

## **The Law Commissions Report May 2011**

### **Background**

The reason for the Law Commissions report as the government advisory body was that the current framework, covered by more than 40 laws, was believed to be "outdated and flawed".

Social care law has developed "piecemeal" since the National Assistance Act in 1948, the Law Commission said. There are now over 40 separate laws and thousands of pages of guidance.

Instead, it said there should be a single piece of legislation so people were clear about their rights.

The report is the first of two reviews ministers will use to reform social care in England in the coming years.

There is almost universal agreement that social care needs reforming, as councils struggle to meet rising demand because of the ageing population amid cuts in funding.

Frances Patterson QC, the law commissioner leading the review, said she wanted existing laws and regulations "swept away" and replaced by a single adult social care statute, adding "Our role is to produce a clear, consistent and comprehensive legal framework to reform the way adult social care is delivered across the country."

She said the Law Commission also wanted to introduce a code of practice which local authorities would be required to follow "unless there was good reason not to", and it would be down to individuals to enforce their rights through the courts if they felt their care was insufficient.

The recommendations call for a duty for councils to assess the needs of carers, and say the NHS and local government should work together more closely.

### **In summary**

The law will be made clearer reforming social care delivery; the new provisions will provide clear and enforceable rights to individuals.

Proposals are that all existing laws and guidance will be removed and replaced by a code of practice.

### **What happens next?**

The Law Commission is due to report to Government in July which will be followed by a white paper at the end of this year and legislation in 2012.

# ADULT SOCIAL CARE SUMMARY OF FINAL REPORT IN RELATION TO ADULT SAFEGUARDING

## Introduction

1. Adult social care refers to the responsibilities of local social services authorities towards adults who need extra support. The legal framework for the provision of adult social care services dates back to 1948, and consists of a complex and confusing patchwork of legislation. The Law Commission's review of adult social care law was announced in 2008. The first stage led to the publication of a scoping report in November 2008. This was followed by the publication of a consultation paper in February 2010 setting out provisional proposals for law reform. The analysis of the consultation responses is available on the adult social care project page at <http://www.lawcom.gov.uk>

## Structure of reform

The new statute should establish that the overarching purpose of adult social care is to promote or contribute to the well-being of the individual. In effect, individual well-being must be the basis for all decisions made and actions carried out under the statute.

The statute would not provide a precise definition of well-being, but would set out a checklist of factors that must be considered before a decision is made in relation to an individual. Thus the decision maker would be required to:

- assume that the person is the best judge of their own well-being, except in cases where they lack capacity to make the relevant decision;
- follow the individual's views, wishes and feelings wherever practicable and appropriate;
- ensure that decisions are based upon the individual circumstances of the person and not merely on the person's age or appearance, or a condition or aspect of their behaviour which might lead others to make unjustified assumptions;
- give individuals the opportunity to be involved, as far as is practicable in the circumstances, in assessments, planning, developing and reviewing their care and support;
- achieve a balance with the well-being of others, if this is relevant and practicable;
- **safeguard adults wherever practicable from abuse and neglect; and**
- **use the least restrictive solution where it is necessary to interfere with the individual's rights and freedom of action wherever that is practicable.**

## **Adult protection**

As well as setting out the legal framework for the provision of care (*For more information, see Part 9 of the Final Report*) and support, the scheme would set out the duties and powers of local authorities to safeguard adults from abuse and neglect. The new statute would provide clearly that local social services authorities have the **lead co-ordinating responsibility** for safeguarding. As part of that responsibility, the statute would place a duty on local authorities to investigate adult protection cases or cause an investigation to be made by other agencies, in individual cases.

Where the duty to investigate is triggered, the local authority would be able to undertake the investigation itself, or it could have the duty performed through a range of *pathways* – such as by referring the matter to another agency, or initiating a multi-agency investigation. However, local authorities may still need to have an ongoing monitoring role when they involve others in an investigation. To help facilitate multi-agency working, local authorities would have a power to request cooperation and assistance from certain bodies (such as health bodies and the police) during adult protection matters, and the requested body would have to give due consideration to the request.

The duty to investigate would apply to an *adult at risk*, which would be defined through four elements:

- (i) The person must appear to have health or social care needs, including carers (irrespective of whether or not those needs are being met by services).
- (ii) The person must appear to be at risk of *harm*, rather than *significant harm* set out in the existing statutory guidance.
- (iii) The person must appear to be unable to safeguard themselves from harm as a direct result of their health or social care needs.
- (iv) The local authority must believe it is necessary to make enquiries. This may be the case because, for example, other less restrictive courses of action (such as a community care assessment) will not remove or reduce the harm and abuse.

**Harm** would be defined in the statute as including but not limited to:

Ill treatment (including sexual abuse, exploitation and forms of ill treatment which are not physical);

the impairment of health (physical or mental) or development (physical, intellectual, emotional, social or behavioural);

self-harm and neglect;

unlawful conduct which adversely affects property, rights or interests (for example, financial abuse).

### **Adult Safeguarding Boards**

The new statute would give local authorities the lead role in establishing and maintaining adult safeguarding boards. The statute would specify the following functions for these boards:

to keep under review the procedures and practices of public bodies which relate to safeguarding adults;

to give information or advice, or make proposals, to any public body on the exercise of functions which relate to safeguarding adults;

to improve the skills and knowledge of professionals who have responsibilities relating to safeguarding adults; and

to produce a report every two years on the exercise of the board's functions.

The local authority, NHS and police would each be required to nominate a member to the board with appropriate knowledge and skills. The Care Quality Commission.

The adult safeguarding board would also be responsible for commissioning serious case reviews.

The new statute **would not** set out new compulsory and emergency powers for local authorities in adult protection cases, such as powers of entry or exclusion orders, unless either Government decided that such powers were needed. Furthermore, the existing power to remove a person from their home to suitable premises under section 47 of the National Assistance Act 1948 would be repealed, on the basis that it is incompatible with the European Convention on Human Rights, has several operational difficulties and is in practice obsolete.