Law Commission Review – Disabled Children's Social Care (near final draft subject to sign off)

The following consultation response is submitted on behalf of the Association of Directors of Children's Services (ADCS) and the Local Government Association (LGA).

ADCS is the national leadership organisation in England for directors of children's services (DCSs) under the provisions of the Children Act (2004). The DCS acts as a single point of leadership and accountability for services for children and young people in a local area, including children's social care and education. ADCS is committed to the principles of equity, diversity, and inclusion which are fundamental to all areas of our work. We are committed to highlighting issues of disproportionality, discrimination and systemic barriers that limit opportunity where they exist, recognising that not all children, young people and families are impacted equally.

The LGA is the national voice of local government. We work with councils to support, promote and improve local government. We are a politically-led, cross party organisation which works on behalf of councils to ensure local government has a strong, credible voice with national government. We aim to influence and set the political agenda on the issues that matter to councils so they are able to deliver local solutions to national problems.

We are in support of the aims of this piece of work. It is vital that the legislative framework for disabled children's social care supports disabled children and their families to access the support they need to thrive, without unnecessarily interfering in family life. We recognise that many of the reforms proposed in this consultation aim to tackle a complex picture of legislation and guidance that has built up over many years, and welcome the opportunity to consider how we can improve this and bring it up to date.

That said, we do have concerns that some of the proposals in this consultation risk a series of unintended consequences that fail disabled children and their families. We are particularly conscious of the need to avoid repeating the mistakes of the Children and Families Act 2014 which, while well intentioned, ultimately led to a SEND system described by the previous government as "failing to deliver for children, young people and their families" and "despite the continuing and unprecedented investment…not financially sustainable.".

We have outlined our key concerns below and would welcome the opportunity to work through potential solutions with the Government as it considers its response to the Law Commission's final proposals.

We have significant concerns about removing the needs of disabled children from duties owed under Section 17 of the Children Act 1989 and establishing a new legal framework for this purpose. The initial aim of Section 17 was focused around help for children, rather than protection, and we still believe disabled children should be supported under this section. It is worrying that the proposals suggest that a whole cohort of children are removed from Section 17 due to their disability and are assessed under a separate legal framework, and yet, depending on individual circumstances, children may still be owed a duty under the Children Act 1989. This will lead to duplication and creates an even more complex picture for families to navigate.

Indeed, the vast majority of need is currently met via Section 10 of the Children Act 2004 which places a duty on local authorities to promote inter-agency cooperation to improve the welfare of children. There has been no guidance in relation to this since 2009/10, it would be helpful to update this as we believe it would enable improved support for children and families more effectively than some of the proposals as they currently stand.

We are increasingly having a national conversation about inclusion, and suggest that ensuring disabled children are considered alongside other children is part of this. We recognise that some children and families have raised concerns that they feel they are assessed through a protection, rather than help, lens, and suggest that this is a practice issue rather than a legislative one. A vast spectrum of need is met under the Section 17 duty, and this isn't confined to issues of safeguarding, as indicated by the move to a system of Family Help.

Practice guidance, focused on assessing and supporting disabled children under Section 17, co-produced with children and families themselves, would be helpful in addressing any concerns in application. However, safeguarding is everyone's business, and it is right that any assessment considers risk and escalates when appropriate. Proportionality of assessment here is key and the move to Family Help will allow a range of alternatively qualified practitioners to undertake assessments for children in need of help and support. It is not clear why assessors of children with disabilities would need specialist training and development and there is a risk that such a requirement would be at odds with the government's children's social care reform programme.

Parental views and wishes and the best interests of a child do not always align, we would not support self-assessment as a means to access statutory help and support. However, it is clear that help and support exist on a continuum and more could be done to define what is 'ordinarily available' to disabled children and families outside of a formal assessment process. Local authorities are experienced in responding to and meeting need; there is no need to develop a non-exhaustive list of services detailed in legislation, the risk is this will soon become outdated and will raise expectations.

It is not always clear through this consultation how proposals tie in with ongoing reform in the SEND system and children's social care. It is important that we avoid systems that act against each other, or set up ways of working that add complexity where it is not needed. Some examples of this include proposals around legislating for the skills and experience of assessors, and developing additional plans for disabled children. Children have multiple and multifaceted needs and therefore considering disability in isolation is unhelpful, any reforms need to consider how they interact with the wider system of children's services.

Broadly, we agree with proposals to combine duties into single express duties where there are currently duplications across different pieces of legislation. This will make it easier for both families and services to understand entitlements. We do not, however, agree with combining the duty to assess young and adult carers; having young carers explicitly referenced in legislation helps to ensure focus on this often-overlooked group of young people and recognises that their needs will be quite different to those of adult carers.

Where duties are combined however, the opportunity must be taken to clarify thresholds, and to ensure that these work to support children and their families. We are concerned that there is a risk of repeating the mistakes of the 2014 SEND reforms, in which vague language and very low thresholds led to an enormous surge in requests for support and an overwhelming of the system, which as a consequence is now failing many of the children we would want to support. We suggest that the threshold for assessment used in Wales – "it appears that a child may need care and support in addition to or instead of that provided by their family" – is most helpful, recognising that disabled children may have additional needs for support and building on the strengths of families, however we would also propose amending this to set a threshold of "it appears that a child is likely to need care and support in addition…".

Instead of new national criteria for assessment and services, we suggest that developing practice guidance to sit alongside the existing Section 17 eligibility criteria would be more appropriate. In adult social care, despite national criteria there is still local variation in practice, so we do not believe national criteria would be the best way of eliminating "postcode lotteries". It will be more important to ensure strong, co-produced practice guidance and sufficient funding for assessment and support.

In relation to the two points above in particular, we do not believe that the impact assessment for these proposals fully captures their likely impact. For example, in Policy Option 2, it suggests that an increased number of social care assessments is likely to cost £8.24 million, and additional costs of support as a result £14.45 million. This breaks down to an average of around £155,000 and £272,600 per council respectively; we believe that this is unlikely to be enough to cover the additional costs, particularly if the impact of these proposals has anything like the impact on demand for assessment as the Children and Families Act 2014 had.

We support proposals to codify in legislation the dividing line between social care and health care in respect of children, mirroring the approach for adults. Too often, support for children (including but not limited to disabled children) is affected by difficulties in agreeing responsibilities and funding across partners, particularly in a context of high needs and limited finances, and we must find ways to ensure that children's needs are always at the centre of discussions. We would also like to see work across Government on pooled funding and other options to improve how this works locally. This could helpfully start with a review of the children's continuing care framework.

With regard to health, it would be helpful to consider which of the proposals in this consultation should be applied to health at the same time. As the consultation identifies, it can be difficult to identify whether a particular need is a health or social care need, and it is therefore important that both health services and local authorities have clear responsibilities towards meeting children's needs and are held to account accordingly. It would not be appropriate to give local authorities a duty to secure the engagement or cooperation of other partners, including health, such a duty needs to be placed clearly with the appropriate body.

The right to redress for children with SEND via the Tribunal system is out of step with the arrangements for all other children in receipt of local authority help and support. We have significant concerns around extending the powers and jurisdiction of the SEND Tribunal as a potential option to challenge and rectify decisions about disabled children's social care. Recent research for the LGA and the County Councils Network found that education, health and council leaders believed that SEND Tribunals had a problematic effect on the operation of the SEND system. While all recognised the importance of a robust and independent route for dealing with disputes, it was unclear whether the Tribunal was an effective means of resolving disputes, given that its judgements would not alter the facts – for example, a Tribunal might name a specific setting in an EHCP, but that did not alter the availability of places in that setting. The Tribunal system does not work, it is adversarial and drives additional cost throughout the system with no consideration to affordability.

There are several proposals within this consultation around giving specific rights to disabled children, for example, access to advocates or giving the Children's Commissioner the power to initiate legal proceedings. There is a clear role for both advocates and the Children's Commissioner when children are in care however we are unclear as to why these rights would need to be extended to disabled children in need of help and support. If this was deemed appropriate, it's then unclear why such measures would not be extended to other children in need of help and support from children's services.

We agree that it would be helpful to start to consider transitions for children with disabilities at an earlier stage, however, this must apply to all partners. As already highlighted, children with disabilities who are transitioning into adulthood will likely need the support of health services, as well as the local authority and other partners, and therefore it is important that planning for adulthood is done in a joined up, holistic way. There are some helpful reflections on transitions for children with SEND in the recently published Ofsted thematic report.

The definition of disability needs to be carefully considered. We agree that it needs to be updated as the current definition is antiquated, however there is a risk that by using the Equality Act definition many more children and young people will be drawn into the system, possibly unnecessarily, such as those with depression and anxiety. Consideration of thresholds and ordinarily available support is therefore key here as outlined elsewhere in this response.

Finally, we have concerns around proposals 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. While it is clearly correct that all children accommodated away from home for a period of time should be appropriately safeguarded, we do not believe that every child will need, nor every family want, an independent reviewing officer for example, particularly for those only having short stays away from home. Increasing rights to IROs, leaving care status and so on would also have significant resource and workload implications.