Law
Commission
Reforming the law

# Disabled Children's Social Care

## Large Print Summary of the Final Report

# THE LAW COMMISSION'S PROJECT ON DISABLED CHILDREN'S SOCIAL CARE LAW

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| 👥 | **Who are we?** | We are the Law Commission of England and Wales. The Law Commission is an independent body established by statute to make recommendations to Government to reform the law in England and Wales. |
| ? | **What are we doing?** | We have been asked to review disabled children's social care law in England. The purpose of the review is to make recommendations aimed at simplifying, clarifying, and modernising the law, and making sure it sufficiently meets the needs of disabled children and their families. |
| 🔍 | **What is this document about?** | This is a summary of our final report. The purpose of this summary is to explain:<br>• the main changes that we recommend to disabled children's social care law; and<br>• why we recommend them |

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| ↖ | **Where can I find the report?** | The full report is available on our website in a variety of formats at https://lawcom.gov.uk/project/disabled-childrens-social-care/ |
| 📅 | **What happens next?** | Government will consider our recommendations and decide whether to change the law. |

## THIS SUMMARY

We have not reproduced every detail of the report in this summary. Instead, we have tried to focus on the most important issues. But if you want to know more about the law, or how and why we think it needs to change, we encourage you to look at the relevant section of the report too.

If you need this summary to be made available in a different format, please email dcsc@lawcommission.gov.uk.

## GLOSSARY

**Assessment**: the process of identifying a person's needs by collecting information and evidence.

**Child**: any person under the age of 18.

**Child in need**: a child –

- who is unlikely to achieve or maintain, or to have the opportunity to achieve or maintain, a reasonable standard of health or development without support from their local authority;
- whose health or development is likely to be significantly impaired, or further impaired, without support; or
- who is disabled.

**Children Act 1989 & Chronically Sick and Disabled Persons Act 1970**: the main pieces of legislation covering disabled children's social care law. Most social services for disabled children are provided under section 17 of the Children Act 1989 (which covers all children in need) or section 2 of the Chronically Sick and Disabled Persons Act 1970 (which covers disabled children only).

**Direct payments**: payments made by local authorities directly to individuals who have been assessed as needing certain services, so that they can buy the services for themselves.

**Education, health and care (EHC) plan**: a plan setting out a child's special educational needs, together with related social care and health care needs.

**Early Help**: a policy, under which local authorities aim to provide support to children and families as soon as problems emerge.

**Family Help**: a 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".

**Judicial review**: the process where someone makes an application to the High Court arguing that a public body has made a legal error.

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

**Safeguarding**: measures taken to protect a child and keep them safe from harm.

**Short breaks**: services to provide breaks for the benefit of disabled children and their parents or carers.

**Special educational needs (SEN)**: a child has special educational needs if they have a learning difficulty or disability which means that they need help with their education or training, over and above the help that is generally available to children of that age in mainstream educational settings.

**SEND**: special educational needs and disability.

**Social services**: the part of a local authority that deals with social care for disabled children. This is separate to the part of the authority that deals with education. But both parts fall within children's services.

**Young carer**: 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.

# 1. INTRODUCTION

## The purpose of this report

The 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 determines:

- whether a disabled child can obtain help from social services to meet their needs;
- what help they can obtain; and
- how they go about obtaining it.

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:

- simplifying and modernising the law;
- promoting clarity and consistency;
- better aligning disabled children's social care law with other areas of social care law and special educational needs and disability (SEND) law; and
- ensuring the law and guidance sufficiently meet the specific needs of disabled children and their families.

The report contains our final recommendations for reform.

## The current law

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 groundbreaking.

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 (later Lord Morris), 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".

Section 17 of the Children Act 1989 was meant to bring together the scattered legal provisions relating to services for disabled children and children in need of protection from harm. It sought to unify them 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

Over time this area of law has become more complex. It is now spread across numerous pieces of legislation 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 the law as “a maze of interacting statutory provisions, which have been subject to frequent amendment”. The authors of the leading legal textbook on disabled children, Steve Broach KC and Professor Luke Clements, describe it as “a system of baffling complexity” and that navigating it amounts to “additional tiring and frustrating work”.

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”. This definition can be traced back to the creation of the welfare state and its roots are found in legislation intended to boost the employment prospects of those injured during the Second World War. 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.

The law is also – potentially – unfair. It has been interpreted to allow local authorities to develop area-specific 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 behind the legislation.

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:

- 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*;
- those assessing the needs of disabled children do not always have expertise in the child’s disability or disability generally;
- the eligibility criteria for accessing services are often too high;
- the needs of parents, carers and siblings are often overlooked; and
- the different teams, departments, and organisations responsible for a child operate in silos and do not always work effectively with other.

## The solutions we recommend and how we have arrived at them

It is these problems, and others, that we have considered and tried to address in making our recommendations for reform. We cannot solve all of the problems we have heard about during this review through law reform. 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, the big decisions about the size of the welfare state and how it should be funded are decisions for the

Government and not for us.

Our recommendations for reform are based on provisional proposals contained in our consultation paper on disabled children's social care. We carried out a full public consultation on our proposals between 8 October 2024 and 31 January 2025. We received 176 written responses, many of which were from organisations representing multiple people or groups. In addition, both before and during the consultation we were fortunate to meet with around 1,000 stakeholders at approximately 150 meetings and events.

The majority of those we met with 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 described to us the realities of caring for a severely disabled child with limited support. The consequences of insufficient support which they reported to us included instances of serious injury to the child or members of their family, care proceedings, loss of employment, loss of home, and, in a few exceptional cases, the death of the child. The local authority representatives, for their part, were dedicated to trying to help these families but often operating with limited resources and significant workloads.

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. They have finite resources to strike this balance and in doing so may err on the side of caution to avoid serious harm arising from 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 our report we have tried to balance the many and varied views we have heard during this review to identify workable recommendations to simplify, clarify and modernise disabled children's social care law, and ensure that it is fit for purpose.

## Thanks and acknowledgements

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. Many have done both. We are extremely grateful to all of those who have taken time away from their significant caring and professional responsibilities to contribute to the review.

## Next steps

Our report will be laid before Parliament in September 2025. The Secretary of State will provide an interim response to the recommendations in the report within six-months of publication. A full response setting out which recommendations the Government intends to accept, reject or implement in modified form will be provided within one year.

# 2. A NEW LEGAL FRAMEWORK

## The problem

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. It is supplemented by various different pieces and types of guidance, combined with numerous important court decisions interpreting the law. There is no single piece of guidance or legislation which a family or local authority can go to, to find out what their rights and responsibilities are.

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 of the Children Act 1989 has the dual functions 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. The report 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”. The trend has been referred to in academic research as “parent carer blame”. Specific examples we were given which gave rise to this perception of blame included:

- children being interviewed on their own during assessments;
- children’s bedrooms being inspected;
- assessors looking in fridges and checking mattresses; and
- parents and carers being encouraged to attend courses where they could learn basic parenting skills.

Some of these practices may be appropriate in certain cases. For example, it might be necessary to see a disabled 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 were “navigating a system that is set up for child protection, not support”.

## The solution

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. In making this proposal, our thinking was 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;
- strike better 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, reducing the tendency for "parent carer blame"; and
- make it simpler to introduce the other legal changes we proposed.

The question of whether we should have a separate legal framework taking disabled children out of section 17 was perhaps the most important and divisive issue that we consulted on. However, there was still much common ground between consultees.

Of those who disagreed with the proposal, no one was 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 suggestions that, when it comes to disabled children, there is sometimes too much focus on safeguarding them from harm and abuse. Nor did they disagree that parents and carers 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 – endorsed 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 main concern expressed by those who opposed the proposal 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 it a risk of unintended consequences. In particular, a separate law focusing only on disability related needs might:

- make it harder to identify and meet the wider needs of disabled children, such as needs relating to poverty, racism, bullying or poor housing;
- lead to the segregation of disabled children and the deprioritsation of this area of social work;
- complicate, rather than simplify, the law, adding to the list of legislation which families and professionals have

to navigate; and

- make it harder to identify cases where a disabled child faces a genuine risk of harm or abuse.

In light of all this, we think that we correctly identified the problem in our consultation paper, but the solution we proposed was not the right one. 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.

## Recommendations 1 and 2

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. This should provide 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 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.

**Recommendations 1 and 2 (cont.)**

This guidance should include material which helps local authorities to ensure that there is a more 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 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.

## 3. The Definition of Disability

The definition of disability in 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.*

In contrast, SEND law uses the definition of disability found in the Equality Act 2010. Under that definition, a person has a disability if:

- they have a physical or mental impairment; and
- the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

Regulations made under the Equality Act 2010 exclude addiction and certain behaviours (such as “a tendency to physical or sexual abuse”) from amounting to impairments.

## The problem

In our consultation paper, we identified two problems with the definition of disability in the Children Act 1989. 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

We proposed that the definition of disability contained in 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. We did not, however, propose to adopt the exclusions from the definition of disability contained in the Equality Act regulations, such as addiction and a tendency to physical abuse. This was because we were concerned that they 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, from receiving social care.

Most consultees supported the proposal to use the Equality Act 2010 definition. One legal expert described it as the "only sensible and legally coherent approach". Of those who were opposed to the proposal, some objected to the use of the word "impairment" in the Equality Act 2010, which "carries negative connotations and may not accurately reflect the diverse range of conditions which can affect a child's ability to perform daily activities". Others – for example, parents of adoptive children – were concerned that the definition would not work well for adopted children who had experienced trauma, who may struggle to obtain a diagnosis.

A majority of consultees agreed that the exclusions from the definition of disability contained in the regulations should not apply, in order to ensure that the definition of disability is inclusive. For example, one NHS integrated care board 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.

## Recommendation 3

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

- they have a physical or mental impairment; and
- the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

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:

- clarify that a recognised medical diagnosis is not needed to satisfy this definition of disability;
- clarify that the definition can encompass the diverse range of conditions which can affect a child's ability to perform daily activities; and
- address the particular circumstances of disabled children in adoptive families.

## 4. Statutory Principles

Statutory principles are legal propositions which guide the application of the law. For example, in child care law, when a court has to make a decision about a child's upbringing, section 1(1) of the Children Act 1989 says that "the child's welfare shall be the court's paramount consideration". In applying a principle, legislation will sometimes require particular things to be taken into account. For example, in adult social care law, in applying what is sometimes referred to as the "well-being principle", social services must have regard to the adult's views, wishes, feelings and beliefs.

### The problem

At present, there are no statutory principles governing the provision of social care for disabled children. In contrast, statutory principles are a feature of Part 1 of the Children

Act 1989, the Mental Capacity Act 2005, and the Care Act 2014. 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

With a view to replicating these positive effects, we proposed that statutory principles should be introduced to disabled children's social care law.

The principles that we proposed were a mixture of:

- requirements under other closely related legislation (such as SEND law) which we would like disabled children's social care to align more closely with;
- matters that should be considered when working with disabled children but are sometimes overlooked; and
- 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.

The majority of consultees were in favour of the principles we proposed.

## Recommendation 4

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

- an overarching principle that the best interests of the child should be a primary consideration;
- a set of considerations to which decision-makers must have regard in applying that principle; and
- 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 should consist of:

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

**Recommendation 4 (cont.)**

- the views, wishes and feelings of the child;
- the views, wishes and feelings of the child’s parents or carers;
- the parents’ or carers’ knowledge of their child’s condition and needs;
- 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;
- the importance of preventing or delaying the development of the needs for care and support;
- the need to prepare the child for adulthood and independent living; and
- the characteristics, culture and beliefs of the child (including, for example, language).

## 5. Assessing the child’s needs

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”. 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.

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.

## Obtaining an assessment

### The problem

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.

Research we conducted, looking at 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 differed from the legal threshold described above.

The second problem is 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, a child detained in hospital under the Mental Health Act 1983 may be entitled to "aftercare" following their discharge from hospital. A child 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 at the same time. But it is necessary to look at five different pieces of legislation and case law to know that this is the case.

The third problem is that it is not always clear 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, the powers and duties to carry out education, health and care (EHC) needs assessments for children with special educational needs, or Early Help assessments.

## The solution

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.

We asked for 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 prior to the consultation 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 also proposed that the different assessments a disabled child might need should be combined where possible, to avoid families having to retell their stories.

Most consultees were in favour of having a single express duty to assess the social care needs of disabled children. This was seen 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.

However, there was no clear consensus over the threshold for obtaining an assessment. Some consultees were in favour of retaining the existing threshold. They saw no case for changing the law and were worried that a higher threshold might create a risk of disabled children missing out on essential support. Others favoured a threshold based on the adult social care legislation, which is not focused on whether a person may have a disability but whether they may need care and support. Others favoured a higher threshold – for example, a threshold based on whether the child “may” be eligible for care and support, or is “likely” to be eligible – often based on resource considerations. Some were in favour of a threshold based on the approach taken in Wales, which gives a right to an assessment if it appears that a child may need care and support in addition to, or instead of, that provided by their family. This was seen as a way of ensuring that “the state only intervenes on the basis of supporting and strengthening families rather than usurping or displacing their role”.

We recognise the importance of the resource concerns raised by local authority consultees. However, there are also resource concerns if the threshold is set too high. Deciding whether a child “may” need care and support, or is “likely” to need care and support, may require considerable investigation; in effect, a pre-assessment assessment. Having too high a threshold also carries a material risk that some children who need and are entitled to an assessment do not get one, as they are judged (wrongly) not to meet the threshold. This could lead to costly litigation.

More fundamentally, our objective here is to simplify and clarify the law. Our objective is not to make it harder for disabled children who want and need support, to obtain an assessment.

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. 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. We do not dismiss the concerns about deliverability and resourcing raised by consultees in favour of a higher threshold. However, we think that our recommendation on having proportionate assessments (see below) addresses this.

We agree 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 below. Family 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.

The majority of consultees supported the idea that the different assessments a disabled child might need should be combined where possible. However, several consultees emphasised that this will not always be appropriate and that there should be some flexibility.

A number of consultees queried the interaction between our proposals on assessments with Early Help assessments, and the Government's Family Help reforms. (Early Help and Family Help are Government policy initiatives which require or encourage local authorities to provide social care in a particular way.) Some consultees were worried that disabled children's social care assessments might replace Early Help assessments. For example, one local authority 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.

We do not think that having a single, statutory duty to assess the social care needs of a disabled child will replace or duplicate Early Help or Family Help assessments. Nor do we think that Early Help or Family Help could be used to circumvent the assessment duty we recommend. Early Help and Family Help are policy initiatives and not statutory services. An assessment that meets the statutory requirements we recommend 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 legal requirements, not what the assessment is called. Conversely, an Early Help or Family Help assessment that does not meet the statutory requirements will not be sufficient by itself but could be combined with the assessment we recommend. All of this can be explained in guidance.

### Recommendations 5 to 8 and 11

There should be a single statutory duty to assess the social care needs of disabled children. Families should be entitled to a written copy of this assessment.

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

- is disabled; and
- may have needs for care and support arising from their disability.

**Recommendations 5 to 8 and 11 (cont.)**

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.

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

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

The statutory guidance should explain the relationship between the assessment duty we recommend, and assessments carried out under Early Help and Family Help.

## The process and content of assessments

### The problem

The requirement to carry out an assessment raises a number of practical questions, such as how it should be carried out and by whom. The answers to these questions are largely not set out 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. 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. For example, we were told that assessments are not always carried out by an appropriate method and that assessors may lack training, experience and understanding of disability, particularly concerning conditions such as autism.

## The solution

In our consultation paper, we proposed a requirement that assessments be “proportionate” and “appropriate” to the circumstances of the child and their family. This proposal sought to allay concerns that putting the duty to assess on a statutory footing would lead to more assessments being carried out, when there are not enough resources to do so. It also sought to meet the concern that a statutory assessment duty would result in unnecessary intrusions into the lives of disabled children and their families. Our aim with this proposal was to emphasise that not all assessments have to be onerous, complex or time consuming. 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 of the assessment. Conversely, 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.

By “appropriate”, we meant that the assessment should be conducted in a way which works best for the child, taking into account their needs. This requirement was intended to address concerns we heard in the lead up to the consultation that assessments are not always completed by suitable 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 was non-verbal.

The majority of consultees agreed that assessments should be “proportionate” and “appropriate”.  A key theme raised by those in favour of the proposal was that it would save time and resources. 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. However, a number of consultees (both in favour and against the proposal) emphasised the need for clarity on what the words "proportionate" and "appropriate" mean, with some suggesting that the terms are too vague.

We also proposed that assessors should be required to have appropriate expertise and training. 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 that they approach a disabled child's assessment in the same way as for a child with safeguarding concerns. This would bring the legal requirements for disabled children in England closer in-line with the requirements that apply to adults and young carers in England, and those that apply to children and adults in Wales. We thought that this could help address the concerns of parents and carers regarding the quality of assessments.

The majority of consultees supported the idea that assessors should be required to have appropriate expertise and training. This was seen as a way to improve assessments, avoid inappropriate practice and ensure a more holistic approach to assessing needs.

**Recommendations 9 and 10**

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.

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.

## 6. Assessing the needs of parents, carers and siblings

### Parents and carers

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 to effectively 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 and carers without parental responsibility, meaning that the law treats these two groups differently when it comes to assessing their needs.

## The problem

Both before and during our consultation we identified a number of problems with the law and how it is applied. For example:

- the law, which is spread across three statutes, is inaccessible;

- assessments for parents and carers are not always offered or undertaken even when they are requested, or if they are undertaken, they do not necessarily result in support being provided;
- there is sometimes a focus on whether the child's needs are being met, at the cost of considering other relevant matters such as sleep deprivation and the emotional toll of looking after a disabled child; and
- there are inconsistencies in the legal frameworks for assessing parent carers’ needs and assessing the needs of carers without parental responsibility. This means, among other things, that it is harder for a carer without parental responsibility to obtain an assessment.

## The solution

Some of these problems will be mitigated by the recommendations made in other sections of our report. But to make the law clearer and promote compliance, and to remove the inconsistencies, we proposed that there should be a single, statutory duty to assess the needs of a parent or carer for a disabled child, irrespective of whether they have parental responsibility. This would mean that a kinship carer – such as a grandparent – who lives with and cares for a disabled child but does not necessarily have parental responsibility for them, should have the same right to an assessment as the child’s parent.

The majority of consultees agreed with this proposal, with one legal expert describing it as a way to "solve one of the most stark and difficult problems with the current statutory scheme". Some, however, felt that our proposals did not go far enough and that more should be done to promote and clarify the legal duties. Others were concerned that the assessment of a parent's or carer's needs should not be carried out in isolation and might need to be combined with the child's or sibling's assessment to ensure it is holistic.

## 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:

- have regard to the well-being of the parent or carer; and
- provide the parent or carer with a written copy of their assessment.

The statutory guidance we recommend should clarify:

- the rights of parents and carers to have their needs assessed and the requirements of such assessment; and

**Recommendation 13 (cont.)**

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

## Siblings

It has been estimated 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. 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.

### The problem

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:

- where meeting the sibling's needs may be necessary to meet disabled child's needs;
- where the sibling is a "child in need" in their own right; and

- where the sibling is a "young carer" to the disabled child.

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.

## The solution

To respond to this, we proposed that:

- guidance should direct local authorities to consider siblings' needs during the assessment of the needs of the disabled child; and
- there should be a single duty to assess the needs of all carers, whatever their age. This would mean that young carers would be assessed under the same legal duty (described above) as parent carers, streamlining and simplifying the law.

The majority of consultees were in favour of both of these proposals, However, some consultees with particular expertise in this area were concerned that having one duty to assess carers, irrespective of their age, might have unintended consequences. For example, the charity Sibs said 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 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.*

We acknowledge that 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 of young carers. 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.

**Recommendation 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 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.

## 7. The powers and duties to meet the needs of disabled children and their families

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 a range of social services including personal care in the home, adaptations to the home and certain types of short break provision.

## The problem

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

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 introduced 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.

In the autumn of 2024 and the early spring of 2025, we conducted our own research into eligibility criteria used by local authorities. 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.

## The solution

To mitigate these problems, in our consultation paper we proposed that there should be a single statutory duty to meet the social care needs of disabled children, subject to national eligibility criteria. 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, we proposed, should be by providing short breaks. These are a vitally important service which can help avoid caring arrangements breaking down.

To complement this, we proposed that 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.

A majority of consultees were in favour of these proposals, taking the view that they would make the law clearer and more accessible. Another recurrent theme among responses in favour of the proposals was that the reforms would promote consistency across the country and reduce the extent of the postcode lottery. This was viewed by many as a way of tackling the unfairness associated with the current system.

However, 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. This concern was shared by some of those who supported the proposals in principle.

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. The picture that emerged was that, in general, local authorities are not currently charging families for disabled children's social care services. However, a significant number of local authorities said that the authority might need to consider charging in future if the proposals in this consultation were implemented.

We remain of the view that a system where a disabled 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 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.

However, we cannot disregard the real and pressing practical concerns that have been raised about the financial 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. We were told that not enough consideration was given to the implementation of the 2014 legislation, and that the rights guaranteed 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. 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 have serious unintended consequences. These include the following possibilities:

- that restrictive national eligibility criteria are introduced out of financial necessity, making it harder for disabled children to access social care than is currently the case in many areas of the country;
- that local authorities start charging for services that are currently free; and
- that local authorities are unable to comply with their obligations, leading to costly litigation.

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 consequences 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.

Taking into account these issues, our recommendations are as follows.

### Recommendations 16 and 21

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 this change, 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 should be published for local authorities to have regard to

**Recommendations 16 and 21 (cont.)**

when drafting their own local criteria.

Alongside the single duty we recommend, local authorities should continue to have powers to:

- meet the social care needs of a disabled child that do not satisfy the eligibility criteria;
- meet the social care needs of a disabled child pending an assessment; and
- provide services to parents, carers and family members, with a view to safeguarding or promoting the disabled child's welfare.

## 8. The range of services that should be available

Under section 17 of the Children Act 1989 local authorities can provide a broad range of services to safeguard and promote the welfare of disabled children. Section 17 does not contain an exhaustive list of things that can and cannot be provided. But it gives examples of things that can be provided, including accommodation, assistance in kind (which means goods and services other than money) and cash.

Section 2 of the Chronically Sick and Disabled Persons Act 1970 is different. Under section 2 there is an exhaustive list of things that local authorities can provide to meet the needs of disabled children. The list includes providing “wireless, television, library or similar recreational facilities”, practical assistance for the child in their home and assistance in arranging adaptations to the home. If a child needs something that is not on the list, it can’t be provided under section 2.

## The problem

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 referred to wireless internet.

## The solution

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. 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 preferable to no list, as a means of promoting clarity and thereby avoiding disputes. The majority of consultees were in favour of this approach.

## 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:

- accommodation;
- the provision of care and support at home or elsewhere;
- educational or leisure activities;
- services to assist families;

- counselling and other types of social work;
- goods and facilities;
- assistance with travel arrangements;
- information, advice and advocacy;
- specialist equipment; and
- adaptations to the home.

## 9. The methods for providing services

There are three ways in which local authorities can secure the provision of services for a disabled child or their family.

- By providing those services directly, for example in the form of support from a local authority social worker.
- 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.
- By providing money to the parent or carer of the disabled child, or the child themselves if they are old enough, so that they can purchase the service for themselves. These are known as “direct payments”.

### The problem

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.

- 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.
- 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.

- 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.

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

In our consultation paper we proposed that the direct payment regime should be amended as follows.

- The payment should be "sufficient" to secure the provision needed. This contrasts with the current position, where the payment is of 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.
- 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 identified through the review process and the local authority could arrange to provide the service directly. There is currently no such review requirement.

These proposals would align the disabled children's social care direct payments regime more closely with the regime in the SEND system.

The majority of consultees supported these proposals. However, a number of consultees raised concerns that they would be unaffordable, requiring local authorities to fund premium services, or that they would distort the market.

Separately, several consultees raised issues relating to parental choice. They reported incidences of families "being coerced into direct payments where [the local authority] have been unable to secure provision due to a lack of suitable provision locally".

We think that the financial impact of these proposals 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.

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 think this risk can be addressed by adapting our 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. The SEND regulations provide a model which would help us to address these concerns, while still tackling the underlying problem, whereby a local authority can only make a direct payment if it is satisfied that:

- 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 plans; and
- securing the proposed agreed provision by direct payments is an efficient use of the authority's resources.

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.

This approach would also help to create consistency between the SEND 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 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 adapted approach will require local authorities to consider 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.

**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:

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

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.

## 10. The plan to meet the needs of a disabled child

### The problem

In the social care context, a plan is a document which sets out what services are to be provided, where, when and by whom. The legislation does not say expressly that disabled children who receive social care are entitled to a care plan. But government guidance and the courts have said that disabled children (and other children in need) are entitled to a plan. Our view was that these requirements would benefit from being made clearer and more accessible.

In addition, there are various other plans (such as an EHC plan) which must be prepared by local authorities for children for whom they are responsible. Some of these plans are not produced solely for disabled children. But disabled children may be entitled to one or more of these other plans too. In our consultation paper we expressed the view that the relationship between the different types of plans is not always clear and that a child may end up with multiple plans covering the same or very similar material, meaning that they may often have to repeat the same information to various professionals.

## Solution

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.

In proposing this, our intention was to codify the 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:

- what services the child is to receive;
- where those services will be provided;
- when those services will be provided; and
- how those services will be provided (which includes who will provide them).

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.

The majority of consultees endorsed this proposal, although several highlighted a need to review the law relating to social care plans for children in need more generally, and not only those for disabled children. A number of consultees also emphasised the need to keep the social care plan for a disabled child under review as their needs may change.

We also 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. The majority of consultees agreed with this proposal, taking the view that it would clarify the law. It was felt that this would promote joint working and reduce the need for families to retell their stories. However, some consultees raised practical concerns with the proposal, drawing our attention to situations where it might not be appropriate to combine plans.

## Recommendations 25 to 27

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.

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.

# 11. Decision making by disabled children

## The problem

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. However, in practice, it can be difficult to secure the participation of disabled children as there is a lack of clarity and consistency relating to:

- which decisions disabled children can take for themselves; and
- the legal test to determine whether the child has the ability to make the decision.

## The solution

We proposed that disabled children should have the right to make certain decisions or take particular steps for themselves. For example, disabled children with the ability to do so should be able to request an assessment. This follows the approach in SEND law. However, in contrast to SEND law, we did not think this right should be limited to 16- and 17-year-olds. We thought that the level of understanding and decision-making ability of the child was more important than their age. Accordingly, for children over the age of 16, we proposed that the right should be available to any child who has "capacity" within the meaning of the Mental Capacity Act 2005. The capacity test does not apply to children under the age of 16 and so we asked consultees what test they thought should be applied to children in this age group.

Most consultees agreed with our proposals that disabled children should have the right to make certain decisions or take particular steps for themselves. The majority of consultees also agreed that this right should be available to any child over the age of 16 who has capacity to make the decision in question.

The test to be applied for children under the age of 16 was a more difficult issue. Some consultees favoured a test that was based on the capacity test, with some adaptations made to make it suitable for younger children. Others were strongly in favour of using the test of "*Gillick* competence" – a test developed by the courts to decide whether a child has the maturity and understanding to make decisions about medical treatment. We decided that the first option was more suitable, as it is clearer and easier to apply.

**Recommendations 28 and 29**

Any disabled child who has the ability to take the relevant step or make the relevant decision should be entitled to:

- request an assessment of their social care needs;
- make representations in the course of that assessment;
- make representations about the content of any plan to meet their needs;
- opt out of advocacy support, where a duty to provide such advocacy is otherwise owed;
- request that services are provided by way of direct payments; and
- make use of relevant remedies.

In deciding whether a child aged 16 or 17 has the ability to take a step or make a decision, 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.

# 12. Advocacy

## The problem

An advocate is someone who assists a disabled person to speak up for themselves, or if the disabled person is unable to do so, to communicate and represent their needs and wishes. Advocacy is one of the ways in which a child or their parent can be helped to participate in decision making.

Under the current legal framework in the Children Act 1989, disabled children (among others) are entitled to advocacy to help them to make representations about the way the local authority is carrying out its social care responsibilities. It is not clear whether this includes advocacy while the needs of a disabled child or their parent or carer are being assessed, or is restricted to the making of complaints. That lack of clarity is a problem. On top of that, there is no requirement for the advocate to be independent. That can also be a problem as the role of the advocate is to represent the child's interests even if they conflict with the interests of the authority. That may be difficult if the advocate is not independent.

This is quite different to the adult social care system. Under the Care Act 2014, adults who need care and support – as well as their carers – have a right to representation and support for the purposes of facilitating their involvement in the process of assessing and planning to meet needs. This is available automatically where, without an advocate, they would have difficulty in understanding, retaining and weighing up information, or communicating their views. The exception to this is that the local authority doesn’t have to appoint an advocate if they are satisfied there is already an appropriate person who can support the individual’s involvement.

## The solution

We proposed that the same approach should apply to disabled children’s social care. The majority of consultees agreed with this. Although a number of consultees highlighted that care would be needed to avoid undermining the role of parents and carers, and to manage situations where the views of the child and their parent or carer diverge. Others pointed out that there was a case for extending our proposals on advocacy to all children in need, and not just disabled children.

Most consultees were also in favour of our proposals on advocacy for parents and carers. However, some consultees were concerned that this could lead to a more adversarial environment and would be difficult to implement if not sufficiently resourced.

### Recommendations 31 and 32

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

**Recommendations 31 and 32 (cont.)**

otherwise experience substantial difficulty in understanding, retaining or using and weighing information, or communicating their views, wishes and feelings.

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 for a disabled child or their parent or carer if: there is already an appropriate person to represent and support them; or they have the ability to refuse an advocate, and do so.

# 13. The transition to adult social care

## The problem

In the work we carried out leading up to our consultation, we were told that disabled children often face a “cliff-edge” at the age of 18. We were told that the support they receive often stops or changes fundamentally, and the child and their family are frequently not prepared for this. This was reported to be a significant problem. Many of the disabled children and young people we spoke to reported that they felt unprepared for adulthood and independent living.

## The solution

We asked consultees whether there should be a particular age, set out in legislation, at which transition planning should start. We also asked what that age should be.

Some consultees were opposed to having a set age, arguing that a flexible approach was more appropriate. However, the majority thought that a set age would be beneficial. Of these, most thought that either 14 or 16 would be the appropriate age. Our view is that 14 is the appropriate age as this is consistent with the approach taken in SEND and in health care.

### 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 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.

# 14. The intersection between health and social care

## The problem

The social care needs of disabled children are met by social services. The health care needs of disabled children are met through the NHS. Local authorities can charge for social care. Health care, on the other hand, is usually free. This means that deciding whether the needs of a disabled child are social care ones or health care ones is really important: it dictates who meets the needs and who pays for them. But this is not always straightforward, particularly for children with complex needs. We were told that disputes between local authorities, the NHS and integrated care boards are common. Part of this comes down to the fact that the boundary between health and social care is not easy to identify and varies depending on the quality and quantity of care being provided.

## The solution

For adults, the dividing line between health and social care is set out in statute. We proposed that the dividing line should be set out in statute for children too, and supplemented by guidance, to help clarify the law and the respective responsibilities of health and social care. The majority of consultees were in favour of our proposals, seeing them as a way to promote clarity and accountability. However, a number of consultees were concerned to ensure that we did not make recommendations which resulted in services that are currently free becoming chargeable.

## Recommendations 34 and 35

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.

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.

- How children with health care needs are to be identified, and by whom.
- Local authority responsibilities to meet the health care needs of disabled children.
- NHS responsibilities to meet the health care needs of disabled children.
- Expectations for joint working and joint accountability where local authority and NHS responsibilities overlap.
- What mechanisms exist for dispute resolution.

**Recommendations 34 and 35 (cont.)**

- 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.

## 15. Identifying need in the local area and securing sufficient services to meet that need

### The problem

Identifying the social care needs of the local population is the first step towards making sure that the right services are available at the right time, so that those needs can be met. However, in the lead-up to this consultation we were told that services aren't always available in the local area to meet the needs of disabled children and their families. Consultation reinforced this.

### The solution

To help us understand whether changing the law could mitigate this problem, we asked consultees (local authorities in particular) to tell us about the different legal tools they use to identify need in their local area and commission appropriate services. We also carried out our own research, looking at the different local assessments and registers made publicly available by local authorities. Practice across the country, we found, is not consistent. Some local authorities maintained a register of disabled children –

a legal requirement first introduced in the 1970s. Some used their SEND data to help understand need in the local area. Others used a more modern legal tool, known as a “joint strategic needs assessment”. However, of the joint strategic needs assessments we looked at, many did not specifically cover social care for disabled children. That is a problem as there are various legal obligations relating to the commissioning of services, which are difficult for local authorities to achieve if their joint strategic needs assessment does not cover social care for disabled children.

### 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 their areas. This requirement should replace the requirement for local authorities to open and maintain a register of disabled children in their area.

## 16. Co-operation and joint working

### The problem

There are lots of different statutory duties requiring the different teams and public bodies responsible for disabled children’s social care, health care and SEND to co-operate. We heard that this does not always happen in practice, and the various teams and bodies sometimes work in silos and do not always communicate or work well with each other.

### The solution

One way to promote co-operation is to have a designated person who is responsible for promoting joint working and who is senior enough to make that happen. With that in mind, and to improve joint working between social care services and the SEND system, guidance encourages local authorities:

> *to implement the role of Designated Social Care Officer (DSCO) in each local area. The DSCO will provide the capacity and expertise to improve the links between social care services and the SEND system … the DSCO role will support both operational input (such as the contributions from care to education, health and care assessments) and more strategic planning functions (such as the commissioning of care services such as short breaks) for disabled children and those with SEN.*

We asked consultees for their views on the designated social care officer role, and whether making it mandatory would be an effective change. 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 for accountable for promoting joint working. Many consultees, however, caveated their support for a mandatory role, highlighting that the role would need to be senior, standalone and clearly defined, to be effective.

**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.

## 17. Remedies

### The problem

There are various remedies which a disabled child or their parent or carer might try to pursue if they are unhappy with a decision that has been made about them or the way that they have been treated. These include internal complaints, complaints to the Local Government and Social Care Ombudsman, appeals to the SEND Tribunal and judicial review.

The parents and carers we heard from before and during our consultation told us that complaints systems (whether internal or to the Ombudsman) don’t always work for them. Judicial review is complicated, expensive (if you don’t have legal aid) and only meant to be used as a last resort. The SEND Tribunal is more accessible but it is not always an option. It can only deal with disputes about disabled children's social care where there is also a dispute about special educational needs. It only has limited powers to deal with social care disputes. Parents, carers and local authorities have expressed mixed views to us about their experiences at the Tribunal, some positive and some negative. The Tribunal also has a very large workload, meaning that appeals can take a long time.

## The solution

We asked consultees several questions about their experiences of the different remedies, to help us understand what changes might be needed to develop an effective system of remedies for disabled children's social care. 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.

However, the responses we received demonstrated that the choices that need to be made in order to design an improved system are primarily political in nature. The SEND Tribunal provides a case in point. As we note 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. Some families we spoke to were in favour of expanding the powers and jurisdiction of the SEND Tribunal to deal with social care disputes. 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 the arguments for and against this primarily raised issues of political policy or about deliverability. For example:

- the appropriateness of expanding the jurisdiction of the Tribunal to make orders about how local authorities should allocate limited resources;
- the availability of legal aid for SEND appeals; and
- 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.

As a law reform body, we cannot answer these questions; they need to be answered by elected representatives. In light of this, we do not recommend a particular system of remedies in our report. Instead, we set out a number of different options that could be pursued and highlight some of the issues that would need to be considered in choosing between those options.

### 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.

## Conclusion and what happens next

The recommendations in our report provide a comprehensive set of reforms to disabled children's social care law. The reforms we recommend represent the most substantial change to this area of law since the Children Act 1989. We believe that our recommendations will make the law clearer, simpler and fairer. Taken together, the reforms will provide a more modern legal framework, better suited to meeting the specific needs of disabled children and their families.

It is now for Government to consider and respond to the Law Commission's recommendations. Under the Protocol between the Lord Chancellor (on behalf of Government) and the Law Commission of England and Wales, the responsible Minister will respond to the recommendations as soon as possible, and in any event with an interim response within six months of publication of the Report and a full response within a year.

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