



## **Draft *Care and Support Bill* 2012-13**

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This note provides general information on the draft *Care and Support Bill* that was announced in the Queen's Speech on 9 May 2012 and published by the Government on 11 July 2012. The Government has said that the draft Bill aims to consolidate "provisions from over a dozen different Acts into a single, modern framework for care and support" and to enact "a fundamental reform of the way the law works." The draft Bill aims to focus care and support legislation on the wellbeing of individuals. Among other provisions, it also places duties on local authorities to provide information and advice relating to care, gives carers the right to support as well the people for whom they care, and includes measures to ensure the 'portability' of care provision for people who move from one area to another. The draft Bill also includes health provisions, to establish the Health Research Authority and Health Education England as non-departmental public bodies, and to abolish the Human Fertilisation and Embryology Authority and Human Tissue Authority.

The provisions in the draft Bill largely apply to England and Wales. Some provisions relating to the establishment of the Health Research Authority as a non-departmental public body, the relations of Health Education England with devolved authorities, and the abolition of the Human Fertilisation and Embryology Authority and Human Tissue Authority extend to England, Wales, Scotland and Northern Ireland.

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## 1 Announcement of the draft *Care and Support Bill* in the Queen's Speech

The [Queen's Speech](#) on 9 May 2012 announced that a draft Bill would be published “to modernise adult care and support in England.”<sup>1</sup> A [press notice](#) published by the Department of Health on the same date noted that the draft Bill would “modernise adult care and support in England, setting out what support people could expect from government and what action the government would take to help people plan, prepare and make informed choices about their care.” The notice also set out the main elements that would make up the draft Bill:

- modernising the legal framework for care and support, to support the vision of the forthcoming White Paper on care and support
- responding to the recommendations of the Law Commission, which conducted a three-year review into social care law
- establishing Health Education England as a non-departmental public body
- establishing the Health Research Authority as a non-departmental public body
- carrying out engagement and pre-legislative scrutiny on the draft Bill, as many in the social care sector have called for, to enable government to listen to people with experience and expertise, to make the most of this unique opportunity to reform the law<sup>2</sup>

## 2 The Law Commission Report on Adult Social Care

### 2.1 The Law Commission Report

In May 2011, the Law Commission published its [report on adult social care](#),<sup>3</sup> the culmination of a three-year project to reform the legal framework surrounding social care. The Commission defined adult social care as:

the care and support provided by local social services authorities pursuant to their responsibilities towards adults who need extra support. This includes older people, people with learning disabilities, physically disabled people, people with mental health problems, drug and alcohol misusers and carers. Adult social care services include the provision by local authorities and others of *traditional services* such as care homes, day centres, equipment and adaptations, meals and home care. It can also extend to a range of so-called *non-traditional services* – such as gym membership, art therapy, life coaching, personal assistants, emotional support, and classes or courses. Adult social care also includes services that are provided to carers – such as help with travel expenses, respite care, and career advice. Finally, adult social care also includes the mechanisms for delivering services, such as assessment, personal budgets and direct payments.<sup>4</sup>

The Commission published a scoping report for the project in November 2008, and from February to July 2010 ran a consultation on provisional proposals to reform the law

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<sup>1</sup> Her Majesty's Most Gracious Speech to both Houses of Parliament on 9 May 2012

<sup>2</sup> Department of Health, [Draft Bill to modernise adult care and support in England included in Queen's Speech](#), 9 May 2012

<sup>3</sup> Law Commission, [Adult Social Care](#), Law Com 326

<sup>4</sup> *Ibid.*, para 1.5

governing adult social care in England and Wales. The May 2011 report completed this project. The documents published at its various stages are available on the Law Commission [website](#).

The Commission set out its reasons for undertaking the project as follows:

It is now well over 60 years since the passing of the *National Assistance Act 1948* which remains to this day the bedrock of adult social care. Since then, adult social care law has been the subject of countless piecemeal reforms including new Acts of Parliament and a constant stream of regulations, circulars, directions, approvals and guidance. The intervening years have also seen the implementation of the *Human Rights Act 1998*, devolution, the restructuring of social services departments and numerous landmark legal judgments.<sup>5</sup> It is of little surprise that not only does the law perplex service users and social workers, but also the judiciary. Adult social care law, including how it relates to other legislation, has been described at various times by judges as “piecemeal ...numerous”, “exceptionally tortuous”, “labyrinthine” and as including some of the “worst drafted” subordinate legislation ever encountered.<sup>6</sup>

The Commission’s intention was to address these problems and in doing so reform the legal framework relating to adult social care. The final report stated that its recommendations aimed to create “a clear, modern and effective legal framework for the provision of adult social care both now and for the future.”<sup>7</sup>

The project was undertaken with the support of successive Governments. The Commission’s final report stated:

The adult social care project was announced in the Law Commission’s Tenth Programme of Law Reform in June 2008.<sup>8</sup> The project was seen as a major undertaking, requiring the Law Commission to devote considerable resources to it. We therefore considered that it was of the first importance for there to be a continuing and positive commitment from the Government. Accordingly, the project was split into three phases, providing break points for both the Commission and Government to consider the desirability of continuing on to the next stage.

[...]

Throughout this project we have benefited greatly from a strong and ongoing commitment by both Governments to the goals of reforming adult social care law. Throughout the life of the project, we have met on a regular basis with officials from the Department of Health, as the sponsoring department for this project. These meetings have been invaluable in providing an opportunity both to update the Department on the progress of the project and for officials to update us on developments in Government policy. We have also met on a number of occasions with Welsh Assembly Government officials in Cardiff.

The Law Commission’s final report was originally scheduled for July 2011, but in June 2010 the Commission agreed, at the request of the Government, to bring forward the timetable for

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<sup>5</sup> See Law Commission, *Adult Social Care: Scoping Report* (2008) Part 2.

<sup>6</sup> *A v London Borough of Lambeth* [2001] EWHC Admin 376, [2001] 2 FLR 1201 at [24] by Scott Baker LJ; *R (F) v Wirral Borough Council* [2009] EWHC 1626 (Admin), (2009) 12 CCLR 452 at [8] by McCombe J; *Crofton v NHS Litigation Authority* [2007] EWCA Civ 71, (2007) 10 CCLR 123 at [111]; and *Ryan v Liverpool Health Authority* [2001] All ER (D) 15 at [5] by Munby LJ (when he was a High Court judge).

<sup>7</sup> Law Commission, *Adult Social Care*, Law Com 326, p2

<sup>8</sup> Tenth Programme of Law Reform (2008) Law Com No 311 HC 605.

delivery of the final report to May 2011, so as to co-ordinate better with the Government-appointed Commission on funding of long-term care (the '[Dilnot Commission](#)').

The Law Commission's recommendations aim to bring together the disparate legislation relating to adult social care and create a unified framework to provide clarity for local authorities as well as service users and carers. Within the scheme the Commission recommends, the report considers the role of statutory principles in providing an overall framework for decision making; the role of community care assessments in determining a person's needs; a framework for determining eligibility for services; assessment and eligibility processes for carers; how service provision might be structured; and the adult protection functions of local authorities. It also considers the issues of 'ordinary residence' and 'portability' for people who move between areas, and how adult social care interacts with other areas of law.<sup>9</sup>

With this structure the report aims to create a framework capable of underpinning future developments in policy, whichever direction they might take:

In our view, the better approach is to create, as far as possible, a neutral legal framework that is not wedded to any particular policy and is capable of accommodating different policies and practices in the future. Underpinning this framework are the core entitlements and rights that are crucial to the existing legal framework.<sup>10</sup>

Annex A of the [report](#) provides a list of the Commission's recommendations to Government.<sup>11</sup>

## **2.2 Government Response and the draft *Care and Support Bill***

The Government's [response](#) to the Law Commission report on adult social care was published on 11 July 2012, alongside the Government's [Caring for our Future](#) White Paper on the future of adult social care, its [progress report](#) on social care funding, and the draft [Care and Support Bill](#).

The Government response to the Law Commission report stated that the Law Commission's report laid the foundations for the legal framework set out in the draft *Care and Support Bill*:

[The Commission's report] has not only provided crucial analysis of the problems posed by the current law, but also has given clear and practical solutions which will make a difference to those who receive care and support, and those who manage the system.<sup>12</sup>

The response follows the broad structure of the Law Commission's report and the Government accepts most of the report's recommendations. As the notes included alongside the draft [Care and Support Bill](#) state,<sup>13</sup> the draft Bill builds on the recommendations of the Law Commission report.

The Government [response](#) to the Law Commission report discusses each of the Commission's recommendations in detail and sets out how the Government intends to proceed in each area. Some of the Government's key responses include that its intended reforms to adult social care will include legislative change to:

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<sup>9</sup> Law Commission, [Adult Social Care](#), Law Com 326, p5

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, pp195-209

<sup>12</sup> Department of Health, *Reforming the law for adult care and support: the Government's response to Law Commission report 326 on adult social care*, July 2012, p2

<sup>13</sup> [Draft Care and Support Bill](#), p4

- clarify the approach to duties and powers relating to care and support through a clear legal structure; and make new regulations and statutory guidance to fit in this structure;
- focus on the overarching principle of promoting well-being, supported by the outcomes which matter most in care and support;
- place or clarify duties on local authorities to provide information and advice; in shaping the market of care and support providers; and in preventing, reducing or delaying the onset of needs for care and support;
- consolidate existing requirements into a single duty to assess for care and support on the appearance of needs;
- clarify individual entitlements to care and support to help people understand what they can expect from local authorities;
- create a new entitlement of carers to public support, to help people understand what they can expect from local authorities, and to consolidate existing requirements into a single duty to assess carers' needs on a similar basis to that for users;
- give personal budgets a new central place in the statute, and consolidate the law on direct payments;
- create a new statutory framework for adult safeguarding, to clarify the roles and responsibilities of local authorities and other organisations, and legislate to create Safeguarding Adults Boards in every local authority area; and
- incorporate ordinary residence into the core eligibility provisions for care and support, and to provide for a new duty that when a person moves between areas, the new local authority must continue to meet their assessed needs for care and support until it carries out its own assessment.

These proposed reforms are included in the draft *Care and Support Bill*.

### **3 Caring for our Future White Paper and a Progress Report on Funding Reform**

#### **3.1 Caring for our Future White Paper**

The *Caring for our Future* White Paper was published in July 2012,<sup>14</sup> alongside the Government response to the Law Commission report and the draft *Care and Support Bill*. The White Paper sets out Government proposals to “deliver a re-engineered care and support system that shifts resources towards prevention and early intervention.”<sup>15</sup>

Section 2.1 of the Library standard note *Social care reform: funding care for the future*, SN/SP/6391, provides an overview of the White Paper's proposals. These include the introduction of a national minimum eligibility threshold for care, to be implemented by 2015; legislating to ensure portability of assessments; piloting the use of direct payments in residential care; legislating to give people an entitlement to personal budgets; improving mechanisms for the early identification of carers and legislating to provide carers with an entitlement to support; and legislating to introduce Local Safeguarding Adult Boards.

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<sup>14</sup> Department of Health, *Caring for our Future: reforming care and support*, Cm 8378, July 2012

<sup>15</sup> *Ibid.*, p63

### 3.2 Funding Reform Progress Report

The White Paper was also accompanied by a separate document, [Caring for our future: progress report on funding reform](#), that sets out the Government's response to the Care and Support Commission's recommendations to reform the way people pay for care services. Section 2.2 of the Library note on [Social care reform](#) discusses this document in more detail. A final decision on a funding model for adult social care is not expected until a spending review subsequent to the introduction of a formal *Care and Support Bill*, which is planned to be introduced in 2013.

## 4 The draft Bill

### 4.1 Social Care provisions

The draft *Care and Support Bill* was published on 11 July 2012. The notes accompanying the draft bill set out its aims, which reflect the Law Commission's proposals accepted by the Government and also seek to enact the aspects of the *Caring for our Future* White Paper that require legislative change. The [Bill document](#) includes notes that discuss the aims of the draft bill and the provisions intended to achieve them:

In summary, the draft Bill will:

- **modernise** care and support law so that the system is built around people's needs and what they want to achieve in their lives;
- **clarify** entitlements to care and support to give people a better understanding of what is on offer, help them plan for the future and ensure they know where to go for help when they need it;
- **support** the broader needs of local communities as a whole, by giving them access to information and advice, and promoting prevention and earlier intervention to reduce dependency, rather than just meeting existing needs;
- **simplify** the care and support system and processes to provide the freedom and flexibility needed by local authorities and care professionals to innovate and achieve better results for people; and
- **consolidate** existing legislation, replacing law in a dozen Acts which still date back to the 1940s with a single, clear statute, supported by new regulations and a single bank of statutory guidance.

The draft Bill will therefore include the following key provisions:

- new statutory principles which embed the promotion of individual wellbeing as the driving force underpinning the provision of care and support;
- population-level duties on local authorities to provide information and advice, prevention services, and shape the market for care and support services. These will be supported by duties to promote co-operation and integration to improve the way organisations work together;
- clear legal entitlements to care and support, including giving carers a right to support for the first time to put them on the same footing as the people for whom they care;

- set out in law that everyone, including carers, should have a personal budget as part of their care and support plan, and give people the right to ask for this to be made as a direct payment;
- new duties to ensure that no-one's care and support is interrupted when they move home from one local authority area to another; and
- a new statutory framework for adult safeguarding, setting out the responsibilities of local authorities and their partners, and creating Safeguarding Adults Boards in every area.<sup>16</sup>

Pages 8-13 of the [Bill document](#) provide an overview of how the social care clauses of the Bill are intended to put these principles into place, and more detailed, clause-by-clause notes are provided in the document's Annex B (pages 113-137).

## 4.2 Health provisions<sup>17</sup>

The Draft Bill includes the following health provisions:

- establish Health Education England (HEE) as a non-departmental public body (NDPB) to provide national leadership for the planning and commissioning of education and training for the health workforce. Health Education England was established as a Special Health Authority in June 2012 and will oversee an education and training budget of around £5 billion;
- establish the Health Research Authority (HRA) as an NDPB. The HRA is intended to promote the interests of patients and the public in health and social care research, as well as to streamline the research approvals process and encouraging investment in research; and
- allow for the abolition of the Human Fertilisation and Embryology Authority (HFEA) and Human Tissue Authority (HTA) by amending the Public Bodies Act 2011; this is subject to a public consultation.

Pages 14-18 of the [Bill document](#) provide an overview of the health measures in the Bill. There are also [impact assessment and equality analysis documents](#) for the establishment of HEE and HRA.

*Liberating the NHS: developing the healthcare workforce* (December 2010) set out proposals for a new system for the education and training of NHS staff and the creation of Health Education England, to take on the education and training functions of Strategic Health Authorities (SHAs), which are to be abolished.

The NHS Future Forum published a [second report](#) in January 2012, which looked at education and training, and the Department of Health gave its response in *Liberating the NHS: developing the healthcare workforce: from design to delivery*. On 23 May 2012 the Health Select Committee published a [report](#) on the Government's proposals for education, training and workforce planning.

## 4.3 Next steps: Consultation and Pre-Legislative Scrutiny

The draft Bill has also been made available for pre-legislative scrutiny in Parliament. At the time of writing, the form this scrutiny would take had not been announced.

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<sup>16</sup> [Draft Care and Support Bill](#), Cm 8386, p6

<sup>17</sup> Section written by Thomas Powell

The draft Bill is also open to public comment until 19 October 2012. A summary of the feedback received by the Department of Health will be made available in early 2013.

#### **4.4 Initial Reaction to the draft Bill, White Paper and Progress Report on Funding**

Reaction to the draft Bill has been limited, with comment focusing on the White Paper and progress report on funding reform that accompanied its publication. The following articles provide some of the initial reaction to the publications:

[Sector slams lack of funding solution in care White Paper](#), Community Care, 11 July 2012

[White Paper should have been bolder on shift to prevention](#), Community Care, 11 July 2012

[Campaigners left disappointed on social care](#), Financial Times, 11 July 2012

[Social Care White Paper: reactions from the sector](#), Guardian, 11 July 2012

### **5 Pre-legislative scrutiny**

A Joint Committee of both Houses was established to carry out pre-legislative scrutiny on the draft Bill, and published its terms of reference on 14 December 2012.<sup>18</sup> The Committee is due to report by 7 March 2013.

### **6 Related Library publications**

The following Library briefings may be of interest for further reading:

[Social care reform: funding care for the future](#), SN/SP/6391. This provides further information on the White Paper and the progress document on funding reform that were published by the Government alongside the draft *Care and Support Bill*.

[Domiciliary Care: Eligibility Criteria](#), SN/SP/6067

[Direct Payments and personal budgets for Social Care](#), SN/SP/3735

[Financing Care Home Charges](#), SN/SP/1911

[Domiciliary care charges: background and Department of Health guidance](#), SN/SP/3774

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<sup>18</sup> Joint Committee on the draft Care and Support Bill, [Have Your Say on the Draft Care and Support Bill](#), 14 December 2012.