# Law Commission Consultation on Disabled Children’s Social Care

## Overview

This is a public consultation by the Law Commission for England and Wales. We have been asked to review the legal framework governing social care for disabled children in England to ensure that the law is fair, modern and accessible, allowing children with disabilities to access the support they need. For more information about this project, please visit [our web page here](https://lawcom.gov.uk/project/disabled-childrens-social-care/).

We recommend that consultees read the full [consultation paper, available here,](https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2024/10/Disabled_-Children_Social_Care_CP.pdf) before responding to the consultation. A shorter [summary is available here](https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2024/10/24.117_LC_Disabled_childrens_social_care_Summary_WEB.pdf) and an [Easy Read version here](https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2024/10/ER_Disabled_Children.pdf). Large print and audio versions of the summary are also available on the project web page.

**Consultees do not need to answer all the questions if they are only interested in some aspects of the consultation.**

Once you have completed your consultation response, we would be grateful if you could complete a short, anonymous survey to help us understand the characteristics of individuals and organisations who have responded. Your answers will be held and analysed separately to your consultation response. The [link is here](https://forms.office.com/Pages/ResponsePage.aspx?id=KEeHxuZx_kGp4S6MNndq2ANkK9TwAFRBnu343TGv-wBUQkg0QUdYUEVVSTdCWklOVVM4SFpWSUEyVy4u).

### About the Law Commission

The Law Commission is a statutory body, created by the Law Commissions Act 1965 for the purpose of promoting the reform of the law. It is an advisory Non Departmental Public Body sponsored by the Ministry of Justice (MoJ). The Law Commission is independent of Government. For more information about the Law Commission please [click here](https://www.lawcom.gov.uk/).

### Responses to this consultation

We aim to be transparent in our decision-making, and to explain the basis on which we have reached conclusions. We may publish or disclose information you provide in response to Law Commission papers, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response itself. We may also share responses with Government. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the Data Protection Act 2018 and the UK General Data Protection Regulation.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response, but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your family, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous we will not include your name in the list unless you have given us permission to do so.

For further information about how we handle your personal data, please see our privacy notice below (also available at: <https://lawcom.gov.uk/privacy-notice-and-handling-data/>).

Any queries on our privacy notice can be directed to: enquiries@lawcommission.gov.uk.

### Privacy Notice

Under the General Data Protection Regulation (May 2018), the Law Commissions must state the lawful bases for processing personal data. The Commissions have a statutory function, stated in the 1965 Act, to receive and consider any proposals for the reform of the law which may be made or referred to us. This need to consult widely requires us to process personal data in order for us to meet our statutory functions as well as to perform a task, namely reform of the law, which is in the public interest. We therefore rely on the following lawful bases:

(c) Legal obligation: processing is necessary for compliance with a legal obligation to which the controller is subject

(e) Public task:  processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

Law Commission projects are usually lengthy and often the same area of law will be considered on more than one occasion. The Commissions will, therefore retain personal data in line with our retention and deletion policies, via hard copy filing and electronic filing, and, in the case of the Law Commission of England and Wales, a bespoke stakeholder management database, unless we are asked to do otherwise. We will only use personal data for the purposes outlined above.

#### Freedom of information

We may publish or disclose information you provide us in response to our papers, including personal information. For example, we may publish an extract of your response in our publications, or publish the response in its entirety. We may also share any responses received with Government. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002. If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commissions. The Law Commissions will process your personal data in accordance with the General Data Protection Regulation, which came into force in May 2018.

Any concerns about the contents of this Privacy Notice can be directed to: enquiries@lawcommission.gov.uk.

## About you

### What is your name?

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| --- |
| Garden Court Chambers’ Community Care and Education Law Team The name of the individual who is the point of contact in relation to this response is: Bethan Harris, a member of the above team. |

### What is the name of your organisation?

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| --- |
| Garden Court Chambers’ Community Care and Education Law Team |

### Please share any details you wish us to know about your organisation below:

|  |
| --- |
| The Garden Court Chambers’ Community Care and Education Law Team consists of 44 barristers at Garden Court Chambers practising in the whole range of areas relating to children’s and adults’ social care, healthcare including mental health, and education law. Members of the team undertake judicial review in the High Court, and appellate courts, and appear before the SEND tribunal, Mental Health Tribunal and other tribunals. Our work includes representing migrant families, families with multiple needs e.g. housing/immigration and community care and individuals who are unable to make their own decisions under Mental Capacity Act 2005 in relevant areas. The team includes editors of the Community Care Law Reports and members of the team have contributed to practitioner handbooks e.g. Migrant Support Handbook (Legal Action Group). The team includes members of the panel of counsel to the Equality and Human Rights Commission. The team co-ordinates the School Inclusion Project in conjunction with the Communities Empowerment Network, Coram Children’s Legal Centre and the Law Centres Network. Members of our team frequently act in cases concerning Children Act 1989 provision (under sections 17 and 20 and leaving care duties) and education under Children and Families Act 2014. Garden Court Chambers is a barristers’ chambers committed to promoting access to justice, defending human rights and fighting injustice.   |

### Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state

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|  |

### What is your email address?

|  |
| --- |
| bethanh@gclaw.co.uk |

### Confidentiality

**If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential.**

As explained in our privacy notice and in the overview to this consultation, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

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| N/A |

### Anonymity

**If you want your response to this consultation to be treated as an anonymous response, please select yes below.**

As explained in our overview page, if your response is anonymous we may refer to what you say in your response, but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your family, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous we will not include your name in the list unless you have given us permission to do so.

No

# Introduction

Chapter 1 is the introduction to our consultation paper. It does not contain any provisional proposals for change, or consultation questions.

# The impact of this review

### Consultation Question 1.

**We invite consultees’ views on the provisional analysis of the costs set out in the draft impact assessment. In particular, please highlight any assumptions we have made that you consider may be incorrect and explain why.**

Please share your views below:

|  |
| --- |
| N/A Please scroll down to Chapter 3. |

### Consultation Question 2.

**We invite consultees’ views and/or evidence as to whether our provisional proposals could result in advantages or disadvantages to particular groups or to individuals with particular characteristics?**

Please share your views and/or evidence below:

|  |
| --- |
| N/APlease scroll down to Chapter 3. |

# Assessing the child’s needs – obtaining an assessment (Q 3-6)

### Consultation Question 3.

**We provisionally propose that that there be a single express duty to assess the social care needs of disabled children.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree. The current regime is not tenable, and we have seen multiple examples in practice of this not working. This affects some of the most complex and vulnerable disabled children given that they are most likely to have multiple duties owed to them. We consider that this will be particularly important where a child is transitioning from children’s social care to adult social care to make sure that both make consistent decisions as to the child’s needs and, for example, a 17-year-old is not left impacted by a failure to holistically assess their needs in good time.Having a single express duty, with accompanying guidance on how to apply it, may lead to better decision-making and scrutiny.This may result in costs savings for local authorities in the long run as these will be better conducted and will not be repeated unduly.If the threshold to assess is in line with that under the Care Act 2014 as proposed under Question 4 below, this would go some way to clarifying the law. The guidance should emphasise that assessors need to consider whether any other relevant statutory assessment duty is engaged when assessing social care needs of the disabled child. |

### Consultation Question 4.

**We invite consultees’ views on the appropriate threshold for carrying out an assessment.**

**Should an assessment be carried out where:**

**(1) the child appears to be disabled;**

**(2) it appears the child may have needs for care and support;**

**(3) it appears the child may be eligible for care and support;**

**(4) the child is likely to be eligible for care and support; or**

**(5) it appears that a child may need care and support in addition to or instead of that provided by their family?**

Option 2

Please expand on your answer below:

|  |
| --- |
| We consider that the threshold should remain low to prevent vulnerable children being ‘gatekept’ from assessments and therefore services, sometimes through a lack of knowledge and lack of information provided as to the different assessments and entitlements. On that basis, we oppose options (3) and (4).We consider that the existing differences in approach between local authorities are mitigated by having a relatively low threshold for assessment (where the child appears to be in need as referred to at 3.8 in the consultation paper). Caselaw is built upon this threshold and changing it may lead to more uncertainty within the law as the new threshold is interpreted by the courts, and which may not, in practice, lead to much change. We consider that the focus should instead be on simplifying the law, for example, by way of a single, express duty to assess as set out above, enshrining the implied duty to assess within it or option (2) in aligning with adult social care law.We consider that option (5) would not be in line with the current caselaw and would create further uncertainty with no identified advantages. It may encourage local authorities to undertake extensive enquiries into the support provided by family, for example, and we would prefer option (2) as this is consistent with the Care Act 2014 and may harmonise the 2 legal frameworks providing more clarity as to how the law is to be applied.  |

### Consultation Question 5.

**We invite consultees’ views on the extent to which, if at all, the law should facilitate the combining of assessments undertaken for other purposes? There are three main options.**

**(1) The legislation could make clear that the assessment for a disabled child should be separate and additional to other assessments.**

**(2) The legislation could remain silent and allow local authorities freedom to choose whether the assessments can or should be combined.**

**(3) The legislation could encourage or compel the assessments to be combined. This could be done in three different ways:**

1. **by giving a power to combine assessments;**
2. **by imposing a duty to combine assessments; or**
3. **by a presumption of combining the assessments which can be rebutted with a good reason.**

**We invite consultees to indicate below, if applicable, which sub-option within option (3) would be preferrable.**

Option 3

Please expand on your answer below:

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| --- |
| Based on our experience, we would be in favour of option (3)(c) given that there is an issue with assessments being repetitive and/or incomplete. For example, it may work well in cases when a child is transitioning to adult social care and where Adult Social Care and Children’s Social Care are not talking to each other. The ‘Working Together’ Guidance states that, “…*Where a child needs other assessments and support, it is important that these are co-ordinated so that the child does not become lost between different organisational procedures. Where a child has had previous assessments and support, information from these should help practitioners build a complete picture of the child and their family, including any support and services that have been provided*”. We have found, in practice, that this does not result in a coordinated approach where assessments are available in the same place and/or combined. We consider therefore that the status quo is not workable or fair to children and parents/ carers in navigating the various assessments and understanding their rights for the reasons set out in the consultation paper and therefore options (1) and (2) are not appropriate. We consider that in the majority of cases, assessments can be combined, but there may be cases where it is more practical for the assessments to be separate for reasons which vary on a case-by-case basis. Accompanying statutory guidance could give examples of scenarios where there is ‘good reason’ not to combine assessments. |

**If consultees choose option 3, please choose a sub-option below:**

Sub-option 3(c)

Please expand on your answer below:

|  |
| --- |
| Please see our answer above. |

### Consultation Question 6.

**We invite consultees to provide their:**

1. **experiences of the use of equivalent assessments under the Mental Capacity Act 2005; and**
2. **views on whether this approach would be appropriate in the context of disabled children’s social care.**

Please share your views and experiences below:

|  |
| --- |
| Our view is that equivalent assessments should not be used habitually given that assessments can often become outdated and care must be taken in placing reliance on capacity assessments where there may have been a change in the protected party’s medical condition and/or their mental capacity. It has been emphasised in decisions from the European Court of Human Rights that caution should be exercised where mental health assessments are carried out to ensure that this is current and based on up-to-date evidence. In one case (Miklic v Croatia [2022] ECHR 311), it was found that a child had been detained contrary to Article 5 (1) (e) ECHR, because it could not be said that the medical evidence of the child’s mental disorder was current so as to justify his continued detention. There are regulations (The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008, SI 2008/1858, amended by SI 2009/827) which specify who can carry out the assessment, the professional skills and training required and timeframes for the completion of assessments. There is good oversight, therefore, with the aim of ensuring that the assessments are of good quality.In practice these assessments are carried out relatively quickly and efficiently. However, we have found that the assessments can be quite brief and lacking in necessary detail and may appear to be more of ‘tick-box’ exercise. In one case, for example, the reason for relying upon an equivalent assessment was simply that there had not been a change to the protected party’s mental capacity or mental health to merit a new assessment (without explaining why that conclusion had been reached by reference to evidence). One of the conditions under Schedule A1 Mental Capacity Act 2005 for relying upon an existing assessment is that “the supervisory body are satisfied that there is no reason why the existing assessment may no longer be accurate”. The extent of the reasons to be provided is unclear but often these are brief. For example, there is no rebuttable presumption to carry out an assessment unless there is a good reason not to which, in our view, would be preferable.When we are advising as to these assessments in our practice, the protected party will have brought a challenge to the standard authorisation under s21A of the Mental Capacity Act 2005 and the Court of Protection will have jurisdiction to review this evidence and make orders for further assessments in order to be satisfied that the protected party lacks capacity and that the care and residence options are in their best interests. In many cases, further evidence of capacity will be ordered including from a treating clinician under s49 of the MCA 2005 which is funded by the NHS Trust and not by the parties to the proceedings. In practice, this evidence will overtake assessments carried out by assessors under the above Regulations.In the context of disabled children’s social care, there is no access to a court or tribunal which has non-means tested legal aid, as in the Court of Protection in DOLS cases. The practical impact of having the same ‘equivalent assessment’ requirement with no rebuttable presumption that a new assessment should be carried out unless the contrary can be justified – and no means of challenge other than judicial review in most cases- would, in our view, be likely to lead to local authorities potentially cutting corners and seeking to rely on older assessments or carrying out an inadequate revised version. Therefore, there could be the possibility of relying upon the principle of an equivalent assessment, but we consider that there would need to be detailed guidance as to how this would work in practice ensuring that full reasons are provided, and this would not be a routine occurrence. On the other hand, if the threshold for assessment remains low and a single express duty is enacted, as set out above, having an option for equivalent assessments may help to mitigate some of the concern around repetitive and/or unnecessary assessments subject to safeguards such as the duty to provide reasons and/or a rebuttable presumption.  |

# Assessing the child’s needs – the process and content of the assessment (Q 7-12)

### Consultation Question 7.

**We invite consultees to tell us about their experiences, both positive and negative, of the current process of assessing the social care needs of disabled children.**

Please share your experiences below:

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| --- |
| Whilst we see some examples of assessments being very detailed and insightful, including a detailed record of the child’s and parents’ views, we become involved where there is a dispute and litigation is contemplated. The negative experiences we have observed include the following:* Lack of making enquiries and taking into account of the views of other professionals working with the child who have relevant expertise, for example, Speech and Language Therapy;
* Assertions of fact which are likely to be disputed later, for example, by the parents, without stating the source of the assertion, leading to frustration and lack of understanding of how that conclusion was reached;
* Misunderstanding the legislative framework and relying on local practice, and as a result, for example, applying an overly narrow view of the services which can be offered.
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### Consultation Question 8.

**We provisionally propose a requirement that assessments are proportionate and appropriate to the circumstances of the child and their family.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree subject to ensuring that the guidance defines ‘proportionate and appropriate’ by reference to a child’s perceived needs i.e. that an assessment must take into account the level of a child’s needs and the appropriate safeguards/measures are put in place.  |

### Consultation Question 9.

**We provisionally propose that assessors should be required to have appropriate expertise and training.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

|  |
| --- |
| We agree with this proposal.  |

**We invite consultees’ views on whether assessors should be required to have expertise in specific conditions.**

Please share your views below:

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| --- |
| Yes, we consider that this will improve the process for all involved. For example, we have seen situations where a child’s condition has not been properly understood, and they have been wrongly assessed and placed in placements which then break down. |

### Consultation Question 10.

**We provisionally propose that local authorities should be required to provide disabled children and their families with a copy of their assessment.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

|  |
| --- |
| We agree. There is no justification as to why they should not be, in line with other cohorts. |

### Consultation Question 11.

**We provisionally propose that guidance should emphasise that assessors need to consider whether any other relevant statutory assessment duty is engaged when assessing the social care needs of a disabled child.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

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| --- |
| Yes, subject to it being made clear that this should not result in ‘passing the buck’ to another department, and that the guidance explains that this should be considered in addition to the assessment of a disabled child’s social care needs. |

### Consultation Question 12.

**We invite consultees’ views on whether it is necessary and appropriate to give local authorities the power to delegate the assessment of the social care needs of disabled children to trusted third parties, retaining ultimate responsibility for the standard of the assessment.**

Please share your views below:

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# Assessing the needs of parents and carers (Q 13-17)

### Consultation Question 13.

**We invite consultees to tell us about their experiences, both positive and negative, of parent carers’ needs assessments, or assessments for carers without parental responsibility.**

Please share your experiences below:

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| --- |
| Our experience relates mainly to parent carers’ needs assessments. At best, we have noticed parents’ views presented in more detail than would have been the case within a child’s social care assessment, giving greater insight into their perspective, which materially adds to what is already in the child’s assessment (as opposed to just repetition).At worst, it seems to be more of a ‘tick box’ exercise where there is a lot of repetition of the contents of the child’s social care assessment and not offering any meaningful solutions for the parent carer, and where the parent carer does not feel that their voice has been heard in any meaningful way.  |

### Consultation Question 14.

**We provisionally propose that there should be a single duty to assess the needs of a carer for a disabled child, which should arise upon (a) request by the carer or (b) it appearing to the local authority that the carer may have needs for support.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

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| --- |
| Yes, we agree with the analysis set out in the consultation paper. If there is a re-assessment of the disabled child’s needs we suggest that this could trigger a re-assessment of the carer’s needs save where there is no good reason not to do so, to allow for consistent decision-making and so that both the carer’s and child’s needs are met holistically. |

### Consultation Question 15.

**We provisionally propose that, in assessing the needs of a carer for a disabled child, the local authority should be required to have regard to the well-being of the carer.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

|  |
| --- |
| Yes, for the reasons set out in the consultation paper, this should be an integral part of an assessment of a carer’s needs. |

### Consultation Question 16.

**We provisionally propose that all carers should have a right to a copy of their assessment.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| Yes. There appears to be no good reason for the distinction between parent carers and carers without parent responsibility in this respect. |

### Consultation Question 17.

**We provisionally propose a requirement that carers’ assessments are proportionate and appropriate to the circumstances of the carer.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

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| --- |
| Yes, subject to statutory guidance clearly explaining and giving examples are to what is proportionate and appropriate in various circumstances to prevent any misunderstanding of these principles. |

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# Assessing siblings’ needs (Q 18-21)

### Consultation Question 18.

**We invite consultees to provide their experiences of the extent to which siblings’ needs are considered during the assessment of a disabled child.**

Please share your experiences below:

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| --- |
| In our experience, siblings’ needs are not usually expressly considered or in any substance, and they are usually mentioned in passing without proper recognition of the siblings’ potential care needs or continuing impact on them. |

### Consultation Question 19.

**We invite consultees to provide their experiences of the conduct of young carers’ needs assessments.**

Please share your experiences below:

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| --- |
|  |

### Consultation Question 20.

**We provisionally propose that statutory guidance should direct local authorities to consider whether the needs of any siblings need to be taken into account as part of the assessment of the needs of a disabled child.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| Yes, we agree. |

### Consultation Question 21.

**We provisionally propose that there should be a single duty to assess the needs of all carers, whatever their age.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

|  |
| --- |
| Tentatively, we would agree, subject to detailed statutory guidance reflecting the differences between children and adult carers including the different approach to assessment in particular. |

# Eligibility for services other than short breaks (Q 22-30)

### Consultation Question 22.

**We provisionally propose that there should be a single statutory duty to meet the social care needs of disabled children.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

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| --- |
| (i)We agree there should be a new specifically enforceable statutory duty to meet needs assessed as meeting national eligibility criteria. * + - * + (ii)The introduction of such a statutory duty should not result in any reduction in the range of services potentially available for disabled children and their families or narrowing overall of statutory power to provide them. Specifically, if changes are to be made to s 17 Children Act 1989 to remove disabled children as deemed children in need, the overall legal framework for social care for disabled children should continue to provide for powers as flexible and wide as currently under s 17 Children Act 1989 (we address this point further in answer to Question 29). Not all cases will fall within eligibility criteria so the residual powers will be important.
				1. (iii)The overall legislative scheme should ensure children’s needs are assessed holistically (without an unnecessary process of seeking to disentangle different types of needs – disability-related/other social care needs) and should ensure that cases do not get lost between separate legal frameworks (fall between 2 stools).
 |

### Consultation Question 23.

**We provisionally propose that the single statutory duty to meet the social care needs of disabled children should be subject to national eligibility criteria.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

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| --- |
| We agree with the proposal for national eligibility criteria.  |

### Consultation Question 24.

**We invite consultees’ views on what the essential features of any national eligibility criteria should be.**

Please share your views below:

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| --- |
| We note that the eligibility criteria would be co-produced through discussions between central and local government because there are resource implications (7.50). We anticipate that eligibility criteria would be in regulations (as is the case in relation to Care Act 2014 Part 1 eligibility criteria) rather than primary legislation. Formulating the criteria will require close attention to the detail. We consider that one of the essential features should be to reflect the need to support those who care for the child because that will assist the child to have as normal life as possible: 1. It is important policy context that existing legislation states

“*Every local authority shall provide services designed**(a) to minimise the effect on disabled children within their area of their disabilities* *(b) to give such children the opportunity to lead lives which are as normal as possible, and* *(c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively by giving them breaks from caring*” (Schedule 2 paragraph 6, Children Act 1989, which provides the basis for making The Breaks for Carers of Disabled Children Regulations 2011).The principles stated in current legislation cited above show the aim that the child should have the opportunity for as normal life as possible. This means looking at the child’s overall family circumstances not the child in isolation from their family circumstances.(ii) Eligibility criteria should not amount to a threshold that requires that parents/carers are at the point of being unable to sustain their role or under threat to their physical or mental health before assistance is provided; eligibility criteria should reflect that in order for disabled children to have an opportunity for have family lives as normal as possible families should not be under an unreasonable level of strain because of the extent of the parents/carers’ role in caring. (iii) Following on from the above, the eligibility criteria should reflect the fact that in order to support disabled children to enjoy a reasonable level of normal family life, the child’s parents/carers must be able to (a) have the time to meet the needs of any other children in the family, (b) carry out day to day tasks which they must perform in order to run their household and (c) be able themselves to have a reasonable opportunity to undertake education or training or a regular leisure activity. These are matters identified in reg 3 of the Breaks for Carers of Disabled Children Regulations 2011. These factors must be reflected in eligibility criteria for disabled children’s social care in order to support disabled children to be able to enjoy normal family life.  |

### Consultation Question 25.

**We invite local authority consultees to provide copies of any eligibility criteria they apply to disabled children’s social care.**

Please provide any eligibility criteria in the box below, or if you would like to send copies to us, please email: dcsc@lawcommission.gov.uk.

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### Consultation Question 26.

**We provisionally propose that the single statutory duty to meet the social care needs of disabled children should take precedence over any other powers and duties which could be used to provide the services.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

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| --- |
| 1. We consider that the right to have needs met under the new statutory duty should not be extinguished by simply referring the parents/carers to the existence of other rights under other statutes. For example, the existence of the right to a mandatory disabled facilities grant (under other legislation) would not mean that the duty (under the new statutory duty) to meet the need that requires to be met by an adaptation would be extinguished, rather the duty should subsist unless and until the need is effectively addressed.
2. Where there is also statutory *power* that could be used to meet the same need we agree that the statutory duty to meet disabled children’s social care needs should take precedence.
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### Consultation Question 27.

**We invite consultees’ views on the residence requirements that should apply to the single statutory duty to meet the social care needs of disabled children.**

Please share your views below:

|  |
| --- |
| This is a complex area to which we cannot do justice in our response. It is likely that a role for the ordinary residence test cannot be avoided but the alternative test of physical presence should be the test at least in part in the statutory scheme in order to avoid any gaps for children who have more than one family home, who have no ordinary residence or where residence is in dispute between authorities.We consider that statutory *powers* to provide services to disabled children should be exercisable by local authorities in any event in respect of any disabled child who is physically present in their area (without requirement of ordinary residence), regardless of where the statutory duty may lie. Please also see our answer to question 29 in which we suggest consideration of importing powers at least equivalent to Children Act 1989 s 17 into the new statutory framework alongside the new statutory duty, so that there would be no less discretion to provide services than currently under Children Act 1989 s 17 in relation to disabled children, if disabled children are taken out of s 17 as a category of children in need.  |

### Consultation Question 28.

**We invite consultees’ views on whether disabled facilities grants should be provided under the single statutory duty to meet the social care needs of disabled children.**

Please share your views below:

|  |
| --- |
| The Housing, Grants Construction and Regeneration Act 1996 (HGC&RA 1996) provides a scheme with accompanying guidance for disabled facilities grants (DFGs), envisaging collaboration between housing departments and social services departments. Disabilities Facilities Grants under the 1996 Act in respect of children are not means tested (referred to at 7.16 of the consultation report). If social care services may in some cases be charged for, then there is a clear advantage for this reason alone in retaining the right to grants under the HGC&RA 1996. We are unconvinced that DFGs in respect of disabled children’s needs for adaptations to their home should be removed from the current statutory scheme for DFGs and moved into the social care duty solely. There are well known problems with delays in getting DFGs but we are not aware of reasons for thinking that the process of getting adaptations in respect of children’s needs would be quicker or improved if these were brought under the umbrella of social care solely. Where under the new social care statutory duty the disabled child’s needs required to be met by an adaptation to the home, those needs should not be treated as met simplyby referring the child’s parents/carers to the DFG scheme under the HGC&RA 1996. The need would remain unmet so long as the relevant adaptation has not been made. This could be made clear in statutory guidance. In this way the social care duty is an overriding duty although the mandatory DFG under the HGC&RA 1996 may in practice be the means through which an adaptation is provided and the need is addressed if in the given case that is an adequate and effective means to do so.  |

### Consultation Question 29.

**We provisionally propose that there should be powers to meet needs:**

1. **that do not satisfy the national eligibility criteria; and**
2. **pending an assessment of needs.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

|  |
| --- |
| We agree that there should be powers to meet needs pending assessment of needs and to meet needs that do not satisfy eligibility criteria or for any other reason cannot be met under the statutory duty. The powers available in respect of cases that do not satisfy the eligibility criteria should be no less than currently available under Children Act 1989 s 17. This is a general duty, in essence a discretion – as described at 7.10 of the consultation document. We note the breadth of the general duty (/discretion) under Children Act 1989 s 17 - the criteria being (other than that the child is a child in need which currently includes disabled children) simply that services are provided with a view to safeguarding and promoting the child’s welfare; also services may be provided for the family of the child or for any member of that child’s family if provided with a view to safeguarding or promoting the child’s welfare; and the range of services is wide - including providing accommodation (which can include accommodation for the child and the child’s family) and assistance in kind or in cash. See Children Act ss 17(1), (3) and (6). In order to ensure that nothing is lost for disabled children by the creation of a new single duty to meet their needs , if they are to be removed as a category or children in need in s 17 Children Act 1989 (as may be proposed, addressed in Question 82), one possible route would be to replicate these provisions or include very similar provisions no less wide and flexible in the new framework alongside the new statutory duty. .  |

### Consultation Question 30.

**We provisionally propose that there should continue to be a power to meet the needs of parents and carers.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree with this proposal.  |

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# Eligibility for short breaks (Q 31-36)

### Consultation Question 31.

**We invite parent and carer consultees to provide their experiences of accessing short breaks.**

Please provide your experiences below:

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|  |

### Consultation Question 32.

**We invite local authority consultees to tell us about the short break services available in their area and any criteria which must be met to access those services.**

Please tell us about short breaks services in your area below:

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| --- |
|  |

If you would like to send us any relevant documents, please email: dcsc@lawcommission.gov.uk.

### Consultation Question 33.

**We provisionally propose to define short breaks as:**

**Services to:**

***(a) provide breaks for the benefit of disabled children; and/or***

***(b) assist individuals who provide care for disabled children to continue to do so, or to do so more effectively, by giving them breaks from caring.***

***Including:***

***(a) accommodation;***

***(b) the provision of care at home or elsewhere;***

***(c) educational or leisure activities; and***

***(d) services to assist parents and carers in the evenings, at weekends and during the school holidays.***

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| We agree with this definition because it is wide and expressly includes the provision of care at home or elsewhere (which is the most common type of service which parents of disabled children whom we represent seek). It would be helpful to include in the definition care provided alongside the parent/carer when caring (provision of a second carer), so not just a “break from caring” by care to take over fully from the parents/carers.The term “short break” is potentially misleading in that it does not readily fit with the idea of regular day to day care to supplement the parents/carers’ care. Many of the cases we see in our legal practices in children’s social care concern families with a disabled child with high needs who are in need of regular day to day help with meeting the needs of the child. There should not be any doubt that the potential configuration and amount of the care that can be provided are not limited by falling under the heading “short break” (if that heading is to be retained in the new statutory scheme).  |

### Consultation Question 34.

**We provisionally propose that short breaks should be made available under the single statutory duty to meet the social care needs of disabled children.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| It should be made clear in the statutory scheme that “short breaks” (if that heading is to be retained at all) covers a wide range of configurations of services to assist with the care of the disabled child and that this can consist of, where appropriate, regular help with meeting the needs of a disabled child with high needs, in the home and/or community. See our answer to Question 33. |

### Consultation Question 35.

**We provisionally propose that eligibility for a short break should be subject to national eligibility criteria.**

**Do consultees agree?**

 Yes

Please expand on your answer below:

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| --- |
| The eligibility criteria must consider the impact on the parents/carers and the whole family of the parents/carers’ role in meeting the needs of the disabled child. We see cases of parents who suffer chronic lack of adequate sleep, health issues, and situations where caring for the disabled child makes normal life impossible for the whole family, with inadequate levels of help for these families.  |

### Consultation Question 36.

**We provisionally propose that children who are provided with a short break in the form of accommodation away from the family home should have the same benefits and safeguards as currently apply to children provided with a short break under section 20 of the Children Act 1989.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| We agree with this proposal. |

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# The range of services that should be available (Q 37-40)

### **Consultation Question 37.**

**We invite consultees to tell us what, in their experience, are the main social services that disabled children require.**

Please share your experiences below:

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| --- |
| We answer from experience as lawyers who frequently represent disabled children and their families where the parents are in dispute with their local authority about the amount of support they receive. The main type of support requested is help with the care for the disabled child to supplement the parent(s)/carer’s care for that child. The parents need more help with caring so that there can be a more reasonable level of normal family life for the whole family. Parents are often under considerable mental or/or physical strain and having inadequate sleep if their child has high care needs and the amount of assistance they receive from services clearly not enough to make a real difference to the family’s situation. |

### Consultation Question 38.

**We invite consultees to tell us about the main social services for disabled children that are available in their area.**

Please tell us below:

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| --- |
|  |

### Consultation Question 39.

**We provisionally propose that legislation should provide a non-exhaustive list of the social services that can be provided to disabled children.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree with this proposal. |

### Consultation Question 40.

**We invite consultees’ views on the services that should be included in the list referred to in Consultation Question 39.**

Please share your views below:

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| --- |
| At 9.20 the (non-exhaustive) list of examples of services as provisionally proposed in the report is as follows:1. accommodation;
2. the provision of care at home and elsewhere;
3. educational or leisure activities;
4. services to assist parents and carers in the evening, at weekends and during the school holidays;
5. adaptations to the home;
6. counselling and other types of social work;
7. goods and facilities; and
8. information, advice and advocacy.

Our comments in relation to the above list:1. As regards accommodation, it should be made clear (within the statutory scheme) that accommodation provided for the child alone under the new statutory duty would be for short breaks only and not longer-term arrangements because s 20(1) Children Act 1989 provides for the latter and this should remain the case. We understand the report intends this as paragraph 8.45 states s 20 Children Act 1989 would remain in place but would no longer be used for short breaks. We consider the distinction between short breaks in accommodation away from home and accommodation away from home for longer periods to be an important one because s 20(1) Children Act 1989 and the legal framework and regulations attached is a whole statutory scheme that provides a threshold for when a child can be voluntarily accommodated by the local authority without their parents and principles for decision-making e.g. about with whom and where the child is placed (proximity to home), and for detailed care planning.
2. Although we do not understand the list to intend to suggest an order of priority in which the types of services should be considered in respect of a child, we suggest that accommodation should not be the service that appears at the top of the list being somewhat counterintuitive because other types of provision should usually be considered first, those being support for the disabled child in their day to day home life, before consideration of accommodation away from home (albeit short term respite only (see the point we make in (a) above)).

 1. There should be clarity as to whether accommodation provided under the statutory duty can include accommodation for a disabled child with their family potentially or just the child alone. This question is linked to a wider issue namely a concern that a change to a new legal framework for services for disabled children could result in some existing service provision ceasing to be available in particular the provision of accommodation for the child with their family. Children Act 1989 s 17 contains a power to provide a range of services for the family of a particular “child in need” (which includes currently a disabled child) or any member of the family if provided with a view to safeguarding or promoting the child’s welfare. This includes an important power to provide accommodation to the child and their family together. We are concerned that changes to the legal framework for disabled children should not result in a narrowing of the scope of this power as regards families with disabled children. The power to provide such accommodation under s 17 Children Act 1989 in our experience can provide a vital safety net for families. This is one of the issues that arises if disabled children are taken out of section 17 Children Act 1989 if that is the route that is adopted (which is being considered within the terms of reference for the consultation, referred to at 1.54 and addressed further in Part 6 of the Consultation Paper).
2. Cash is not included in the list that is provisionally proposed. Section 17(7) Children Act 1989 includes a power for local authorities to provide cash (to the family of a particular child in need or for any member of that child’s family, if it is provided with a view to safeguarding or promoting the child's welfare) which may be unconditional or subject to conditions as to repayment. This is a more flexible type of provision than direct payments. We are concerned that the range of services available should not be reduced. The possibility for needs to be met in an appropriate case by this type of provision should remain available for disabled children and their families if a new statutory duty is introduced.
3. We agree that social care provision to fund and arrange adaptations to the home should be included in the list of examples because adaptations are an important means of meeting disability related needs.

 However the availability of adaptations as part of social care should not mean removing the right to a Disabled Facilities Grant (DFG) in respect of the needs of a disabled child under the Housing Grants and Construction Act 1996, which is a non-means tested grant where awarded in respect of a child’s needs, up to £30,000 (as stated at 7.16). The proposed new statutory duty should be a duty to ensure that the assessed need is met and so if, despite the availability of a DFG, needs remain unmet the social care duty to meet the need would remain extant (as is the case in relation to assessed needs under the Care Act where the contemplated means of meeting the need is a housing adaptation).  |

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# How to provide services (Q 41-43)

### Consultation Question 41.

**We provisionally propose that local authorities should be able to provide services:**

**(1) directly;**

**(2) indirectly through third parties; and**

**(3) by means of direct payments.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| We agree. We wish to add that it should be clearly explained that direct payments are a choice. We see cases in which it has not been made clear to parents that they have a choice to receive services commissioned directly by the local authority. Whereas direct payments work for some people, we see parents finding them burdensome on top of all their other responsibilities, and the difficult job of finding carers being transferred on to them. |

### Consultation Question 42.

**We provisionally propose that parents, carers and children aged 16 and over should have a right to a personal budget.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| Yes. |

### Consultation Question 43.

**We provisionally propose that the regime for direct payments should be adapted so that:**

1. **the amount of the payment is the amount sufficient to secure the provision needed, as opposed to an amount that is estimated to be reasonable; and**

**(2) payments should be kept under review, so that their sufficiency can be monitored and alternative arrangements made if necessary.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| Yes. |

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# The plan to meet the needs of a disabled child (Q 44-46)

### Consultation Question 44.

**We provisionally propose 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.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| Yes. |

### Consultation Question 45.

**We provisionally propose that the content of the plan to meet the needs of a disabled child should be dealt with in guidance.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| Yes, on the basis that this should be statutory guidance (which the local authority would be required to follow unless there is a good reason not to follow it).  |

### Consultation Question 46.

**We provisionally propose that the plan to meet the needs of a disabled child should be combined, where appropriate, with other plans for the child such as their EHCP, care plan or pathway plan.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| We agree with this proposal as a means of avoiding duplication and promoting joined up services in an appropriate case. However combined care plans should retain a clear structure that identifies the source of the service: whether it is educational provision, social care or care leaver provision etc. This is important in order that parents/carers/the child can see what they are getting and on what basis, and check it against their entitlements. |

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# Means testing and charging (Q 47-48)

### Consultation Question 47.

**We invite consultees to provide examples of local authority charging practices.**

Please provide examples below:

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| --- |
|  |

If you would like to send us any relevant documents, please email: dcsc@lawcommission.gov.uk.

### Consultation Question 48.

**We invite consultees’ views on whether local authority charging practices would be likely to change if any of the provisional proposals in this consultation paper were implemented. In particular, is it likely that local authorities would need to charge more, or more often?**

Please share your views below:

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| --- |
|  |

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# The intersection with SEND (Q 49)

### Consultation Question 49.

**We invite consultees’ views on the extent to which disabled children’s social care law can and should be aligned with SEND law.**

Please share your views below:

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| --- |
| We consider that there is significant potential for greater alignment. We address below the assessment, appeals and enforcement processes. 1. Currently, in an Education, Health and Care Needs Assessment (‘EHCNA’) the primary focus is on special educational needs rather than health and/or social care needs. Despite section 22 Children and Families Act 2014 imposing a duty on local authorities to *“exercise its functions with a view to securing that it identifies a) all the children and young people in its area who have or may have special educational needs, and (b) all the children and young people in its area who have a disability,”* children’s social care and special educational needs departments in local authorities operate in silos. This means that a disabled child might have a section 17 Children Act 1989 assessment that identifies that they are disabled/a child in need, however, the local authority fails to undertake any assessment of special educational needs. Integrating the assessment processes, so that there is a holistic assessment of disabled children, could reduce gatekeeping of special educational provision.
2. A full statutory appeal to the SEND Tribunal is in principle better than internal review processes, or the Ombudsman and in principle can offer advantages over judicial review. However see further our response to consultation question 65 where we set out what would be required for a full statutory appeal to be an effective remedy in children’s social care.
3. The enforcement regime for securing provision set out in plans is more robust in SEND law. We therefore see significant benefit if disabled children’s social care law is aligned by having a framework that provides for a social care statutory duty which is the same type of robust duty as that in SEND law. Section 42 Children and Families Act 2014 imposes an absolute duty to secure special educational provision and healthcare provision in an EHCP. The case law that has developed, such as R*(L) v Hampshire County Council* [2024] EWHC 1928 (Admin) and *R(JSH) v Westmorland and Furness Council* [2024] EWHC 3362 (Admin) has made clear that a claim for judicial review based on a breach of section 42 is a swift and effective remedy, and will generally result in a mandatory order with tight timescales (ordinarily 5 weeks) for a local authority to comply. However, while section 42 applies to special educational provision and healthcare provision, it does not apply to social care provision in an EHCP.
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# The intersection with health care (Q 50-52)

### Consultation Question 50.

**We provisionally propose that the current dividing line between social care and health care in respect of children, based upon the scale and type of the care being provided, should be placed on a statutory footing, with a regulation-making power to enable that line to be changed in future.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| We can see a benefit in terms of transparency and clarity of the dividing line being codified. |

### Consultation Question 51.

**We provisionally propose that there should be a single provision setting out when a local authority with responsibilities under section 117 of the Mental Health Act 1983 is required to assess a disabled child’s social care needs.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| We agree. We consider that this would bring much needed clarity to an area in which section 117 authorities, in our experience, can use the complexities of the interlocking statutory provisions to gatekeep provision. |

### Consultation Question 52.

**We provisionally propose that guidance include a specific section – co-produced between local authority and NHS representatives – on the intersection between health care and social care. This should make the following clear.**

**(1) How children with health care needs are to be identified (see further in this regard our provisional proposals regarding referral for assessment at paragraph 4.41).**

**(2) Local authority responsibilities to meet the health care needs of disabled children.**

**(3) NHS responsibilities to meet the health care needs of disabled children.**

**(4) Expectations for joint working and joint accountability where local authority and NHS responsibilities overlap in the meeting of such needs.**

**(5) Mechanisms for dispute resolution, including an expectation that “internal” disputes as between local authority and NHS organisations should not affect the meeting of the needs of the child in the interim.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree with this proposal. Greater clarity should lead to better decision-making and less opportunity for gatekeeping. We consider the fifth point to be particularly important. Disabled children must not be left in limbo, and with inadequate provision, while a dispute is resolved between two public authorities. One public authority must bear the costs and take responsibility, even if on a without prejudice basis. Issues of financial responsibility between the two public authorities must be secondary and resolved without affecting the quality and continuity of provision for a disabled child.  |

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# The transition to adult social care (Q 53-55)

### Consultation Question 53.

**We invite consultees' views on the cause of the problems faced by disabled children receiving social care in making the transition to adult social care.**

Please share your views below:

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| --- |
| In our experience, the main cause of the problems faced by disabled children making the transition from children to adult social care services is a lack of transition planning, which arises in part from the siloing of children’s social care teams from adults’ social care teams in local authorities. In our casework, we frequently see examples of transition planning happening too late and/or being rushed. This can lead to gaps in provision where the local authority ceases to provide support through children’s social care without a new placement in place (often as the provider only accommodates children rather than adults), a continuation of age-inappropriate support and/or significant changes in level/type of support that are implemented abruptly. The latter is particularly frequent in our experience, with levels of support in a plan under the Care Act 2014 being assessed without reference to what the young person was receiving as a child. The problems are often compounded by a failure to work collaboratively with other parts of the local authority. For example, an EHCP can continue until a young person is a 25-year-old. Although we consider there to be significant room for improvement in respect of integration of children’s social care and special educational needs teams within local authorities, in our experience this *does generally improve* once an EHCP has been in place for several years. However, when an individual’s social care transfers from the children’s to adults’ teams, this can cause significant disruption to SEND provision as well. For example, the delivery of an Education, Otherwise than at School (‘EOTAS’) package in the family home will often require carers to be present (funded by social care). If the number of social care hours do not take into account what is required in the EOTAS package, that can cause significant difficulties.  |

### Consultation Question 54.

**We provisionally propose that the Care Act 2014 be amended to provide a statutory age at which transition planning should be started in relation to disabled children.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| We can see the benefit of this. As set out in our response to consultation question 53, there is a significant issue with transition planning being left too late. However, the amendment would need to be carefully drafted to recognise that transition planning for some disabled children will be more complex than for others and therefore could take longer. Any issues could be avoided by the amendment setting a minimum requirement and by statutory guidance expressly stating that transition planning should start earlier if it would be in the best interests of the child.  |

### Consultation Question 55.

**If the Care Act 2014 were to be amended to provide a statutory age at which transition planning should be started in relation to disabled children, we invite consultees’ views as to the age at which this should start.**

Please share your views below:

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| --- |
| Please see our response to consultation question 54. We can see significant benefit of transition planning starting at 16 years old. This would allow a reasonable period (2 years) and would align with a natural transition point in a disabled child’s education, and likely lead to a more joined up approach between SEND and social care. However, we reiterate that disabled children’s needs vary considerably and any statutory amendment and/or statutory guidance would need to make clear that there should be a case-by-case child-centred approach.  |

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# Identifying need in the local area and securing sufficient services to meet that need (Q 56-57)

### Consultation Question 56.

**We invite local authority consultees to tell us the methods they use to:**

**(1) identify the nature and extent of social care provision required by disabled children in their area;**

**(2) ensure that sufficient services are made available to meet those needs; and**

**(3) keep the sufficiency of service provision under review.**

Please tell us below:

|  |
| --- |
|  |

If you would like to send us any relevant documents, please email: dcsc@lawcommission.gov.uk.

### Consultation Question 57.

**We invite consultees’ views on, and experiences of, the sufficiency of disabled children’s social care provision in the local area.**

Please provide your views and experiences below:

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# Co-operation and joint working (Q 58-60)

### Consultation Question 58.

**We invite consultees’ views on whether it should be mandatory for local authorities to have a designated social care officer.**

Please share your views below:

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|  |

### Consultation Question 59.

**We invite consultees to tell us about their experiences of co-operation and joint working in the social care context, or between social care, education and health.**

Please share your experiences below:

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| --- |
| In our experience, local authority teams work in silos and there is not effective joined up working in respect of education, social care and health. There is also not effective coordination between local authorities and integrated care boards where a disabled child is eligible for continuing healthcare funding. The main problems that we see in practice:1. *Failures to use statutory assessment processes to holistically assess and identify a disabled child’s needs across education, health and social care.* For example, we frequently see section 17 Children Act 1989 assessments which identify a child as disabled but do not refer the child for an EHCNA. The same is true vice versa.
2. *Staffing levels for education, health and social care packages not being joined up.* For example, EOTAS packages provided for in an EHCP often require carers (either funded by health or social care) to be present. However, health and social care often do not appreciate that an EOTAS package is generally term-time only and as such there will be different demands on health/social care involvement at different points in the year.
3. *Reviews.* Annual reviews for EHCPs are often conducted out of sync with reviews of care plans for social care/healthcare and without relevant health and/or social care personnel present. In our experience, the situation is particularly acute in respect of (lack of) involvement of ICBs with EHCPs.
4. *Statutory appeals.* In our experience, it is rare to have meaningful involvement from social care teams or ICBs in respect of EHCP appeals, despite the First-tier Tribunal’s jurisdiction to make recommendations in respect of health and social care.
 |

### Consultation Question 60.

**We invite consultees’ views on the factors that help and hinder effective co-operation and joint working.**

Please share your views below:

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| --- |
| Factors that help effective cooperation and joint working: 1. Where there is a single individual with lead responsibility for a disabled child that spans local authority teams.
2. Regular team around the child (‘TAC’) meetings that bring education, health and social care personnel together.
3. Meaningful involvement of the family so that the voice of the child/young person and carers are heard.
4. Effective record keeping/minutes of TAC meetings with specific and measurable action points so that the various teams can be held accountable.
5. Where local authorities and ICBs have positive working relationships and clear protocols in place regarding determining responsibility for healthcare provision and integration of healthcare provision with education and social care provision.

Factors that hinder effective cooperation and joint working:1. The siloing of teams in local authorities, meaning that issues are looked at in isolation rather than a holistic approach to a disabled child’s needs.
2. Rapid turnover of key personnel.
3. Restructures in local authority teams.
4. Team specific budget targets, for example, where the local authority has entered into a Safety Valve agreement with the Secretary of State for Education to reduce its deficit in its High Needs Block (i.e. its SEND budget), a SEND team has to make significant cuts regardless of the impact on the local authority’s social care budget.
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# Remedies (Q 61-66)

### Consultation Question 61.

**We invite consultees’ views on the statutory complaints procedure (either through making or handling a complaint).**

Please share your views below:

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| --- |
| We are unable to comment on this save for noting that we frequently see examples of excessive delays in complaints being processed and that complaints procedures are often raised as a defence in claims for judicial review (i.e. that they are an adequate alternative remedy).  |

### Consultation Question 62.

**We invite consultees to tell us about experiences of complaints to the Local Government and Social Care Ombudsman. Do consultees consider that the current system enables timely and appropriate resolution of such complaints?**

Please share your experiences below:

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| --- |
|  |

### Consultation Question 63.

**We invite consultees’ views on whether the Children’s Commissioner should be given an express power to initiate legal proceedings in respect of the social care needs of disabled children.**

Please share your views below:

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| --- |
| We can see the value of this. However, the Children’s Commissioner would need to be appropriately resourced otherwise this new power would be a dead letter. In addition to bringing legal proceedings, it might be more impactful if the Children’s Commissioner could instigate an investigation, equivalent to the Equality and Human Rights Commission’s powers under section 20 Equality Act 2006 and be able to issue an unlawful act notice to a local authority that was found to have committed unlawful acts equivalent to the Commission’s powers under section 21 Equality Act 2006. We consider that this would allow the Children’s Commissioner to better investigate and address systemic unlawfulness within a local authority in respect of its (lack of) compliance with its statutory duties to disabled children’s social care.  |

### Consultation Question 64.

**We invite consultees’ views on the changes necessary in order for families to have an effective and independent mechanism to challenge and rectify decisions about disabled children’s social care.**

Please share your views below:

|  |
| --- |
| We consider that a right of appeal to a specialist tribunal could be beneficial but only if there were significantly more resources for such a tribunal than are currently available for the SEND tribunal. This includes as regards legal aid. We develop our position further in answering consultation question 65.  |

### Consultation Question 65.

**We invite consultees’ views on extending the powers and jurisdiction of the SEND Tribunal as a potential option to challenge and rectify decisions about disabled children’s social care.**

Please share your views below:

|  |
| --- |
| We consider that there could in principle be considerable benefits to expanding the jurisdiction of the SEND Tribunal as education, health and social care are closely linked and it would promote a holistic approach to addressing a disabled child’s multiple and intersecting needs. The SEND Tribunal is an expert tribunal and a full statutory appeal is in principle a more effective remedy than judicial review. However, it would not be effective to extend the tribunal system to children’s social care if this were done without significant reforms to the SEND Tribunal to make it an effective remedy. Without these significant reforms and resourcing, a move to a tribunal system would mean a reduction in access to judicial review without replacing it with an effective remedy and therefore would not be beneficial. In particular: 1. The SEND Tribunal would need significantly increased resources. The SEND Tribunal currently lists appeals for more than a year’s time[[1]](#footnote-1) as it is overwhelmed by demand. Individuals and families in need of social care services need to have access to a swift remedy and not be left without the services to which they are entitled for a long time because they are waiting for a hearing, and need to have the possibility of applying for interim relief to enable services to be ordered in appropriate cases straightaway.
2. The expertise of the specialist Tribunal members would need to be diversified to include, for example, independent social workers. In our experience, the primary expertise of specialist members of the SEND Tribunal is in SEND matters and there is not comparable expertise in broader health and social care issues.
3. Legal aid: access to and availability of legal aid would need to be reformed. EHCP appeals are within scope for legal help stage (preparation of the appeal up to the door of the Tribunal). This is loss making work for education legal aid providers and many are returning their contracts or opening only a limited number of matter starts. The Law Society has identified education legal aid as the worst ‘legal aid desert’ of any area of civil legal aid.[[2]](#footnote-2) Legal aid for representation at the hearing is out of scope and is contingent on Exceptional Case Funding (‘ECF’) being granted. A key benefit of legal aid is that expert reports can be commissioned, and the experts can attend the Tribunal hearing when ECF is granted. Without effective access to legal aid there is an inequality of arms and the SEND Tribunal is not an effective remedy.

 [SEND tribunal caseloads soar: Solicitor calls for urgent action in managing education appeals | Law Gazette](https://www.lawgazette.co.uk/news/latest-send-backlog-alarming-says-specialist-solicitor/5121893.article)  [Education – legal aid deserts | The Law Society](https://www.lawsociety.org.uk/campaigns/civil-justice/legal-aid-deserts/education) |

### Consultation Question 66.

**We provisionally propose that the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations are amended. This amendment should make clear that the SEND Tribunal has the power on an “extended” appeal to recommend that a local authority carries out a social care assessment where one has not been carried out.**

**Do consultees agree?**

Other

Please expand on your answer below:

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| --- |
| We agree with this proposal but consider that it could go further. A recommendation can be relatively easily resiled upon by a local authority if the procedure in the regulations is followed. We consider that this would be a more effective proposal if the Tribunal’s jurisdiction was expanded to enable it to *order* local authorities to undertake assessments rather than merely recommend them.  |

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# The definition of disability (Q 67-69)

### Consultation Question 67.

**We provisionally propose that a child should be regarded as disabled for the purposes of disabled children’s social care law if:**

**(1) they have a physical or mental impairment; and**

**(2) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree. The current definition of disability is out of date and needs to be replaced. It is unhelpful to have more than one definition of disability which is currently dependent on whether the child’s needs are being considered under the Children Act 1989, the Children and Families Act 2014 or the Chronically Sick and Disabled Persons Act 1970. Given that it is the access to services which is critical, one definition of disability which aims to ensure no diminution to the available services via either Act is preferable. The most readily available definition is section 6 of the Equality Act 2010 which has the advantage of already being known and understood. We note, significantly, that it is not proposed that a formal diagnosis be required in order to qualify as an impairment. |

### Consultation Question 68.

**We provisionally propose that the statutory definition of disability should clarify that social care services should not be denied to a child purely on the basis that their impairment gives rise to:**

**(1) addiction;**

**(2) a tendency to set fires;**

**(3) a tendency to steal;**

**(4) a tendency to physical or sexual abuse of other persons;**

**(5) exhibitionism; and**

**(6) voyeurism.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree. Although the exclusions are within the Equality Act 2010 (Disability) Regulations 2010, we do not consider that it would be fair to introduce them into disabled children’s social care law. The child’s impairment would have to be demonstrated to have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities in any event. Given that there is no legal requirement for a diagnosis of ‘impairment’ there is a real risk that resources may be diverted away from the local authority’s primary function towards justifying that a disabled child falls outside the definition of disability due to (1) – (6) instead of supporting the child to address and/or cope with their aspects of need if manifested within (1) – (6). The prospect of children with an impairment which gives rise to (1) – (6) above being excluded from children’s social care would be unfair and problematic and contrary to the overall inclusionary approach within the proposals. |

### Consultation Question 69.

**We invite consultees’ views on whether the definition of “substantial and long term” requires adaptation for younger children in the context of disabled children’s social care law.**

Please share your views below:

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| --- |
| We note the point made within the report that for some younger children, their range of independent day to day activities is limited by virtue of their age. We note the intention to reduce or minimise inconsistency between legislative schemes. The language of regulation 6 of the *Equality Act 2010 (Disability) Regulations 2010* as it applies to babies and young children, provides as follows:*For the purposes of the Act, where a child under six years of age has an impairment which does not have a substantial and long-term adverse effect on the ability of that child to carry out normal day-to-day activities, the impairment is to be taken to have a substantial and long-term adverse effect on the ability of that child to carry out normal day-to-day activities where it would normally have that effect on the ability of a person aged 6 years or over to carry out normal day-to-day activities.*This regulation ensures that the definition of disability will include younger children who may not otherwise fall within the definition.Insofar as any adaptation of the definition of ‘substantial and long term’ would not generate inconsistency, there may be room to include a modification to the definition of disability so that younger children who require substantially more care than a child without an impairment have access to services. |

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#  Statutory principles (Q 70-73)

### Consultation Question 70.

**We provisionally propose that decision-making as to the assessment and meeting of the social care needs of disabled children should be based upon:**

**(1) an overarching principle that the best interests of the child be the primary consideration for decision-makers;**

**(2) a set of considerations to which decision-makers must have regard in applying that principle; and**

**(3) a final check that decision-makers must apply 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.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree that the best interests of the child ought to be the primary focus for decision-makers. This ought to shift the emphasis away from safeguarding towards proactively meeting the needs of the disabled child. It follows that the criteria which decision-makers would use when applying the principle of best interests would need to be drafted sufficiently clearly and broadly to lend itself to straight-forward application and raises the need for appropriate training for decision makers to promote consistency of application.We agree that any proposed decision or action identified from an assessment ought to be achieved in the least restrictive manner, conscious of the child’s rights and freedoms. |

### Consultation Question 71.

**We are provisionally proposing the following list of considerations to which decision-makers should have regard:**

**(1) 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;**

**(2) the importance of the child participating as fully as possible in decisions relating to the exercise of the function concerned;**

**(3) 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;**

**(4) the views, wishes and feelings of the child;**

**(5) the views, wishes and feelings of the child’s parents and carers and their knowledge of their child’s condition and needs;**

**(6) the need to support the child and their parent 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;**

**(7) the importance of preventing or delaying the development of the needs for care and support;**

**(8) the need to prepare the child for adulthood and independent living; and**

**(9) the characteristics, culture and beliefs of the child (including, for example, language).**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree. We note that no hierarchy between considerations is proposed. We consider that there is a risk, without appropriate training and sufficiently detailed guidance, that the manner in which these considerations are applied may not result in consistent outcomes. We recognise that experienced social work practitioners familiar with disability may approach this process more comprehensively than those with less experience or less training. We mention this given the risk of tension which exists between the considerations were opposing views to be taken. It may be useful to add the principle of least restriction to the list of considerations to which decision makers ought to have regard. |

### Consultation Question 72.

**We invite consultees’ views on the operation and practical effect of the list in section 1(3) of the Care Act 2014.**

Please share your views below:

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| --- |
| From our experience it is generally considered useful that there is a requirement to have regard to the list in section 1(3) of the Care Act 2014 as it enables discussions to be framed with local authorities with reference to specific factors relevant to the individual’s circumstances. This, in turn, can be of practical use when seeking to obtain a particular outcome from the care planning process, sometimes resulting in an outcome that is better and more tailored to the individual than one which may otherwise have resulted.  |

### Consultation Question 73.

**If the approach that we have set out in Consultation Questions 70-71 to participation were to be adopted, we invite consultees’ views as to whether and how it should vary according to the age of the child.**

Please share your views below:

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| --- |
| As a matter of principle, where a child is able to participate they ought to be supported to do so. We consider this should not be age dependent. |

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# Participation (Q 74-77)

### Consultation Question 74.

**We provisionally propose that legislation should provide that children (of any age) who have the ability to do so, can:**

**(1) request an assessment of social care needs (see further Chapter 3);**

**(2) make representations in the course of the assessment of those needs (see further Chapter 4);**

**(3) make representations about the content of any plan developed to meet those needs (see further Chapter 11);**

**(4) opt-out of advocacy support where a duty to provide such advocacy is engaged (see further Chapter 22);**

**(5) request that services are provided by way of direct payments (see further Chapter 10); and**

**(6) make use of the relevant remedies that are available where a local authority has failed to assess or meet their needs appropriately (see further Chapter 18).**

**Do consultees agree?**

Other

Please expand on your answer below:

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| --- |
| We agree that the focus ought to be on the child’s ability rather than their age when making requests or representations. We are unclear from this question what precisely is being asked. We note that problems may arise where children of any age, but more particularly children younger than 16 years, may make a request, including an opt-out request or representations – which others objectively consider is to their detriment – and the child does not anticipate the consequences of their request or representation. We consider that the provision of support and services, including advocacy services ought to be deployed to ensure as far as possible that the request or representation being made by the child is made with an appreciation of the consequences. While we are in favour of supporting a child’s decision-making, we consider that, broadly speaking, legislation would not permit an objectively adverse decision being made by younger children. |

### Consultation Question 75.

**We provisionally propose that the test for whether a child aged 16 or 17 is able to make the decisions set out in Consultation Question 74 should be the test contained in the Mental Capacity Act 2005.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree.  |

### Consultation Question 76.

**We invite consultees’ views as to whether legislation should provide that the test for whether a child aged under 16 is able to make the decisions set out in Consultation Question 75 is:**

**(1) competence (and not provide any further definition of the term); or**

**(2) the child’s ability to understand, retain, use and weigh the relevant information, and to communicate their decision.**

Other

Please expand on your answer below:

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| --- |
| We consider that the preferred test for whether a child aged under 16 is able to make the decision listed within (1) – (6) under Question 74 above is the test which considers their ability to understand, retain and weigh the relevant information and communicate their decision. It would necessitate the assessor being appropriately trained. However, please see our response to Question 74. |

### Consultation Question 77.

**We provisionally propose that the law should provide that a local authority must carry out an assessment of the social care needs of a disabled child where the child is seeking to opt out of such an assessment if the child is experiencing, or is at risk of, abuse or neglect.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree. In circumstances where a child is experiencing, or is at risk of experiencing abuse or neglect, the duty of the local authority to carry out an assessment should be maintained, even where a child seeks to opt out of the assessment. While acknowledging the importance of the wishes and feelings of the child not to participate, the basis for opting out or not engaging ought not to lead to an automatic pausing of the local authority’s duty without further investigation. |

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# Advocacy (Q 78-81)

### Consultation Question 78.

**We provisionally propose that a new legal framework for disabled children’s social care should include a right to independent advocacy for any disabled child who would otherwise have difficulty in participating in the assessment and planning process around their social care needs. This right would apply unless:**

**(1) there is already an appropriate person who can represent and support that child; or**

**(2) a child with the ability to do so (as to which, see Chapter 21) does not want an advocate to be involved.**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree. The availability of independent advocacy is important but currently advocacy services are severely stretched, and therefore if this is to be available it requires adequate resources in whichever local authority area the child resides to ensure equal access to independent advocacy. |

### Consultation Question 79.

**We invite consultees to provide their experiences of situations where support by an independent advocate has been provided to a disabled child being assessed under section 17 of the Children Act 1989.**

Please share your experiences below:

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| --- |
| We leave other consultees to provide direct experience of independent advocacy. We note only anecdotally that the stage at which an independent advocate is introduced to the assessment process can- unless appropriately managed- generate complexity, as well as when the advocate is changed at short notice and/or the advocate is unwilling or unable to engage with the parent carers of the child. |

### Consultation Question 80.

**We invite consultees to provide us with experiences of culturally competent advocacy (both positive and negative).**

Please share your experiences below:

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| --- |
| [Not answered] |

### Consultation Question 81.

**We provisionally propose that a new legal framework for disabled children’s social care should provide an entitlement for parents and carers of disabled children to have advocacy support in respect of the assessment of their own needs where, without such support, they would have difficulty participating in the assessment (and where there is no appropriate person who can represent and support them).**

**Do consultees agree?**

Yes

Please expand on your answer below:

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| --- |
| We agree. However we share the caution expressed in the report as to circumstances which may arise where there is a lack of agreement between an advocate for the child and an advocate for the parent/carer. It would be unhelpful where this detracts from meeting the needs of the child.  |

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# A new legal framework? (Q 82-83)

### Consultation Question 82.

**We provisionally propose 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.**

**Do consultees agree?**

Yes

Please expand on your answer below:

|  |
| --- |
| We agree with the Law Commission’s provisional proposal that disabled children should be taken out of section 17 of the Children Act 1989 and that a new distinct statutory framework for addressing their social care needs should be created.We agree that further statutory guidance will not address the issues identified within this consultation as statutory guidance cannot operate other than within the existing statutory framework and cannot create new rights. Further there is a risk that any new statutory guidance will just add to the complexity within the existing frameworks and may not be lawful should it stray beyond the existing statutory framework as identified in paragraph 23.5 of the Consultation Paper. Further, we agree as to the additional problems which are potentially caused by the use of statutory guidance as the mechanism for change as set out in paragraphs 23.6 and 23. 7 of the Consultation Paper.We agree with paragraph 23.9 that there is a need to create primary legislation to set out a clear, legally enforceable framework in order to secure the rights of disabled children and clearly identifying the obligations owed by public bodies to deliver and provide services to disabled children and their families.In respect of the potential amendment of existing legal frameworks we agree with the Law Commission’s provisional view that this adds to the problems of complexity. The risk is that this would just increase the extent of the maze which is already created by the existing framework and would no doubt increase complexity and uncertainty by the promulgation of revised guidance as well arising out of amendments to the existing statutory framework. We agree with the Law Commission’s provisional view and reasons, and we agree with the Law Commission’s provisional views as set out at paragraphs 23.16 – 23.18 of the Consultation Paper as there is a clear need to reduce complexity and introduce clarity. We share the view expressed at paragraphs 23.17 and 23.18 that the approach set out in Chapter 20 of the Consultation Paper would not be possible by mere amendment of the existing scheme and would not simplify the charging framework. We share the view that there needs to be a clear and straightforwardly accessible statutory framework which amendment to existing legislation would not provide.We agree with the key benefits identified as three benefits of a new framework at 23.19. We acknowledge the concerns expressed at 23.20 as to the potential risks of a new framework. We consider that the Law Commission appear to have identified the key benefits and risks and we have little to add in response to paragraph 23.21. We do note the concern raised in paragraph 23.20, in particular, the risks of missing abuse and neglect but this ought to be addressed by Government for example in the Children’s Wellbeing and Schools Bill presently being debated and through the local authority’s Safeguarding functions. It is our view that the Law Commission’s provisional recommendation to create a new statutory framework and the development of the policy behind it must flag these issues to Government and it would be for Government in the end to create effective and joined up legislative schemes (1) for disabled children and; (2) protect children from abuse. It is of note that these risks would still likely exist if ether new guidance or amendments to existing statutory frameworks were the mechanism of reform. We also note the concern of the risks at paragraph 23.20 at (3) and (4), but we consider the proposals to prevent children falling within the gaps proposed are reasonable solutions by use of combined assessments. We consider that the identified issues with labelling of children as “disabled” or risk of creating a hierarchy of children in need under s 17 is a matter which Parliament has to address and in part relates to a cultural change issue which cannot be easily remedied by use of primary legislation.On balance, we agree with the Law Commission’s provisional proposal as set out at paragraph 23.22 and we would welcome sight of the proposed draft legislation. Throughout our answers to earlier questions we have sought to highlight our concern that nothing should be lost as a result of introducing a new framework, meaning that powers to provide services in respect of disabled children at least as wide as the wide powers that currently exists in respect of disabled children under s 17 Children Act 1989 should be included in any new legal framework for social care for disabled children, alongside the new statutory duty. |
|  |

### Consultation Question 83.

**We provisionally propose that any new framework should be accompanied by two sets of guidance, one for professionals applying the law, and the other for parents and carers who need to understand their rights under the law.**

**Do consultees agree?**

Other

Please expand on your answer below:

|  |
| --- |
| We agree that there should be new guidance as proposed. We are slightly confused as to what is meant by Guidance for professionals and Guidance for parents and the proposed legal status of the separate set of guidance and possible conflict between them.Our understanding would be that guidance produced for professionals would, for example, potentially fall into a traditional form of statutory guidance where a local authority must act under the general guidance of the Secretary of State and this would be identified in the Explanatory Notes to any legislation that this will have the same effect as section 7 of the Local Authority Social Services Act 1970 (for example, see *R v Islington LBC ex parte Rixon* (1998) 1 CCLR 119, 123 (H – I) where a local authority must follow it unless there is good reason to deviate from it without freedom to take a substantially different course.).Although we see the benefit of documentation referred to as guidance for the parents and carers to enable the parents and carers to aid navigation and enforcement of the new proposed statutory framework, we are concerned that there could be a risk of conflict between two sets of guidance, and there does in our view need to be more precision and clarification within the proposals as to what the legal status is, if any, of the two sets of guidance proposed, and whether the professional guidance proposed would have a particular legal status in respect of enforceability against a public body in support of the statutory framework. |

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# Additional Consultation Question (Q 84)

### Consultation Question 84.

**We invite consultees’ views on whether any of the proposals in this consultation paper require adaptation in order to meet the needs of disabled children who are not in family-based care (for example, children in custody).**

Please share your views below:

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| --- |
| [Not answered] |

# Consultation Engagement Questionnaire

Once you have completed your consultation response, we would be grateful if you could complete a short, anonymous survey to help us understand the characteristics of individuals and organisations who have responded. Your answers will be held and analysed separately to your consultation response. The [link is here](https://forms.office.com/Pages/ResponsePage.aspx?id=KEeHxuZx_kGp4S6MNndq2ANkK9TwAFRBnu343TGv-wBUQkg0QUdYUEVVSTdCWklOVVM4SFpWSUEyVy4u).

1. [SEND tribunal caseloads soar: Solicitor calls for urgent action in managing education appeals | Law Gazette](https://www.lawgazette.co.uk/news/latest-send-backlog-alarming-says-specialist-solicitor/5121893.article) [↑](#footnote-ref-1)
2. [Education – legal aid deserts | The Law Society](https://www.lawsociety.org.uk/campaigns/civil-justice/legal-aid-deserts/education) [↑](#footnote-ref-2)