

Appendix 2

Relevant Adult Social Care legislation and guidance

NHS & Community Care Act 1990

Mental Health Act

FACS Guidance

Transforming Adult Social Care

Mental Capacity Act 2005 (DoL safeguards)

National Assistance Act 1948

Chronically Sick and Disabled Persons Act 1970.

NB

Equity and Excellence: Liberating the NHS :

The Government will bring together the conclusions of the Law Commission and the Commission on funding of long-term care, along with our vision, into a White Paper in 2011, with a view to introducing legislation in the second session of this Parliament to establish a sustainable legal and financial framework for adult social care.

1 Eligibility: A single framework for all services

The current structure for determining eligibility is complex and, at times, impenetrable.

Once a local authority has completed an assessment, it must decide whether to provide services. Under the current law, eligibility is determined by reference to Fair Access to Care Services (and the Welsh equivalent) and statute law, such as the National Assistance Act 1948 and the Chronically Sick and Disabled Persons Act 1970.

Instead, we propose that an assessment of social care needs and the application of eligibility criteria should be the sole way to determine a person's eligibility for services.

In effect, there would be a single eligibility framework for all community care services.

Councils would have a duty to use that framework to determine whether a person's social care needs are eligible, and a duty to provide or arrange for the provision of services to meet all eligible needs.

The duty to meet eligible needs would be strong and individually enforceable. Our statute would also impose a duty on the secretary of state and Welsh

ministers to make regulations prescribing the eligibility framework that must be used by local authorities.

Given the Department of Health's commitment to personal budgets, it is important that the law and personal budgets are more closely aligned. Our statute would enable the secretary of state and Welsh ministers to make regulations prescribing whether councils have a duty to allocate a personal budget, or whether it is optional.

2 Community care assessment: a duty on local authorities

The community care assessment process is the gateway to the provision of services.

The current legal duty to undertake an assessment is spread over three pieces of legislation: the NHS and Community Care Act 1990, the Chronically Sick and Disabled Persons Act 1970 and the Disabled Persons (Services, Consultation and Representation) Act 1986. We propose there should be a single and explicit duty placed on a local authority to undertake a community care assessment.

This would provide that, where it appears to a local authority that any person for whom they may provide or arrange the provision of community care services (or a direct payment) may have social care needs that can be met by the provision of community care services (including a direct payment in lieu of services), the authority would be under a duty to carry out a community care assessment.

The focus of that assessment would be a person's social care needs and the outcomes they wish to achieve.

Although we do not propose to put self-assessment on a statutory footing, we welcome views on whether we should make it clear that a "co-produced self-assessment" is a lawful form of assessment or should allow for a "pure self-assessment" for certain groups.

We also propose that some aspects of the assessment process - such as who should be consulted during the assessment - should be set out clearly in regulations.

3 Statutory principles: the need for clear interpretation

Unlike the Children Act 1989 and the Mental Capacity Act 2005, community care legislation contains no statement of fundamental principles. Instead, the principles must be understood by considering numerous sets of guidance and other supporting documents.

Our provisional view is that there is a compelling case for statutory principles on the face of our statute. The following general concepts might form the basis of these principles:

- Choice and control.
- Person-centred planning.
- Considering a wide range of needs.
- Prevention and early intervention.
- Independent living.
- An assumption of home-based care.
- Dignity in care.
- The need to consider safeguarding.

At this stage, we are not considering the precise wording of the statutory principles. But any statutory principle must be able to be interpreted clearly by the courts, lawyers and social workers.

4 Carers' assessments: a duty to assess all carers

There should be a single duty to assess any carer who is providing or intending to provide care to another person, and not just those providing a substantial amount of care on a regular basis.

The assessment would be triggered where a carer appears to have, or will have, needs that could be met by the provision of carers' services or by the provision of services to the cared-for person.

Local authorities should have to use a mandatory national eligibility framework in exercising their power to provide carers' services.

This would remove the ambiguity about how decisions are made on the provision of services to carers, and would mean that a carer's eligibility for support is assessed against the same framework throughout England and throughout Wales.

Authorities would also have to specify which bands they will provide services to meet.

5 Safeguarding adults: a duty to investigate

Unlike in Scotland, there are no specific statutory provisions for adult protection; the legal framework is provided through a combination of common law, local authority guidance and general statute law.

Our statute would clarify the existing legal position and establish a duty to make enquiries and take action in adult protection cases. This duty would

operate with the community care assessment duty by explicitly enabling a formal process to be initiated in adult protection cases.

The introduction of a duty to investigate would be in the context of the existing powers and duties of local authorities to intervene in cases where adults are at risk of abuse and neglect.

The duty would be distinct from any responsibility the police may have to conduct a criminal investigation, though a joint approach may be appropriate in some circumstances.

The duty to make enquiries would be triggered in cases where there is an "adult at risk".

This would be defined as an adult who has social care needs (whether or not they meet the local authority eligibility criteria) and is at risk of significant harm; where harm is defined as ill-treatment or the impairment of health or development or unlawful conduct which appropriates or adversely affects property, rights or interests (for example, theft, fraud, embezzlement or extortion).

OTHER PROPOSALS

- The introduction of a statutory care plan.
- A single code of practice for adult social care.
- A broad list of community care services.
- Section 117 of the Mental Health Act more fully integrated into community care law.
- Statutory adult safeguarding boards.
- The abolition of the compulsory removal power under section 47 of the National Assistance Act 1948.

Transforming Adult Social Care – Legislative Framework

- ***Putting People First: a shared vision and commitment to the transformation of Adult Social Care (Dec 2007)***. Social Care Reform Grant has been provided to support LAs and their partners in delivering the transformation of adult social care.
- ***Vision for Adult Social Care: Capable Communities and Active Citizens (November 2010)*** based on the partnership agreement of the consortium (ADASS, LGA, DH) – ‘Think Local, Act Personal’ The partnership agreement focuses on the delivery of personalisation, developed together with the adult social care sector, service users and carers. In addition to this, the Consortium has also produced a number of best practice guides.
- ***Community Care (Direct Payments) Act 1996***: An Act to enable local authorities responsible for community care services to make payments to persons in respect of their securing the provision of such services; and for connected purposes
- ***The Health and Social Care Act 2008 and the Community Care, Services for Carers and Children’s Services (Direct Payments) (England) Regulations 2009***, provided regulations and guidance in conjunction with the Mental Capacity Act 2005, extend the scope of direct payments to include adults lacking capacity to consent to them and lift a number of exclusions previously placed upon individuals subject to mental health legislation and provisions of criminal justice legislation relating to mental disorder.
- Social Care Reform Grant has been continued in 2011/12 as part of the Comprehensive Spending Review (although no longer ringfenced) (Stockton BC = £838,361). The funding is to be used to help Councils redesign and reshape their systems to deliver self-directed support systems and personalised services.
- The vision sets out how the Government wishes to see services delivered for people. It is a new direction for adult social care, putting personalised services and outcomes centre stage.
- The vision is the first step towards the White Paper that is intended to be published in 2011, setting out a long-term solution to the funding and delivery of care and support.

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