the guidance would eliminate ambiguity, ensuring that both entities understand their roles and obligations, leading to more efficient and effective service delivery.

14.33 One matter that we proposed should be addressed in the guidance was dispute resolution. We emphasised the need to ensure that services are not denied to the child pending the resolution of a dispute between local authorities and the NHS. Some consultees understood that we were proposing the establishment of new dispute resolution mechanisms. This was not, in fact, the case; rather, we were referring to existing dispute resolution mechanisms discussed in Chapter 17.

14.34 The three consultees who opposed the proposal did so either on the basis that it would increase division between services, or on the basis that they had understood us to be proposing a new form of internal dispute resolution mechanism between health and social care.

14.35 The need for guidance to be co-produced was endorsed by some consultees. One parent carer forum emphasised that such co-production should not just involve representatives of local authorities and the NHS, but also of parents and carers.

14.36 Some consultees who were supportive identified additional areas which would need to be covered. These included children and young people with mental health needs, reference to housing issues, and the intersection with education.

14.37 The strongest opposition to the proposal came from those who understood us to be proposing that the guidance itself should contain the framework for the resolution of disputes between health and social care. The Challenging Behaviour Foundation

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[10] As set out further below, we were not proposing the creation of any new dispute resolution mechanisms.

emphasised that they did not agree this was an issue which could be resolved “behind closed doors”. Professor Luke Clements suggested that it was “unacceptable that the intersection between health care and (currently ‘chargeable’) social care should be dealt with by an internal discussion between the local health and social care bodies”. He considered that this was “a constitutional principle of immense importance”.

Discussion and recommendation

14.38 In Chapter 2 we recommend a single, comprehensive piece of statutory guidance on disabled children’s social care law. That guidance should set out the respective rights and responsibilities of disabled children, families, and local authorities.

14.39 Consultation reinforced our provisional view that this guidance should contain a specific section relating to the intersection between health care and social care. This will help all concerned – parents, carers, local authorities and the NHS – apply the equivalent of section 22(1) of the Care Act 2014 that we recommend above. We emphasise that we do not consider that such guidance should, itself, determine the obligations that are owed by the NHS or local authorities. Rather, it would help explain how their respective statutory obligations are to be discharged.

14.40 We consider that this section of the guidance should include the matters set out at paragraph 14.30 above, with the detail to be worked out between central government, NHS bodies, and local authorities. Reflecting views expressed to us both in relation to this aspect of guidance specifically, and our proposals on guidance for disabled children’s social care more generally, we think that it is important that it is also co-produced with parents, carers and disabled children.

14.41 In relation to dispute resolution mechanisms, we had in mind when advancing our proposal that the guidance would reflect existing dispute resolution mechanisms, rather than establishing a new mechanism. We entirely agree that it is inappropriate for dispute resolution mechanisms to be established through guidance. This would amount to disguised legislation and would lie outside the power to make guidance.

14.42 However, we also note that some local authority consultees took the view that there was a need to establish dispute resolution mechanisms, suggesting that they did not consider that the existing ones were working. We think such views go not to the content of the guidance we consider in this chapter, but to the issue of remedies. This is a matter the Department for Education may wish to take into account when considering our recommendations in relation to remedies in Chapter 17. If an equivalent of section 22(1) of the Care Act 2014 is legislated for the purposes of children’s social care, and it is accompanied by clear co-produced guidance, we think that the existing dispute resolution mechanisms will work more satisfactorily.

14.43 We are therefore minded to recommend, as we proposed, that co-produced guidance should include provision on the intersection between social care and health care. We have clarified that the guidance should not purport to lay down new dispute resolution mechanisms.

Recommendation 35.

14.44 The statutory guidance we recommend in Chapter 2 should contain a section, co-produced between local authority and NHS representatives, and parents and carers, addressing the intersection between social care and health care in relation to children. It should make the following matters clear.

(1) How children with health care needs are to be identified, and by whom.

(2) Local authority responsibilities to meet the health care needs of disabled children.

(3) NHS responsibilities to meet the health care needs of disabled children.

(4) Expectations for joint working and joint accountability where local authority and NHS responsibilities overlap in the meeting of such needs.

(5) What mechanisms exist for dispute resolution.

(6) An expectation that disputes as between local authority and NHS organisations should not affect the meeting of the needs of the child in the interim.

Assessing the social care needs of disabled children who may need aftercare services under the Mental Health Act 1983

Our provisional proposal

14.45 Section 117 imposes a duty on local authorities to provide aftercare services to individuals who have been detained under certain sections of the 1983 Act. Aftercare services are intended to meet the needs arising from or related to the individual's mental disorder, and to reduce the risk of deterioration in their mental health condition.

14.46 Our consultation paper called for simplification of the statutory mechanism by which a local authority with responsibilities under section 117 of the Mental Health Act 1983 is required to consider its obligation to meet the social care needs of disabled children.

14.47 At present, those providing aftercare under section 117 are also required to consider the disabled child's social care needs. But this duty is not clearly stated in one legislative provision. Rather it arises out of a combination of the National Health Service and Community Care Act 1990, the Chronically Sick and Disabled Persons Act 1970, the Disabled Persons (Services, Consultation and Representation) Act 1986, and the Children Act 1989.[11]

14.48 Our consultation paper proposed that there should be a single provision setting out when a local authority with responsibilities under section 117 of the Mental Health Act 1983 is required to assess a disabled child's social care needs.

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[11] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 14.26.

Consultation analysis

14.49 Of the 115 consultees who answered this question, the majority (100) agreed with our proposal. A number of consultees who supported the proposal, from a range of backgrounds, highlighted the need for simplification and clarity. Closely linked to this, others identified that this would bring greater accountability.

14.50 There were no substantive reasons advanced against the proposal by the three consultees who disagreed with it, although some of the 12 who did not express a clear view either way felt that the proposal was not necessary.

Discussion and recommendation

14.51 Consultation confirmed our view that there is no clear justification for the complexity of the current position, which appears to reflect historical accident rather than a deliberate policy. We are persuaded that the link between an assessment for aftercare services under section 117 of the Mental Health Act 1983, and the duty to assess the social care needs of a disabled child should be simplified.

14.52 We are not proposing any change to the policy contained in relation to section 117 of the Mental Health Act 1983 (which we note is presently before Parliament[12]). Similarly, we are not proposing a change in the policy as to how section 117 of the Mental Health Act 1983 is supposed to interact with section 17 of the Children Act 1989. That policy is that:

(1) a local authority considering the position of a child who is eligible for services under section 117 of the Mental Health Act 1983 should also consider whether they appear to be disabled; and

(2) if they are disabled, then the local authority should determine whether they are eligible for social care services as a disabled child.

14.53 Our proposal is simply that the interaction is made clearer and simpler, and that references to unnecessary statutory provisions are removed. The simplest way of achieving this outcome is by relocating the duty to undertake a disabled child's social care assessment to the single assessment duty that we recommend in Chapter 5. Replacing the current four duties would therefore represent a technical, but important, simplification of the law.

Recommendation 36.

14.54 There should be a single provision setting out when a local authority with responsibilities under section 117 of the Mental Health Act 1983 is required to assess a disabled child's social care needs. That provision should be contained in the single assessment duty recommended in Chapter 5.

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[12] The Mental Health Bill would (by clause 45) amend section 117 of the Mental Health Act 1983 (materially) to set out how to determine which local authority is responsible for meeting the child's aftercare needs.

Chapter 15: Identifying need in the local area and securing sufficient services to meet that need

INTRODUCTION

15.1 In this chapter we consider the duties that local authorities should have to identify the social care needs of disabled children in their area and secure sufficient services to meet those needs. This chapter focuses on the general strategic powers and duties that local authorities have to identify needs.[1] The duties to assess and meet the needs of individual children are dealt with separately in Chapters 5 and 7.

KEY LEGAL PRINCIPLES: THE STRATEGIC DUTIES

Under the Children Act 1989, local authorities must take reasonable steps to identify the extent to which there are children in need (including disabled children) within their area.[2] In addition, they must maintain a register of disabled children.[3]

Under the Local Government and Public Involvement in Health Act 2007, local authorities are required to prepare and publish an assessment of "relevant needs" in relation to their area.[4] This is referred to as a "health and social care, joint strategic needs assessment". The assessment should be prepared jointly by the local authority and the integrated care boards (ICBs) for the area.[5]

Under the Children and Families Act 2014, local authorities must:[6]

(1) exercise their functions with a view to identifying all of the children in the area who have a disability;

(2) work together with other bodies to make joint commissioning arrangements for the social care provision reasonably required by disabled children in the area; and

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[1] Our proposals on identifying need in the local area and sufficiency, and an overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 16.

[2] Children Act 1989, Sch 2, para 1.

[3] Children Act 1989, Sch 2, para 2.

[4] Local Government and Public Involvement in Health Act 2007, s 116(1) and (5).

[5] Local Government and Public Involvement in Health Act 2007, s 116(4) and (9).

[6] Children and Families Act 2014, ss 22, 26(1) to (3) and 27(1), (2) and (4).

(3) keep the sufficiency of social care provision for disabled children in their area under review, having regard to any joint strategic needs assessment.

THE PROBLEM

15.2 In the lead up to our consultation, both local authorities and families told us that sufficient services are not always available in their local area to meet the needs of disabled children and their families. The general impression that we formed was that, across the country, the supply of social care services for disabled children does not match demand.

15.3 This is problematic in its own right. However, a striking manifestation of this problem can be found in the abuse and neglect of disabled children which took place in residential settings provided by the Hesley group in the Doncaster area between 2018 and 2021. The reports of the child safeguarding practice review panel constituted to investigate how and why this abuse was able to take place found that placement far from home increased the children's vulnerability. However, such placements were seen as the only viable option and multi-agency commissioning, the review found, had not been effective in ensuring that children with disabilities and complex health needs were able to access the right support at the right time.[7]

15.4 In order to bridge the gap between the supply and demand for disabled children's social care services, the law needs to provide an adequate set of tools to allow local authorities to identify need in their area and arrange services to meet that need. In our consultation paper, we reached the tentative view that the legal tools available to local authorities – which we summarise above – are themselves adequate. We hypothesised however, that the relevant legal duties are not always complied with in full and may need to be monitored more closely, but this does not require law reform.

THE SOLUTION

Does the law need to change?

Consultation questions and additional research

15.5 To test our hypothesis and help us decide whether a change in the law might solve the problems, we asked consultees to provide us with their views on, and experiences of, the sufficiency of social care provision in their local area. We also asked local authorities to tell us about the methods they use to:

(1) identify the nature and extent of social care provision required by disabled children in their area;

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[7] The Child Safeguarding Practice Review Panel, *Safeguarding children with disabilities and complex health needs in residential settings – phase 1 report* (October 2022) para 1.16; The Child Safeguarding Practice Review Panel, *Safeguarding children with disabilities and complex health needs in residential settings – phase 2 report* (April 2023) para 4.2.

(2) ensure that sufficient services are available to meet those needs; and

(3) keep the sufficiency of service provision under review.

15.6 In parallel with the consultation, we conducted internet-based research to get a picture of whether and how local authorities are using joint strategic needs assessments, and the extent to which this is considered by Ofsted during inspections. We looked at 104 local authorities and identified:

(1) whether they had a joint strategic needs assessment;

(2) whether the joint strategic needs assessment addressed the social care needs of disabled children in the area; and

(3) whether Ofsted had commented on the joint strategic needs assessment in the most recent report on the local authority.

This research will be published alongside this report.

Consultation and research analysis

15.7 Almost all consultation responses, whether from local authorities, parents, charities or voluntary associations, indicated that services are insufficient. Consultees identified a range of challenges which contribute to the shortfall in services including a lack of service providers, difficulties in recruiting staff, and increasing costs (especially travel costs). Consultees also suggested that rural areas face unique obstacles in securing provision across the entire local area. This means that families often have to travel long distances to receive services.

15.8 Local authorities highlighted a range of methods for identifying the needs of disabled children in their area and ensuring that sufficient services are available to meet those needs. The most prevalent approach involved drawing upon the local authority's special educational needs and disability (SEND) data, for instance using a database that records the education, health and care (EHC) plans the authority maintains. Other methods included the use of joint strategic needs assessments, gathering information from parent carer forums, using statistics from gov.uk and relying on research from bodies such as the Council for Disabled Children. In addition, four local authorities referred to the use of their register of disabled children.

15.9 Turning to our own research, every local authority we reviewed had a joint strategic needs assessment. However, while a significant number of these included general discussion of SEND, far fewer had any discussion of disabled children's social care needs. Of those that did, the discussion tended to be skeletal, and subsidiary to discussion of, for instance, the number of EHC plans the authority maintained. Of the Ofsted inspection reports we reviewed for the 104 local authorities in question, 22 mentioned joint strategic needs assessments, suggesting they are not a prominent feature of the inspection regime.

Discussion and recommendation

15.10 The consultation responses that we received suggested that there are a series of factors, including resource constraints, which make it difficult for local authorities to secure sufficient services. Many of these cannot be remedied by changing the law. The consultation responses also suggested – as we suspected – that there is incomplete compliance with the current law. For example, it appears that not all local authorities maintain a register of disabled children and so are not using one of the legal tools which they have available to identify the need for services locally.

15.11 However, the consultation responses coupled with our own research have led us to revise our initial view that law reform will not help solve the problems we have identified in this area. Specifically, we were struck by the mixed practice in relation to the use of joint strategic needs assessments.

15.12 Joint strategic needs assessments represent a more modern and sophisticated legal tool for evaluating need in the local area than the register of disabled children. There are no particular legal requirements relating to the register – a simple list of names is sufficient to constitute a lawful register – and the only additional specification is the now very dated qualification that the register "may be kept by means of a computer".[8] In contrast there is a relatively detailed statutory framework and accompanying statutory guidance relating to joint strategic needs assessments.[9] Taken together these are intended to achieve the "core aim" of allowing local authorities to "develop local evidence-based priorities for commissioning which will improve the public's health and reduce inequalities".[10]

15.13 Self-evidently a local authority can only use a joint strategic needs assessment to achieve this aim in relation to disabled children's social care if it *has* a joint strategic needs assessment covering disabled children's social care. In our consultation paper we observed that there was no clear legal requirement for a local authority to have a joint strategic needs assessment covering this topic.[11] Under the Local Government and Public Involvement in Health Act 2007, local authorities – together with the ICBs for the area – are only required to prepare a joint strategic needs assessment in relation to "relevant needs".[12] In deciding whether or not there is a relevant need, local authorities must consider factors such as whether a particular need exists in the local area and is capable of being "met" (or in the case of the ICB, "affected") to a significant extent by the local authority or the ICB exercising any of their functions.[13] This entails a judgement on the part of the local authority and our research and consultation responses illustrate the extent to which different local authorities and ICBs have formed differing judgements on how to characterise the relevant needs for the local area. Of the local authorities we considered in our research, most considered

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[8] Children Act 1989, Sch 2, para 2.

[9] Local Government and Public Involvement in Health Act 2007, ss 116 to 116B; Department of Health, *Statutory Guidance on Joint Strategic Needs Assessments and Joint Health and Wellbeing Strategies* (August 2022).

[10] Department of Health, *Statutory Guidance on Joint Strategic Needs Assessments and Joint Health and Wellbeing Strategies* (August 2022) p 4.

[11] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 16.11.

[12] Local Government and Public Involvement in Health Act 2007, s 116(1).

[13] Local Government and Public Involvement in Health Act 2007, s 116(6) and (7).

the relevant need to be SEND, and very few covered disabled children's social care in any detail.

15.14 It might be argued that it is implicit within the statutory scheme that disabled children's social care should be regarded as a "relevant need" giving rise to a requirement to include the subject within a joint strategic needs assessment.[14] However, assuming that argument is correct, implied requirements lack clarity and transparency and it is unsurprising that practice is variable.

15.15 The omission of disabled children's social care from many joint strategic needs assessments is a problem as it limits the utility of the assessment. But it also has consequential problems for the operation of the other legal tools in the Children and Families Act 2014. In particular, that Act requires local authorities to have regard to their joint strategic needs assessment when:

(1) making joint arrangements for commissioning social care services for disabled children;[15] and

(2) reviewing the sufficiency of social care provision for disabled children in the area under review.[16]

These functions cannot be performed effectively if the joint strategic needs assessment does not cover disabled children's social care. In our view, the appropriate way to remedy this is to require local authorities, jointly with their ICBs, to have a joint strategic needs assessment that covers disabled children's social care.

15.16 Looking at this issue in its historical context, Alf Morris MP observed in 1972 that, unless we can "obtain full identification of the severely disabled in Britain… policy making is blind".[17] One of the problems he and others sought to address when the Private Members Bill that became the Chronically Sick and Disabled Persons Act 1970 was drafted was that local authorities at that time were permitted, but not required, to maintain registers of the disabled people they were helping.[18] That these registers were optional and included only people in the area *getting* help – as opposed to all of those in the area who *needed* help – meant that there were a large number of people who needed help who were not known to their local authority. Section 1 of the Chronically Sick and Disabled Persons Act 1970, which required local authorities to find out how many disabled people were in the area and inform them of their rights and entitlements, was meant to change this. It was described as "the master key to the problem".[19] That legal provision was the forerunner of the provisions now found in

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[14] Implied to give effect to Children and Families Act 2014, ss 26(1), (2) and (7) and 27(1), (2) and (4) (see para 15.15), and by virtue of Children Act 1989, Sch 2, paras 1 and 2.

[15] Children and Families Act 2014, s 26(1), (2) and (7); Local Government and Public Involvement in Health Act 2007, s 116B(1)(a).

[16] Children and Families Act 2014, s 27(1), (2) and (4); Local Government and Public Involvement in Health Act 2007, s 116B(1)(a).

[17] A Morris and A Butler, *No feet to drag* (1972) p 11.

[18] National Assistance Act 1948, s 29(4)(g).

[19] A Morris, *Needs before means – an exposition of the underlying purposes of the Chronically Sick and Disabled Persons Act 1970* (1971) p 10.

the Children Act 1989, which require local authorities to take reasonable steps to identify the extent to which there are children in need (including disabled children) within their area and maintain a register of disabled children.[20]

15.17 It is relatively clear that both the use and value of these provisions in the Children Act 1989 is diminishing. They no longer hold the master key to the problem of identifying and meeting need in the local area. In our view, the joint strategic needs assessment is better suited to achieving that policy and helping local authorities try and ensure that the supply of disabled children's social care services meets demand. Accordingly, we recommend that the requirement to open and maintain a register of disabled children is replaced with a requirement to prepare a joint strategic needs assessment covering disabled children's social care. Compliance with this requirement is something which, if deemed appropriate, could be monitored by Ofsted or another appropriate body.

Recommendation 37.

15.18 Local authorities, and their partner integrated care boards, should be required to prepare a joint strategic needs assessment covering the social care needs of disabled children in the area. This requirement should replace the requirement for local authorities to open and maintain a register of disabled children in their area.

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[20] Children Act 1989, Sch 2, paras 1 and 2.

Chapter 16: Co-operation and joint working

INTRODUCTION

16.1 In this chapter, we consider how to improve co-operation and joint working between the public bodies and departments responsible for meeting the needs of disabled children.[1]

THE PROBLEM

16.2 Co-operation within and between local authorities, and between local authorities and the NHS is important in the delivery of disabled children's social care. Meeting the needs of a disabled child may require their special educational needs, health care needs and social care needs to be viewed holistically.

16.3 As explained in chapter 17 of our consultation paper, there are various co-operation duties in different pieces of legislation that are relevant to disabled children. Some of these duties require co-operation at a strategic level, while others require co-operation in relation to individual children or in specific situations.[2] However, in the lead up to our consultation, we were told that there are problems with joint working and co-operation in practice. In particular:

(1) different departments and public bodies involved in meeting the needs of disabled children tend to operate in silos and do not always talk to or co-operate with each other;

(2) children and families often have to tell their stories over and again, to different people; and

(3) social care input in the special educational needs and disabilities (SEND) context is often limited.

16.4 This raises the question of why co-operation is not always happening effectively, when the law requires it to. While the co-operation duties are spread across different pieces of legislation, which lack simplicity, the duties themselves are relatively clear. This led us to form the initial impression that the issues with joint working are primarily cultural, financial and institutional, rather than legal, and that creating more or different legal duties to co-operate would not necessarily improve practice.

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[1] Our proposals on co-operation and joint working, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 17.

[2] Disabled Children's Social Care (2024) Law Commission Consultation Paper 265 paras 17.2 to 17.14.

THE SOLUTION

Improving co-operation and joint working

Our consultation questions

16.5 To establish whether our initial impression was correct, we asked consultees about their experiences of co-operation and their views on factors which help and hinder joint working.

16.6 We also invited consultees' views on whether it should be mandatory for local authorities to have a designated social care officer. The *Working Together* guidance encourages local authorities to have this role, but it is not a statutory requirement. *Working Together* explains that a designated social care officer, sometimes known as a "DSCO", is a person who has the capacity and expertise to improve the links between social care services and the SEND system in a local area. The role should provide strategic planning functions, for example, commissioning care services like short breaks for disabled children and those with special educational needs. It should also have some operational input, such as contributing on behalf of social care to education, health and care (EHC) needs assessments.[3]

Consultation analysis

Experiences of co-operation and joint working

16.7 The majority of consultees who shared their experiences of joint working and co-operation reported negative or mixed experiences. Several observed that public bodies work in silos, with one parent carer commenting that this was the case "even within one department". Some consultees mentioned the lack of co-ordination between departments in preparing and reviewing EHC plans. For example, one parent carer highlighted that it is "unusual for health or social care to attend EHC plan reviews". On a more general level, the Disabled Children's Partnership reported that legal duties to co-operate "have been largely ignored or delivered in an ineffective, token way".

16.8 Consultees highlighted how important individuals are in making co-operation happen. For example, Birmingham Children's Trust said that co-operation and joint working "often relies on relationships rather than process or responsibilities". Further, the Court of Protection Bar Association commented that positive experiences "can often be the result of a single proactive professional taking the lead".

Factors which help and hinder joint working

16.9 Funding was one of the key factors which consultees said hindered joint working. Consultees reported that different departments have separate budgets and that funding constraints cause departments to be "protective" of the money they do have. Several consultees suggested that difficulties with legislation and unclear responsibilities can also hinder joint working. For example, Dr Camilla Parker KC (Hon) noted that a "significant barrier is the lack of clarity on relevant law, how the

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[3] HM Government, *Working Together to Safeguard Children 2023* (December 2023) para 191.

differing legal frameworks interact and the respective responsibilities of NHS bodies and local authorities".

16.10 Consultees said that better communication and information sharing would help joint working and co-operation. Coram Children's Legal Centre suggested that there should be regular joint meetings among the team around the child, bringing together social care, education and health care personnel, and that recording "designated actions" could help to hold different teams accountable. Joint training, policies and procedures were also common ideas for improving co-operation, with Cornwall Council commenting that they can help "develop better shared understanding".

Designated social care officer

16.11 Most consultees who shared their views on the designated social care officer supported the idea that this role should be mandatory. Consultees felt that requiring local authorities to have a designated social care officer would help ensure that there is someone responsible and accountable for promoting joint working. Many consultees, however, caveated their support for a mandatory role, with conditions including the following.

(1) The role should be clearly defined. Durham Children's Social Care remarked that "there needs to be clear guidance on the role".

(2) The role should be standalone, with one parent carer commenting that "this role should not be 'diluted' by being included with other roles such as 'safeguarding officer'".

(3) The designated social care officer should be sufficiently senior or empowered to take decisions, otherwise "the role could risk becoming a symbolic position without the capacity to make tangible improvements".

(4) The role should be included in Ofsted's Area SEND inspections.[4]

16.12 Several consultees reported that their local area already had a designated social care officer and that the role was working well. Achieving for Children noted that "the value of the DSCO was clearly evidenced in our recent SEND Inspection", while the West Sussex Parent Carer Forum highlighted that their designated social care officer "is a crucial point of contact for us to work with in coproduction". The Council for Disabled Children, who helped to develop the role of the designated social care officer, referenced a case study on the benefits that Shropshire experienced as a result of implementing the role.[5] This case study found that after the designated social care officer was introduced, partnership working and co-production improved.

16.13 Hampshire County Council opposed making the designated social care officer mandatory, stating that the role already exists. They also noted that there is a lot of

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[4] The Area SEND inspection is an inspection of the services jointly provided by education, health and social care. The inspection is undertaken by inspectors from Ofsted and the Care Quality Commission.

[5] What Works in SEND, *Implementing the Designated Social Care Officer role in Shropshire,* https://whatworks-send.org.uk/resources/implementing-the-designated-social-care-officer-role-in-shropshire/.

variation between local authority structures, so mandating the functions of a designated social care officer might be more helpful than mandating the position. The Court of Protection Bar Association, who gave a neutral response to the proposal, suggested that there could be "a clearly designated 'lead department' which is responsible for co-ordinating" instead.

Discussion and recommendation

16.14 Duties to co-operate already exist. Although they are spread across various statutes that tend to reflect the different statutory contexts in which co-operation may be needed, we do not think that amending this framework or creating new duties to co-operate would improve joint working. Consultation confirmed our impression that the key issues affecting joint working are operational matters such as funding, communication and implementation of joint policies. Therefore, more or stronger legal duties to co-operate are unlikely to be the answer.

16.15 That said, consultees reinforced our view that the overlapping legal duties between health, education and social care can create confusion over who is responsible for what. This can contribute to cultures where blame and responsibility shift between departments, and where nobody is clearly accountable for meeting children's needs, which hinders joint working. Our recommendations in Chapter 14 to clarify the respective responsibilities of health and social care and help resolve disputes will, we think, make joint working easier. We also think that our recommendation to have a single duty to meet the social care needs of children, subject to national eligibility criteria, should help to clarify when the responsibility lies with social care.[6]

16.16 This still leaves us with the question of how to ensure that the existing legal duties to co-operate are discharged more effectively, which means we need to consider how to improve joint working on the ground. We have reached the view that requiring local authorities to have a designated social care officer, as defined at paragraph 16.6 above, would help achieve this. Where the position has been introduced, it has had a positive impact from both a local authority and parent carer perspective. As the link between social care and SEND services, the designated social care officer is well-placed to promote factors that help co-operation, such as joint training and policies. Having a specific person makes it clear who should be facilitating co-operation and provides a point of contact if joint working is not happening.

16.17 While the role is encouraged in the *Working Together* guidance, not all local authorities have a designated social care officer. As of March 2023, over 40 local authorities had an officer in post or were actively recruiting for the position.[7] The need to ensure that existing duties to co-operate are discharged effectively and consistently weighs in favour of the role being mandatory. This would standardise the approach and mean that all local authorities would gain the benefits of a designated social care officer.

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[6] See paras 7.44 to 7.47.

[7] Community Care, *Government pushes ahead with rollout of SEND social work lead role* (March 2023) https://www.communitycare.co.uk/2023/03/02/government-pushes-ahead-with-rollout-of-send-social-worklead-role/.

16.18 Some consultees suggested that the designated social care officer role would only improve co-operation if it is clearly defined, a standalone position, and someone with sufficient decision-making power or seniority to have influence. We recognise the force in these points but think that this level of operational detail, which may change as time passes and the role develops, is better dealt with in the statutory guidance we recommend in Chapter 2.

16.19 There is also a question over how a statutory designated social care officer role would sit with the designated clinical officer and designated medical officer roles. Designated clinical or medical officers are non-statutory roles recommended in the *SEND Code of Practice*.[8] The purpose of these roles is to support integrated care boards to meet their statutory responsibilities for children and young people with SEND. Some consultees pointed out that making the designated social care officer a statutory role would be inconsistent with these analogous roles which are non-statutory. We recognise that this is the case. However, it would lie outside of our terms of reference to make recommendations about those roles and further, having not consulted on the issue, we are not in a position to say whether putting those roles on a statutory footing is necessary or desirable. We highlight this potential inconsistency for the Department for Education to take into account in deciding whether and how to implement our recommendation.

16.20 Finally, we note the views of those consultees who suggested that the designated social care officer role should be considered as part of the Area SEND inspections carried out jointly by Ofsted and the Care Quality Commission. We recognise in general terms the importance of effective oversight of the legal duties owed to disabled children. However, this is not a matter where law reform is required.[9] Ofsted acts under the direction of the Secretary of State[10] and whether Ofsted should have a role in overseeing the existence and performance of the designated social care officer role is a matter for the Government to consider, in conjunction with Ofsted, in deciding on the nature and level of oversight appropriate for the recommendations in this report.

Recommendation 38.

16.21 Local authorities should be required to have a designated social care officer. Further operational detail about the role – such as the level of seniority – should be set out in the statutory guidance we recommend in Chapter 2.

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[8] Department for Education and Department of Health, *Special educational needs and disability code of practice: 0 to 25 years* (January 2015) paras 3.45 to 3.48.

[9] Education and Inspections Act 2006, ss 135(1) and 136(1), Children Act 2004, ss 20 and 23 and Children Act 2004 (Children's Services) Regulations 2005, SI No 1972, reg 2 provide the requisite powers.

[10] Education and Inspections Act 2006, ss 117(3) and 119(3).

Chapter 17: Remedies

INTRODUCTION

17.1 In this chapter, we consider the remedies that should be available when things go wrong in assessing and meeting the social care needs of disabled children.[1]

KEY PRINCIPLES: THE MAIN REMEDIES AVAILABLE[2]

Internal complaints. A three-stage, statutory complaint system operated by all local authorities, with increasing degrees of independence as the complaint escalates.

Complaints to the Local Government and Social Care Ombudsman. Available to those who have exhausted the internal complaints process. The Ombudsman investigates maladministration and failures in service provision.

Judicial review. The process by which a person applies to the High Court for a review of the lawfulness of a decision taken by a public body.

The First-tier Tribunal (Special Educational Needs and Disability). Commonly known as the SEND Tribunal. Deals with appeals relating to education, health and care (EHC) plans under the Children and Families Act 2014, for children with special educational needs and disabilities (SEND).

THE PROBLEM

17.2 The parents and carers we spoke to in the lead-up to this consultation gave us the impression that complaints systems – whether internal or to the Ombudsman – do not always work effectively for them. In particular, the perception of a number of families was that internal complaints systems do not always operate fairly and sometimes appear to "rubber stamp" initial decisions. In relation to the Ombudsman, some families told us that the complaints process can take a long time. In relation to both of these complaints systems, families expressed dissatisfaction that the outcome, if the complaint was upheld, tended to be a recommendation that the local authority should remake the decision that the family had complained about, as opposed to recommending the provision of a particular service.

17.3 Judicial review, we noted, is a complicated process and one that is expensive and inaccessible to those who do not have access to legal aid. In turn, legal aid is means-tested and even where the child, parent or carer satisfies the means test, it may not

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[1] Our proposals on remedies, and a detailed overview of the current law, can be found in Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 18.

[2] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 18.3 to 18.58.

be possible to find a legal aid solicitor who is able to assist.[3] There is an overlap between areas with high rates of disability and low numbers of legal aid solicitors.[4]

17.4 The SEND Tribunal is more accessible than seeking judicial review but is not always available. The SEND Tribunal can only consider a dispute about disabled children's social care where it arises in the context of a dispute about the child's special educational needs or the special educational provision they require.[5] In those cases, it can make recommendations about the social care needs that are set out in the child's EHC plan, and the social care provision to meet those needs.[6] In contrast, the SEND Tribunal can make binding orders in relation to special educational needs and special educational provision, requiring the amendment of the EHC plan.[7]

17.5 Taken together, this means that there is a mismatch between the jurisdiction and powers of the SEND Tribunal. It can deal with some disputes about social care for disabled children but not others. Further, where it does have the jurisdiction to consider a dispute about social care for a disabled child, its powers in relation to social care are more limited than its powers in relation to special educational needs.

17.6 However, both sets of powers are more extensive than the powers of the High Court when dealing with an application for judicial review relating to social care for a disabled child. The High Court does not make recommendations about the services a child should receive and would only order that a particular service should be provided to a particular child in a truly exceptional case, where that was the only rational option available to the local authority.

17.7 We heard different views on whether the powers of the SEND Tribunal in relation to social care include a power to recommend that a local authority carry out an assessment of a child's social care needs.[8] The position of the Upper Tribunal – set out in a decision given shortly before we published our consultation paper – is that the Tribunal has no express power to order or recommend that a social care assessment be carried out, by way of a remedy. However, it can direct that a social care assessment be provided as part of its case management powers.[9] Prior to this decision we were told that practice on this issue varied.

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[3] The Law Society of England and Wales identified that 71% of people in 2024 did not have access to a local legal aid provider with the relevant community care contract: the Law Society, *Community Care – legal aid deserts*, https://www.lawsociety.org.uk/campaigns/civil-justice/legal-aid-deserts/community-care.

[4] Office for National Statistics*, Disability by age, sex and deprivation, England and Wales: Census 2021*, https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/disability/articles/disabilitybyagesexanddeprivationenglandandwales/census2021#disability-at-a-regional-and-local-authority-level-2021.

[5] Children and Families Act 2014, s 51(1) and (2). See Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 ch 13 for a more detailed overview of SEND law and the basis of the various rights of appeal to the SEND Tribunal.

[6] Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017, SI No 1306, regs 4-5.

[7] Special Educational Needs and Disability Regulations 2014, SI No 1530, reg 43.

[8] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 18.51(2).

[9] *MM v Royal Borough of Greenwich* [2024] UKUT 179 (AAC), [2024] PTSR 1452 at [108(f)].

17.8 These issues with the jurisdiction and powers of the SEND Tribunal are inherent in the design of the legal framework. But, in the lead up to the consultation, stakeholders also reported other practical concerns about the operation of the SEND Tribunal. In particular, it has a very large workload, meaning that appeals can take a long time, and both families and local authorities told us that appeals can be stressful and divisive.

THE SOLUTION

An effective and independent remedy for disabled children's social care

Consultation questions and provisional proposals

17.9 Identifying solutions to the problems we outline above is far from straightforward. As we observed in our consultation paper, a number of the problems we identified are general ones which affect anyone who is unhappy with the service they have received from their local authority, or from public bodies more generally. They are not unique to disabled children's social care and to recommend wide-ranging changes, for example to judicial review, would lie outside our terms of reference.

17.10 In addition, a number of the problems are largely financial or political in nature, such as the availability of legal aid, the workload of the SEND Tribunal or the question of whether and when courts and tribunals should be able to make decisions about the allocation of resources. These are not necessarily problems which have a solution that is available to us as a law reform body.[10]

17.11 Against this backdrop, we asked a number of open questions in our consultation paper to help us get a better understanding of the problems and decide whether they have a law reform solution. We asked consultees to provide:

(1) their views on the statutory complaints procedure;

(2) their experiences of complaints to the Ombudsman; and

(3) their views on the changes necessary in order for families to have an effective and independent mechanism to challenge and rectify decisions about disabled children's social care.

17.12 We also sought consultees' views on the following options:

(1) extending the powers and jurisdiction of the SEND Tribunal to deal with disabled children's social care appeals; and

(2) giving the Children's Commissioner an express power to initiate legal proceedings in respect of the social care needs of disabled children.

Consultation analysis

17.13 In relation to local authority statutory complaints procedures, the principal themes among families, and organisations representing families, were that the process is lengthy and does not lead to the rectification of incorrect decisions. The latter point

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[10] See paras 1.8 on the relationship between law reform and politics.

was highlighted by a number of consultees such as the Parent and Carer Alliance and Contact, who observed that successful complaints rarely result in a change in outcome or children receiving the support they need. The charity Cerebra, who have conducted research into the handling of complaints, also expressed the view that the complaints processes can lack rigour and be hampered by a lack of legal expertise. They cited the example of a senior officer within a local authority who had characterised the Chronically Sick and Disabled Persons Act 1970 "as being of questionable relevance because of its age". That error was upheld by an investigator who agreed that the Act – which remains in force and applicable to all local authorities in England – was irrelevant because it was "old legislation". Some local authority consultees also echoed elements of these concerns, although a number disagreed, suggesting that the statutory complaints process worked effectively.

17.14 In relation to the Ombudsman, the principal theme raised by consultees concerned the length of the process. For example, the Disabled Children's Partnership reported that "the main concerns we hear about the [Ombudsman] are around its capacity and therefore the timeliness of responses". The Down's Syndrome Association noted that this can be "particularly problematic for cases involving urgent care needs or safeguarding issues, where delays can exacerbate harm or unmet needs". Several consultees expressed the view that the redress available through the Ombudsman was not sufficient. In addition, a number of consultees, primarily from local authorities, highlighted what they considered to be inconsistent responses to complaints by the Ombudsman. In some instances, this was attributed by consultees to a lack of specialist knowledge on the part of the investigators.

17.15 The cumulative time taken to pursue a complaint through the internal complaints process and then onwards to the Ombudsman was specifically highlighted as problematic by a number of consultees. For example, the Challenging Behaviour Foundation reported that this combined process can take in excess of 12 months. They described the potential for this to be "exhausting and disheartening", placing an "emotional and mental strain on families". Cerebra painted a similar picture, noting that families "may wait for months, possibly years, simply for the matter to be remitted to the council for reconsideration".

17.16 Consultees had mixed views on the possibility of extending the powers and jurisdiction of the SEND Tribunal in relation to decisions about disabled children's social care. Of the 105 consultees who answered this question, 34 were in favour of this option, 36 were against and 29 were neither for nor against. Consultees in favour of the proposal primarily saw it as a way to secure accountability. Those opposed to increasing the powers and jurisdiction of the SEND Tribunal expressed concerns that it would be impractical. For example, the Children's Commissioner's Office referred to the "existing challenges with the Tribunal, including workload and delays" and Coram Children's Legal Centre expressed the view that "given the existing significant delays with appeals and a SEND system in limbo", an expanded role for the Tribunal would "merely add to the backlog". A number of consultees, including the Association of Directors of Children's Services and the Local Government Association, and Rotherham Metropolitan Borough Council, also highlighted the adversarial nature of proceedings at the SEND Tribunal, and the divisive effect this can have.

17.17 Similar themes were raised by those who attended our consultation events. Some parents and carers reported that they had found the appeal process stressful and time consuming, but that it was – in their eyes – the only effective way to secure the services they sought for their disabled child. However, this same feature of the system was perceived negatively by a number of local authority representatives. They expressed concern about the adverse impact that an order to provide services for one child can have on the ability of the local authority to assist other children in the area. If a local authority is ordered to provide a costly service for the benefit of one child there will, they pointed out, be less money left in the budget to assist other children who might have needs that are equally or more significant. This wider context, they felt, could be overlooked by the SEND Tribunal in making decisions.

17.18 We received a mixed response to the proposal to give the Children's Commissioner express powers to bring legal proceedings in relation to disabled children's social care. Notably, the Children's Commissioner's Office was opposed to this option, expressing concern that it would not be feasible with the Office's current capacity and that "this reform could skew the focus of the office towards disabled children, omitting other children that the office has a statutory duty to promote and protect".

17.19 Finally, we received a broad range of responses to our request for views on the changes necessary in order for families to have an effective and independent mechanism to challenge and rectify decisions about disabled children's social care. There was no consensus among consultees about the changes needed, but responses included:

(1) a greater role for mediation;

(2) increased availability of legal aid;

(3) more robust monitoring and inspection by the Department for Education and Ofsted;

(4) better guidance and a simpler legal framework;

(5) more advocacy services; and

(6) an entirely new dispute resolution service, such as a regulatory body, or a dedicated complaints service.

Discussion and recommendation

17.20 There was a broad consensus within consultation responses and at consultation events that there needs to be a fair, accessible, independent and effective system for resolving disputes about social care for disabled children. There was also a broad consensus that the current system does not provide this. Some local authority consultees expressed the view that the current system operates effectively. But this view was not widely held.

17.21 However, consultation has reinforced the concerns we set out at paragraphs 17.9 and 17.10 above that choosing or designing a system that is fair, accessible, independent and effective involves decisions that are primarily political in nature, including decisions that are purely about public spending, or that may have practical implications that we are not in a position to evaluate. In particular, we are conscious that our terms of reference focus on the provision of care to disabled children. Difficulties would arise were we to recommend reform only for remedies as regards disabled children where such remedies may also apply to other children in need. As a law reform body, operating within defined terms of reference, these are not decisions which are appropriate for us to make.

17.22 The SEND Tribunal provides a case in point. As noted above, there is a mismatch in the remedies available to disabled children in relation to their social care needs: some can go to the Tribunal and some cannot. Those who can do so have a more limited range of remedies in relation to their social care needs than their special educational needs. Our terms of reference require us to consider alignment between SEND law and disabled children's social care law, and consistency and fairness are generally desirable goals in law reform. For those reasons we sought views on whether or not the powers and jurisdiction of the SEND Tribunal in relation to disabled children's social care should be extended.

17.23 Some families we spoke to regarded this as a highly desirable option as, in their eyes, the Tribunal offered their only real opportunity to secure accountability and obtain the services their disabled child needed. But there was no consensus among consultees on this issue and – as we foreshadowed in our consultation paper[11] – the arguments for and against this primarily raised issues of political policy or about deliverability. For example:

(1) the appropriateness of expanding the jurisdiction of the Tribunal to make orders about how local authorities should allocate limited resources;

(2) the availability of legal aid, which is available for judicial review, but not generally available for SEND appeal; and

(3) the impact which any expansion in the workload of the SEND Tribunal might have on its ability to manage its current workload in relation to SEND appeals.

17.24 Issues of this type are of critical importance in deciding on an appropriate system of remedies, but they are not issues which we, as a law reform body, can properly resolve. It is our view and recommendation that there should be a fair, accessible, independent and effective system for resolving disputes about social care for disabled children. This is vital in order to give effect to the recommendations we make in this report. However, further work and consideration will be required on the part of elected representatives in Government to decide what that system should be.

17.25 To assist in this exercise, the most that we can properly do is to identify the principal options for remedies that have been considered or have emerged during our review. We set these options out below. Together with each remedy we include some of the practical and political issues that would need to be considered in order to make that remedy fair, accessible, independent and effective. The only option we do not include in this list is the option of increased reliance on the Children's Commissioner. This is

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[11] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 18.95 to 18.98.

in deference to the clear view expressed by her Office that this would not be appropriate.

(1) **The SEND Tribunal**.[12] Expansion of the jurisdiction and powers of the Tribunal to make this the primary and ultimate mechanism for resolving disputes about disabled children's social care would engage the considerations we set out above at paragraph 17.23. As we noted in our consultation paper, the Tribunal is relatively unusual in being able to make orders requiring local authorities to provide a particular service to a particular child.[13] It is precisely this feature which makes the SEND Tribunal an effective remedy in the eyes of some. However, it is a feature which also has resource implications for the other disabled children for whom local authorities are responsible. The impact which any expansion in the role of the SEND Tribunal would have on its ability to perform its existing functions would need to be carefully evaluated. This would be necessary to ensure it is appropriately resourced and that any changes do not result in delays in cases being considered, among other things. Expansion of the role of the SEND Tribunal would result in inconsistency in remedies as between disabled children's social care and adult social care. That inconsistency could be removed if deemed appropriate; there is a power to institute an appeal system for adult social care which has not yet been exercised.[14]

(2) **Judicial review**. If reliance is to be placed on judicial review as the primary remedy for disabled children's social care, consideration would need to be given to how it could be made more accessible, whether by means of increased availability of legal aid or otherwise.

(3) **Internal complaints**. The primary issues raised in relation to internal complaints were delay and inadequate redress. Reducing delay may require increased resourcing and adjustments to timescales for dealing with complaints. In relation to redress, consideration would need to be given to the powers available to those resolving complaints, and how they should be used. For example, whether investigators should be permitted or required to substitute their own views for those of the initial decision-maker to a greater extent.

(4) **The Ombudsman**. Increased reliance on complaints to the Ombudsman raises similar issues: how to ensure that complaints can be dealt with quickly and whether changes are needed to the modes of redress.

(5) **Oversight by Ofsted**. A view expressed at a number of our consultation events, and in relation to consultation questions considered elsewhere in this report, was that Ofsted could or should play an increased role in overseeing

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[12] We refer here, as we have throughout this chapter, to the SEND Tribunal as it is this part of the Tribunal that currently deals with (some) disabled children's social care disputes that arise in the context of SEND appeals. However, the SEND Tribunal forms a part of the Health, Education and Social Care Chamber of the First-tier Tribunal and the option of expanding the role of the First-tier Tribunal could potentially be implemented within a different part of the Chamber or within a newly constituted Chamber under Tribunals, Courts and Enforcement Act 2007, s 7.

[13] Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 paras 18.43 to 18.44.

[14] Care Act 2014, s 72.

local authorities' performance of their disabled children's social care functions. Our view is that law reform is not required to enable this.[15] Rather, the direction of the Secretary of State would be required.[16] Whether this is appropriate would require discussion between the Government and Ofsted as to where Ofsted's priorities should lie, bearing in mind Ofsted's remit extends well beyond the cohort of children considered in this report.

(6) **An entirely new dispute resolution system**. Options put forward for consideration within consultation responses and at our consultation events included: a disabled children's social care mediation service; an internal review system of the type that applies to homelessness decisions made under Part 7 of the Housing Act 1996; and a peer review system whereby a suitably senior and experienced member of local authority B reviews a decision made by local authority A.

Recommendation 39.

17.26 There should be a fair, accessible, independent and effective system for resolving disputes about social care for disabled children. Further work is required on the part of Government to decide what the appropriate system should be.

The SEND Tribunal's power to seek a social care assessment

Our provisional proposal

17.27 We turn now to the more specific issue we identified at paragraph 17.7 above, that there is a lack of clarity about the power of the SEND Tribunal to recommend that a social care assessment be carried out.[17] This results in a variation in practice. To resolve this issue, we proposed that the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017[18] should be amended to provide the SEND Tribunal an express power to make such a recommendation in the course of an "extended appeal".[19]

Consultation analysis

17.28 In total 110 consultees answered this question. Of these, 76 supported the proposal, 16 opposed it and 18 were neither for nor against it. Those in favour of the proposal primarily saw it as a necessary tool for the SEND Tribunal to properly perform its functions in relation to social care. The prevalent themes among those who opposed the proposal were that it was unnecessary – either because there were alternative routes to obtaining an assessment or because it was felt that the Tribunal already had

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[15] Education and Inspections Act 2006, ss 135(1) and 136(1), Children Act 2004, ss 20 and 23 and Children Act 2004 (Children's Services) Regulations 2005, SI No 1972, reg 2 provide the requisite powers.

[16] Education and Inspections Act 2006, ss 117(3) and 119(3).

[17] See Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 18.51.

[18] SI 2017 No 1306.

[19] An extended appeal is one in which recommendations are sought about a child's health or social care needs, or about the provision that should be made for those needs.

the requisite power – or that the SEND Tribunal was not the right forum for resolving disputes about disabled children's social care.

Discussion and recommendation

17.29 The proposal was primarily intended to promote clarity in the law and consistency in practice. As we noted in the consultation paper,[20] the SEND Tribunal has been making such recommendations for some time, but practice is not consistent. Further, the Upper Tribunal has clarified that the SEND Tribunal can seek an assessment during the course of an appeal using its case management powers.[21] It is incongruous that it should not also be able to recommend an assessment at the end of an appeal using its remedial powers. It is also inconsistent with the powers that the Tribunal has to make recommendations about a child's social care needs or the provision necessary to meet those needs.[22] Having an assessment of the child's social care needs is a necessary precursor to the effective use of those powers. For these reasons we proceed with this recommendation.

Recommendation 40.

17.30 The SEND Tribunal should have an express power to recommend that a local authority carry out a social care assessment in an extended appeal.

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[20] See Disabled Children's Social Care (2024) Law Commission Consultation Paper No 265 para 18.51.

[21] *MM v Royal Borough of Greenwich* [2024] UKUT 179 (AAC), [2024] PTSR 1452 at [108(f)] by Upper Tribunal Judge Stout.

[22] Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017, SI No 1306, regs 4 and 5.

Chapter 18: Recommendations

Recommendation 1.

Disabled children should remain within the scope of section 17 of the Children Act 1989 and a disabled child should continue to be classed as a "child in need".

A discrete set of provisions should be introduced into the Children Act 1989, to implement the various recommendations we make in this report, thereby providing a simpler, largely unified framework for disabled children's social care. This new legal framework would apply solely to children who are disabled within the meaning of section 17.

This new legal framework should be accompanied by dedicated statutory guidance, and this guidance should include material which helps local authorities to ensure that there is an appropriate balance struck between identifying and meeting the needs of disabled children and their families in a non-stigmatising way and safeguarding them from harm and abuse.

Paragraph 2.15

Recommendation 2.

There should be a single, comprehensive piece of statutory guidance on disabled children's social care law. That guidance should set out the respective rights and responsibilities of disabled children, families, and local authorities.

The guidance should be published in a variety of formats, to ensure that it is accessible for all of the various groups and individuals who need to rely on it.

The guidance should be produced with input from disabled children and young people, families, and local authorities.

Paragraph 2.22

Recommendation 3.

For the purposes of disabled children's social care law, a child should be regarded as having a disability if:

(1) they have a physical or mental impairment; and

(2) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

The modified definition of "substantial and long-term" contained in regulation 6 of the Equality Act 2010 (Disability) Regulations 2010, that relates to younger children, should apply to this definition of disability. This provides that where a child under six years of age has an impairment which does not have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, the impairment is to be taken to have such an effect if it would normally have that effect on a person over the age of six.

The exclusions contained in regulations 3 and 4 of the Equality Act 2010 (Disability) Regulations 2010 should not be applied to this definition of disability.

The statutory guidance we recommend in Chapter 2 should:

(1) clarify that a recognised medical diagnosis is not necessary to satisfy this definition of disability;

(2) clarify that the definition can encompass the diverse range of conditions which can affect a child's ability to perform daily activities; and

(3) address the particular circumstances of disabled children in adoptive families.

Paragraph 3.21

Recommendation 4.

Decision-making in relation to the social care needs of disabled children should be based upon:

(1) an overarching principle that the best interests of the child should be a primary consideration;

(2) a set of considerations to which decision-makers must have regard in applying that principle; and

(3) a final check, as to whether the purpose being served by the proposed decision or action can be as effectively achieved in a way which is less restrictive of the child’s rights and freedom of action.

The set of considerations which decision-makers must have regard to consists of:

(1) the importance of promoting the upbringing of the child by the child's family, in so far as doing so is consistent with promoting the best interests of the child;

(2) the importance of the child participating as fully as possible in decisions relating to the exercise of the function concerned;

(3) the importance of the child being provided with the information and support necessary to enable participation in those decisions, having regard to their particular needs;

(4) the views, wishes and feelings of the child;

(5) the views, wishes and feelings of the child’s parents or carers;

(6) the parents’ or carers’ knowledge of their child’s condition and needs;

(7) the need to support the child and their parents or carers in order to facilitate the development of the child and to help them achieve the best possible outcomes at each stage of their life;

(8) the importance of preventing or delaying the development of the needs for care and support;

(9) the need to prepare the child for adulthood and independent living; and

(10) the characteristics, culture and beliefs of the child (including, for example, language).

Paragraph 4.21

Recommendation 5.

There should be a single statutory duty to assess the social care needs of disabled children.

Paragraph 5.13

Recommendation 6.

The duty to assess should arise if it appears to the local authority that a child in the area:

(1) is disabled; and

(2) may have needs for care and support arising from their disability.

The need for care and support should be judged without reference to the support the child is currently receiving.

The statutory guidance we recommend in Chapter 2 should clarify that a diagnosis is not necessary to meet this threshold.

Paragraph 5.29

Recommendation 7.

There should be a rebuttable presumption that assessments should be combined unless there is a good reason not to do so.

The statutory guidance we recommend in Chapter 2 should provide examples of situations in which combining assessments may not be appropriate.

Paragraph 5.44

Recommendation 8.

The statutory guidance we recommend in Chapter 2 should explain the relationship between the duty we recommend to assess the social care needs of a disabled child and assessments carried out under Early Help and Family Help.

Paragraph 5.56

Recommendation 9.

There should be a requirement that assessments are proportionate and appropriate to the circumstances of the child and their family.

The statutory guidance we recommend in Chapter 2 should provide a framework for assessment and include examples of appropriate and proportionate assessments.

Paragraph 5.76

Recommendation 10.

A person assessing the social care needs of a disabled child should be required to have the skills, knowledge and competence to carry out the assessment in question and be appropriately trained.

The assessor should be required to consult a person who has expertise in the child's condition, or other aspects of the child's circumstances, where they consider that the child's needs require it.

Paragraph 5.86

Recommendation 11.

Local authorities should provide disabled children and their families with a written copy of the child's social care assessment.

Paragraph 5.91

Recommendation 12.

The statutory guidance we recommend in Chapter 2 should clarify the legal position in relation to delegating assessments in disabled children's social care and provide examples of when it is appropriate to delegate.

Paragraph 5.100

Recommendation 13.

There should be a single duty to assess the social care needs of the parent or carer for a disabled child, which should arise upon (a) request by the parent or carer or (b) it appearing to the local authority that the parent or carer may have needs for support.

In assessing the needs of a parent or carer, the local authority should be required to:

(1) have regard to the well-being of the parent or carer; and

(2) provide the parent or carer with a written copy of their assessment.

The statutory guidance we recommend in Chapter 2 should:

(1) clarify the rights of parents and carers to have their needs assessed and the requirements of such assessment; and

(2) clarify that assessments of parents and carers can be combined with the assessment of their child's needs, and that of their siblings, if applicable.

Paragraph 6.22

Recommendation 14.

The assessment of the social care needs of the parent or carer of a disabled child should be proportionate and appropriate to their circumstances.

Paragraph 6.30

Recommendation 15.

The statutory guidance we recommend in Chapter 2 should direct local authorities to consider the relevant needs of any siblings as part of the assessment of the needs of a disabled child.

This guidance should also direct local authorities to consider whether the sibling is a child in need, or a young carer for the disabled child.

Siblings who are young carers of disabled children should continue to have their needs assessed under the existing legal framework for young carers. The duties owed to young carers should not be subsumed within the legal framework that applies to other carers.

Paragraph 6.48

Recommendation 16.

There should be a single duty to meet the social care needs of disabled children, subject to national eligibility criteria.

As a necessary precursor to this, further work will need to be carried out by the Government to evaluate the prospective impact of the recommendation, to inform the decisions as to how and when the recommendation is implemented, and precisely what the eligibility criteria should be.

This work should involve local authorities, the families of disabled children and those representing their interests.

As an interim measure while this work is carried out, we recommend that statutory guidance on eligibility criteria is published for local authorities to have regard to when drafting their own local criteria.

Paragraph 7.44

Recommendation 17.

One of the ways in which local authorities should be able to discharge the duty to meet the social care needs of a disabled child who meets the national eligibility criteria should be by providing short breaks.

Short breaks should be defined as services to:

(1) provide breaks for the benefit of disabled children; and/or

(2) assist individuals who provide care for disabled children to continue to do so, or to do so more effectively, by giving them breaks from caring.

These services should include:

(1) accommodation;

(2) the provision of care and support at home or elsewhere;

(3) educational or leisure activities; and

(4) services to assist parents and carers.

Paragraph 7.68

Recommendation 18.

Disabled facilities grants should continue to be administered by local housing authorities under the separate legal framework in the Housing Grants, Construction and Regeneration Act 1996.

Paragraph 7.78

Recommendation 19.

The single duty to meet the social care needs of a disabled child should operate in the same way as section 2 of the Chronically Sick and Disabled Persons Act 1970, as a duty that requires a local authority to exercise its functions under Part 3 of the Children Act 1989 to ensure that the child's social care needs are met, rather than a freestanding duty to provide services.

Paragraph 7.87

Recommendation 20.

The single duty to meet the social care needs of a disabled child, should apply to any child who is in the area of the local authority. But if the child is ordinarily resident in the area of a different local authority, the local authority meeting the child's needs should be able to recover the costs of doing so from the authority where the child ordinarily resides.

Paragraph 7.96

Recommendation 21.

Local authorities should continue to have powers to:

(1) meet the social care needs of a disabled child that do not satisfy the national eligibility criteria;

(2) meet the social care needs of a disabled child pending an assessment of whether they satisfy the national eligibility criteria; and

(3) provide services to parents, carers and family members, so long as the services are provided with a view to safeguarding or promoting the disabled child's welfare.

Paragraph 7.103

Recommendation 22.

The legal framework should include a non-exhaustive list of services that local authorities can provide to meet the social care needs of disabled children.

This list should cover:

(1) accommodation;

(2) the provision of care and support at home or elsewhere;

(3) educational or leisure activities;

(4) services to assist families;

(5) adaptations to the home;

(6) counselling and other types of social work;

(7) goods and facilities;

(8) specialist equipment;

(9) assistance with travel arrangements; and

(10) information, advice and advocacy.

Paragraph 8.20

Recommendation 23.

The direct payment regime should be adapted so that the amount of the payment is sufficient to cover the actual cost of the provision necessary to meet the disabled child's assessed social care needs.

Local authorities should not be required to make a direct payment if:

(1) the direct payment would have an adverse impact on other services which the local authority provides or arranges for disabled children; or

(2) securing the proposed agreed provision by direct payments would not be an efficient use of the authority's resources.

Local authorities should be required to keep direct payments under review so that their sufficiency can be monitored and alternative arrangements made if the payment is insufficient or the family have not been able to secure the services required. This review process should be aligned with the review of the disabled child's care plan that we recommend in Chapter 10.

The statutory guidance we recommend in Chapter 2 should clarify that direct payments can only be made with the consent of the person to whom the payment will be made.

Paragraph 9.26

Recommendation 24.

There should be a right to a personal budget in disabled children's social care, on request by any disabled child aged 16 or 17, or their parent or carer, who has capacity within the meaning of the Mental Capacity Act 2005.

A local authority should not be required to prepare a personal budget in disabled children's social care where disaggregation of the funds for the personal budget would:

(1) have an adverse impact on other services provided or arranged by the local authority for disabled children; or

(2) not be an efficient use of the local authority's resources.

Paragraph 9.41

Recommendation 25.

Disabled children who are eligible to have their needs met by social services should have a statutory entitlement to a plan setting out what services they are to receive, and where, when, how and by whom those services will be provided.

Local authorities must provide disabled children and their parents or carers with a copy of their plan.

Local authorities must keep these plans under review.

Paragraph 10.24

Recommendation 26.

The statutory guidance we recommend in Chapter 2 should set out requirements as to the process and content of the plan to meet the needs of a disabled child.

Paragraph 10.35

Recommendation 27.

The plan to meet the needs of a disabled child should be combined with other plans for the child if it is appropriate and practical to do so.

The statutory guidance we recommend in Chapter 2 should provide examples of when it may be appropriate and practical to combine plans, and how this can be done effectively for each of the different plans a disabled child may have.

The statutory guidance we recommend in Chapter 2 should set out who has oversight of a combined plan and who should contribute to a combined plan.

Paragraph 10.43

Recommendation 28.

Any disabled child who has the ability to take the relevant action or make the relevant decision should be entitled to:

(1) request an assessment of their social care needs;

(2) make representations in the course of that assessment;

(3) make representations about the content of any plan to meet their needs;

(4) opt out of advocacy support, where a duty to provide such advocacy is otherwise owed;

(5) request that services are provided by way of direct payments; and

(6) make use of relevant remedies.

Paragraph 11.26

Recommendation 29.

In deciding whether a child aged 16 or 17 has the ability to make a decision or take an action of the type described in paragraph 11.26, a local authority should apply the capacity test in sections 2 and 3 of the Mental Capacity Act 2005.

For children under the age of 16, the local authority should apply a test based on functional element of the capacity test in section 3 of the Mental Capacity Act 2005, and should regard the child as able to make the decision if they are able to understand, retain, use and weigh the relevant information, and communicate their decision.

Paragraph 11.36

Recommendation 30.

A local authority should be required to carry out an assessment of the social care needs of a disabled child where the child is seeking to opt out of such an assessment if the child is experiencing, or is at risk of, abuse or neglect.

Paragraph 11.39

Recommendation 31.

A disabled child should have the right to an independent advocate when the local authority is assessing and planning to meet their social care needs if they would otherwise experience substantial difficulty in understanding, retaining or using and weighing information, or communicating their views, wishes and feelings.

This should not require a local authority to arrange an advocate if: there is already an appropriate person to represent and support the child; or a child with the ability to refuse an advocate, does so.

Paragraph 12.25

Recommendation 32.

The parent or carer of a disabled child should have a right to an independent advocate when the local authority is assessing their needs as a parent or carer, if they would otherwise experience substantial difficulty in understanding, retaining or using and weighing information, or communicating their views, wishes and feelings.

This right would not require a local authority to arrange an advocate if: there is already an appropriate person to represent and support the parent or carer; or a parent or carer with the ability to refuse an advocate, does so.

Paragraph 12.32

Recommendation 33.

The assessment of whether a disabled child is likely to have needs for care and support after becoming 18 and, if so, what those needs are likely to be, should begin by the school year in which they turn 14.

The statutory guidance we recommend in Chapter 2 should clarify that this process can begin earlier if the local authority regards that as appropriate. In deciding whether it is appropriate to start the process earlier, local authorities should have regard to the need to prepare the child for adulthood and independent living.

Paragraph 13.16

Recommendation 34.

Legislation should set out the existing dividing line between social care and health care for children, based upon the quality and quantity of the care being provided, emulating section 22(1) of the Care Act 2014.

Paragraph 14.29

Recommendation 35.

The statutory guidance we recommend in Chapter 2 should contain a section, co-produced between local authority and NHS representatives, and parents and carers, addressing the intersection between social care and health care in relation to children. It should make the following matters clear.

(1) How children with health care needs are to be identified, and by whom.

(2) Local authority responsibilities to meet the health care needs of disabled children.

(3) NHS responsibilities to meet the health care needs of disabled children.

(4) Expectations for joint working and joint accountability where local authority and NHS responsibilities overlap in the meeting of such needs.

(5) What mechanisms exist for dispute resolution.

(6) An expectation that disputes as between local authority and NHS organisations should not affect the meeting of the needs of the child in the interim.

Paragraph 14.44

Recommendation 36.

There should be a single provision setting out when a local authority with responsibilities under section 117 of the Mental Health Act 1983 is required to assess a disabled child's social care needs. That provision should be contained in the single assessment duty recommended in Chapter 5.

Paragraph 14.54

Recommendation 37.

Local authorities, and their partner integrated care boards, should be required to prepare a joint strategic needs assessment covering the social care needs of disabled children in the area. This requirement should replace the requirement for local authorities to open and maintain a register of disabled children in their area.

Paragraph 15.18

Recommendation 38.

Local authorities should be required to have a designated social care officer. Further operational detail about the role – such as the level of seniority – should be set out in the statutory guidance we recommend in Chapter 2.

Paragraph 16.21

Recommendation 39.

There should be a fair, accessible, independent and effective system for resolving disputes about social care for disabled children. Further work is required on the part of Government to decide what the appropriate system should be.

Paragraph 17.26

Recommendation 40.

The SEND Tribunal should have an express power to recommend that a local authority carry out a social care assessment in an extended appeal.

Paragraph 17.30

Appendix 1: Terms of Reference

To review the laws relating to the provision of support and services for disabled children in England, and the wider legal frameworks in which they are contained; with a view to making recommendations aimed at simplifying and modernising them, and at promoting clarity and consistency of understanding as to entitlements.

The review will focus on the provision of support and services in the context of family-based care. In particular, it will not extend to deprivation of liberty or secure accommodation of disabled children.

The review will consider whether existing duties (specifically the inclusion of disabled children as children in need under section 17 of the Children Act 1989) and accompanying statutory guidance sufficiently meet the specific needs of disabled children and their families.

In carrying out this review, the Law Commission will have regard to the Government’s wider work on children’s social care, and how the legislation relating to disabled children aligns with other parts of the statute book concerning social care, support for Special Educational Needs and children’s rights more generally.

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