

### **Law Commission Consultation:**

A response on behalf of **research in practice for adults** and Partners

**research in practice for adults** is a partnership organisation that works with forty six Local Authorities throughout England. Our aim is to promote evidence-informed policy and practice in adult social care, and in the way that social care works with other agencies to support and improve outcomes for service users and carers.

We are responding to the Law Commission Consultation because we are deeply interested and involved in how people working in adult social care are enabled and empowered to work for the benefit of their customers. As part of promoting an evidence-informed way of working, we also have a role in questioning and commenting on how social care responds to what is impacting upon it.

We asked our Partners to respond to us on the key proposals contained within the consultation document. We also asked our Reference Panel, which is made up of service users and carers, to provide feedback to us.

We received a strong response from the Reference Panel and four responses from Partner Agencies. We have collated these, together with our views.

### **General Points**

The limited response from Partner Agencies may reflect a lack of time resulting from the demands placed on adult social care at present. That being so, the first point we would like to make is that it is essential that any process to review the law ensures sufficient time and space to fully engage users and practitioners. This is a particular challenge given the current demands arising from spending reviews and increased demand on services.

Our Reference Panel emphasised the difficulty of reading and absorbing all of the proposals, and stated a need for clear, easy-to-read information. On the basis of that feedback we prepared a summary document for our Partner agencies that you can view [http://www.ripfa.org.uk/images/downloads/Law Commission Consultation.pdf](http://www.ripfa.org.uk/images/downloads/Law_Commission_Consultation.pdf)

**research in practice for adults** has just completed the Dartington Review of the Future of Adult Social Care <http://www.ripfa.org.uk/publications/dartington-review> which highlights the pressures that adult social care faces and suggests some solutions. A central question facing the future of adult social care is 'what should social care be?'

The review of social care law is an opportunity to re-evaluate the role of social care in our society and to consider the follow issues:

- Should adult social care law be a process or a set of entitlements?
- Should adult social care law be universal or based on eligibility criteria?
- Should adult social care law be local or national?
- Should adult social care be about choice and control, or about protection?

We wish to emphasise the importance of ensuring that the way the law underpins adult social care promotes the principle of equity for service users and carers. We urge

the Law Commission to continue to involve all stakeholders in this fundamental debate.

It is important to note that any discussion of equity and how the law can support this leads inevitably to consideration of how adult social care will be funded in future. We believe that a debate about what adult social care will do in the future is inseparable from the debate about how it will be funded.

These key questions also lead to the debate of who will do what in adult social care in the future. We fully support the advances in service user and carer involvement, and in ensuring strong and continuous professional development for practitioners, and will continue to promote and support these.

Finally, we acknowledge that adult social care does not work in isolation. Evidence supports good partnership working between organisations as a way of improving customer experience, and increasing access and equity of service. We recognise that this consultation relates only to adult social care. However, we suggest that the law could offer a way of strengthening inter-agency working for the benefit of those accessing and using support.

### **Specific Points – Main Proposals**

#### **Introduce a coherent, effective and modern legal framework for adult social care (Part 2)**

Our Reference Panel emphasised the need for statute, rather than guidance, stating that guidance is open to interpretation and may not be legally enforceable. They also called for a uniform system, rather than a postcode lottery.

Partner organisations agreed that a single statute would avoid inconsistencies and that legislation needed to be updated to reflect modern realities. One response stressed the need for careful consideration given that this is a time of great change.

#### **Include a statement of principles in the statute (part 3)**

Our Reference Panel and Partners agreed with the use of principles. The Reference Panel stated that it was not able to define the perfect one and called for the proposed principles to fully acknowledge carers, be clear, promote personalised support and safeguard adults at risk.

One Partner response stated that it is important that any chosen principles are not too defined as these would be open to legal challenge and that they reflect that different people will want different outcomes. The main emphasis for Partners was ensuring that individuals were at the centre, that support provided is personalised, and that adults are safeguarded from abuse and neglect.

#### **A duty to undertake a community care assessment (part 4)**

Our Reference Panel fully agreed that the needs and outcomes of a service user must be the basis of any assessment and suggested that this could be the single principle on which the statute was based. They supported a duty to assess and a right to request an assessment. Co-produced assessments should be lawful and service users should be supported to work in partnership and identify both needs and strengths.

However, they raised concerns that pure self-assessment could be open to exaggerated or understated claims.

The Reference Panel also said that regulations would be helpful and that temporary services should be provided in urgent cases.

One Partner response also emphasised an outcome-based approach to assessment. There were mixed responses from Partners about self-assessment. The key question was how to define the threshold for assessment and how to ensure that assessment can be used flexibly to access different levels of services.

### **A duty to undertake a carer's assessment (part 5)**

The Reference Panel and Partners agreed that people should be able to access an assessment when providing care. The Reference Panel acknowledge the wide range of situations that carers experience. Again, the question is how to define the threshold for assessment so that it can be used flexibly, as there is a resource implication. The need for carers to be able to request an assessment was clear. There was agreement that carers should be able to have a unified assessment with the cared for person. However, this is not always appropriate. The Reference Panel stated:

*We think it is important for the home situation to be assessed jointly but with scope for carer and cared for to be spoken to separately without the other listening in to allow honest answers. This allows both parties to have their say and the assessor to have a more informed opinion about the needs of both. Carers do not want their cared for to know that they are struggling but cared for frequently have unrealistic views of their circumstances.*

The Reference Panel also supported carers being able to receive a direct payment, but expressed concern that direct payments could be open to abuse and called for there to be absolute clarity and effective monitoring.

### **A duty to determine eligible needs and to meet them (part 6 and 7)**

The Reference Panel and Partners acknowledge the need to have clarity and equity of eligibility for service users and carers. However, this means that resources must be available to meet expectations and national funding should be considered. The funding allocation should always follow an evidence based assessment.

They also agreed that the right to reablement should be accommodated in a statute if it is introduced.

### **A duty to meet needs where someone is ordinarily resident (Part 8)**

The Reference Panel fully supported clarity on 'ordinary residence' and that carers should have their needs met by the same body as supported the cared-for person. They stressed the need for continuity of support, which could be met by a portable assessment.

Partners emphasised the need for Local Authorities to co-operate and work across borders. However, they called for clarity about responsibility and flexibility in checking assessments, as well as the need to be clear about how funding follows assessments.

### **A short and broad list of adult social care services (part 9)**

The Reference Panel felt that services should be clearly defined, as this helped service users and carers to take action.

Partners called for a definition that allowed new and innovative services to be included. One response raised the concern that over-definition would limit creativity, which is a key element of the personalisation agenda. One suggestion was for the scope of social care to be defined by outcomes.

Partners asked for the statute to clearly show where responsibility lay with health and where with social care. One suggestion was for the statute to define what was *not* the responsibility of social care. However, the Reference Panel emphasised that health and social care need to operate more closely together.

### **A statutory duty to provide a care plan for eligible people (part 10)**

There was strong agreement for a care plan to be provided. The Reference Panel emphasised the need to include carers' views. Partners called for a practical document that was flexible, to ensure the focus remained on the outcomes people want to achieve to live their life as independently and inclusively as possible. One Partner pointed out that a prescribed care plan could limit creativity, for example preventing them from using video and alternative media.

### **A statutory duty on local authorities in adult protection cases (part 12)**

The Reference Panel and Partners agreed with the new terminology of *adults at risk* and with the duty of Local Authorities to take a lead on safeguarding. One Partner response queried whether only adults *with social care needs* should be considered and the Reference Panel raised the questions of subjectivity if *significant* was left undefined.

The Reference Panel also emphasised the need for co-operation and gave an example of the role of practitioners in pulling different agencies together for this.

The role of Local Authorities in safeguarding again needs to be adequately resourced.

## **Specific Points – Other Proposals**

### **Continuing health care, housing and services to destitute asylum seekers to remain out of scope (part 9)**

The Reference Panel stated that humanitarian considerations should be strong in looking at how asylum seekers' needs are met.

Partner responses emphasised the need for a clear definition of adult social care and health responsibilities in complex cases.

### **Direct payments to be extended to cover residential accommodation (part 10)**

The Reference Panel disagreed with this proposal as the sums of money would be huge, abuse is very possible and the person needing the accommodation would be made very vulnerable if someone misused the direct payment money. Their emphasis throughout for direct payments was on the need for direct payments to remain an option and for there to be other options for those who don't want the responsibility of employing their own staff.

One Partner also questioned how this would link with deferred payments and raised the concern that in many situations and overtime there is not a single person who would be prepared to manage this on behalf of the individual.

**Choice of accommodation directions and option to top-up option payment for accommodation to remain (part 10) and be extended to section 117 services (part 11)**

The Reference Panel said that there should be the right to choose accommodation and that top-ups should be possible. Partners agreed this should be extended to section 117 services.

**Secretary of State or Welsh Ministers to be able to require or authorise local authorities to charge for residential and non-residential services (part 10)**

The Reference Panel called for clarity about which services could be charged for and which could not. Again, this points to the need to agree how adult social care will be funded in the medium to long term. They emphasised the need to be fair and to avoid unnecessary bureaucracy.

One Partner stated the need to deal with inconsistencies in current charging arrangements for example the ability to charge for care and not for occupational therapy equipment.

**Statute to apply to 18 year olds and over; power to assess 16 and 17 year olds (part 11)**

The Reference Panel supported the right to request an assessment and stressed that the transition from *young person* to adult life should be *smooth*. Partners had mixed views and this points to the need for clarity about where responsibility for assessment and funding lies between agencies.

**Community care assessment to have regard to any young carer (part 11)**

Partners agreed with this proposal.

**Parent carers to have right to an assessment (part 11)**

Again, Partners pointed out the need for clarity about where responsibility lies between adult and children's services.

**Delayed discharge provisions to remain (part 11)**

Partners called for careful consideration of how this fits with discharge arrangements as a whole and suggested a review.

**Decision to be made on whether prisons come under the statute (part 11)**

Both the Reference Panel and Partners queried whether this was an appropriate use of resources.

**Section 117 services to be split so LAs have a duty to provide social care and PCTs have a duty to provide health care (part 11)**

The Reference Panel and Partners called for greater clarity of the discharge of this duty and the time limits on this, and stated that both health and social care need to be involved in decisions about ending care. One Partner called for a review of whether Section 117 services should be chargeable, as current arrangements create anomalies and perverse incentives.

**General duty to co-operate with relevant organisations; Local Authorities to be able to request assistance e.g. with an assessment or safeguarding case (part 11)**

The Reference Panel referred to this proposal as '*perhaps the most important item*'. They stated that co-operation is essential and raised concern about the phrase *give due consideration to the request*, stating that co-operation should be compulsory to ensure uniformity across the country.

One Partner suggested that the duty needs to be extended to other organisations.

**Section 47 of the National Assistance Act 1948, which enables a local authority to remove people from their home into a hospital or other place of safety, to be repealed (part 12)**

Both the Reference Panel and Partners supported the aim of protecting human rights. However they queried how people could be supported to take action if there were public health issues.

**Local Authority to continue to have a duty to prevent loss or damage to property when someone is admitted to residential care or hospital (part 12)**

The Reference Panel supported this duty. Partners had mixed views and again this reflects the need for the capability to act to follow the requirement to act.

**Disabled person's register to be abolished (part 13)**

Both the Reference Panel and Partners supported abolishing this register, whilst ensuring that this did not dilute responsibilities to people with a disability.

**Strategic planning not to be included in the statute (part 13)**

The Reference Panel and Partner, who responded, agreed with this to allow scope for local responses.

**Duty to provide information about services in the area (part 13)**

The Reference Panel and Partners recognised that this is an integral part of Local Authorities' roles. Again, this raised the question of how it will be resourced.