Seven-minute briefing

Law Commission: Disabled Children's Social Care

North West ADCS Leading Children's Services

Introduction

The Law Commission has been reviewing the legal framework surrounding disabled children's social care in England, following a recommendation in the 2022 Independent Review of Children's Social Care. The law in question determines whether a disabled child is eligible for support from social care, what support they can receive, and how it is provided. The current system is seen as problematic and highly complex, with no single piece of legislation or guidance that local authorities (LAs) can rely on to understand their responsibilities. The law is also outdated, relying on a definition of disability that is now considered offensive and does not reflect modern understandings such as neurodiversity. Additionally, the system is arguably unfair, as each local authority sets its own criteria for eligibility, meaning children with similar needs may receive different levels of support depending on where they live.

Recommendations

The report recommends reforms to improve social care for disabled children, based on consultation with stakeholders, including children, families, professionals, and organisations. Recognising not all challenges can be solved through legislation, it focuses on areas where legal change can have real impact. Culture, training, and funding are acknowledged as critical but are left to government decision-makers. The proposals are designed to be practical and achievable within the limited resources of LAs. Drawing lessons from past legislation, such as the Children and Families Act 2014, the report aims to simplify, clarify, and modernise the legal framework to better support disabled children and their families, while remaining realistic about constraints.

A new Legal Framework

- Disabled children should remain within scope of section 17 Children Act 1989 and continue to be classified as a "child in need". This reflects the fact that disabled children may have needs in addition to those that arise from their disability.
- This framework should be accompanied by dedicated statutory guidance to help LAs ensure appropriate balance between identifying and meeting needs of disabled children and their families in a non-stigmatising way and safeguarding them from harm and abuse.
- There should be a single, comprehensive piece of statutory guidance on disabled children's social care law. That guidance should set out the respective rights and responsibilities of disabled children, families, and local authorities. This guidance should be produced with input from disabled children and young people, families, and LAs and should be published in a variety of formats to ensure accessibility for all.

Definition of Disability

For the purposes of children's social care, a child should be considered disabled if:

- they have a physical or mental impairment; and
- that impairment has a substantial and long-term negative impact on their ability to carry out everyday activities.

For children under six, an impairment is considered substantial and long-term if it would typically have that effect on someone aged six or older, ensuring younger children aren't excluded due to developmental differences. Medical diagnosis isn't required—the focus is on the condition's impact. The definition covers physical, mental, emotional, and behavioural impairments. Equality Act exclusions (e.g. addiction or behaviours like stealing) should not apply, to avoid unfairly excluding children with complex needs. Guidance should also reflect specific challenges of disabled children in adoptive families.

Seven-minute briefing

Law Commission: Disabled Children's Social Care

North West ADCS Leading Children's Services

Statutory Principles

Decision-making, in relation to the social care needs of disabled children, should be based upon:

- An overarching principle that the best interests of the child should be a primary consideration
- A set of considerations to which decision-makers must have regard in applying that principle
- A final check, whether 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.

The set of considerations which decision-makers must have regard to consists of:

- Promoting the upbringing of the child by the child's family
- The child participating as fully as possible in decisions relating to the exercise of the function concerned.
- The child being provided with information and support necessary to enable participation in those decisions, having regard to their particular needs.
- The views, wishes and feelings of the child.
- The views, wishes and feelings of the child's parents or carers.
- The parents' or carers' knowledge of their child's condition and needs.
- The need to support the child and their parents or carers to facilitate the development of the child and to help them achieve the best possible outcomes at each stage of their life.
- Preventing or delaying the development of the needs for care and support.
- The need to prepare the child for adulthood and independent living.
- The characteristics, culture and beliefs of the child (including, for example, language).

Assessing the Needs of Disabled Children

- A single statutory duty to assess the social care needs of disabled children. The duty to assess should arise if it appears to the LA that a child in the area is disabled; and may have needs for care and support arising from their disability.
- Need for support and care should be judged without reference to current support and should clarify a diagnosis is not necessary to meet threshold
- Different types of assessments (health, education, and social care) should usually be done together, unless there's a good reason not to. Guidance should give examples of when it's better to keep them separate.
- Guidance should explain how social care assessments for disabled children link with Early Help and Family Help assessments.
- Assessments should be suitable for the child and family's situation, not too detailed or too basic. Guidance should include examples.
- The person doing the assessment must have the right skills, knowledge, and training. If needed, they should speak to someone with expertise in the child's condition or situation.
- Families should be given a written copy of the assessment so they understand what was looked at and what support may be needed.
- Guidance should make clear when it's legally okay to delegate assessments to someone else and give examples of when this is appropriate.

Assessing the needs of parents, carers and siblings

There should be a single duty to assess the social care needs of the parent or carer for a disabled child, which should arise upon:

- request by the parent or carer; or
- it appearing to the local authority that the parent or carer may have needs for support.

In assessing the needs of a parent or carer, the local authority should be required to:

- Have regard to the well-being of the parent or carer
- Provide the parent or carer with a written copy of their assessment

The statutory guidance should:

- Clarify the rights of parents and carers to have their needs assessed and the requirements of such assessment.
- Clarify that assessments of parents and carers can be combined with the assessment of their child's needs, and that of their siblings if applicable.
- Be proportionate and appropriate to their circumstances.

This statutory guidance should also direct local authorities to consider whether the sibling is a child in need, or a young carer for the disabled child:

- Siblings who are young carers of disabled children should continue to have their needs assessed under the existing legal framework for young carers. The duties owed to young carers should not be subsumed within the legal framework that applies to other carers.

The Powers and Duties

- Introduce a single duty for local authorities to meet the social care needs of disabled children, based on national eligibility criteria.
- Government should define and implement these criteria in collaboration with local authorities, families, and advocates.
- Publish interim statutory guidance to help local authorities develop local eligibility criteria.
- Short breaks should be one way to meet eligible needs, including:
    - Accommodation
    - Care and support at home or elsewhere
    - Educational or leisure activities
    - Support for parents and carers
- Continue administering Disabled Facilities Grants under the Housing Grants, Construction and Regeneration Act 1996.
- The duty should operate within the Children Act 1989 framework and apply to any disabled child physically present in the local authority's area.
- If a child is ordinarily resident in another area, the providing authority should be able to recover costs from the home authority.

Local authorities should still have the flexibility to provide support in three key situations:

- When a child's needs don't meet national eligibility criteria, but support is still helpful.
- While waiting for an assessment to decide if the child meets the criteria.
- To support parents, carers, and family members in ways that promote the child's welfare

Local authorities should still have the flexibility to provide support in three key situations:

- When a child's needs don't meet national eligibility criteria, but support is still helpful.
- While waiting for an assessment to decide if the child meets the criteria.
- To support parents, carers, and family members in ways that promote the child's welfare

Range of Available Services

The legal framework should include a non-exhaustive list of services that local authorities can provide to meet the social care needs of disabled children. The list should cover:

- accommodation
- the provision of care and support at home or elsewhere
- educational or leisure activities
- services to assist families
- adaptations to the home
- counselling and other types of social work
- goods and facilities
- specialist equipment
- assistance with travel arrangements
- information, advice and advocacy

Methods for Providing Services

- The direct payment regime should be adapted so that the amount of the payment is sufficient to cover the actual cost of the provision necessary to meet the disabled child's assessed social care needs.
- LAs should not be required to make a direct payment if: the direct payment would have an adverse impact on other services which the LA provides or arranges for disabled children; or securing the proposed agreed provision by direct payments would not be an efficient use of the LAs resources.
- Direct payments must be regularly reviewed by LAs to ensure they are sufficient and effective. If not, alternative arrangements should be considered.
- This review should be aligned with the disabled child's care plan review.
- Consent is required from the person receiving the direct payment.

There should be a right to request a personal budget in disabled children's social care for:

- any disabled child aged 16 or 17, or
- their parent or carer, if they have capacity under the Mental Capacity Act 2005.

Local authorities do not have to prepare a personal budget if doing so would:

- negatively affect other services for disabled children, or
- be an inefficient use of resources.

Plan to meet their needs

- Eligible disabled children should have a statutory entitlement to a plan detailing the services they will receive.
- Parents/carers should receive a copy of the plan, which must be regularly reviewed.
- Statutory guidance should define the process and content of the plan.
- Plans should be combined with other relevant plans where appropriate and practical.
- Guidance should include examples of when and how plans can be combined

Decision making by disabled children

Any disabled child who has the ability to take the relevant action or make the relevant decision should be entitled to:

- Request an assessment of their social care needs.
- Make representations in the course of that assessment.
- Make representations about the content of any plan to meet their needs.
- Opt-out of advocacy support, where a duty to provide such advocacy is otherwise owed.
- Request that services are provided by way of direct payments; and make use of relevant remedies.
- In deciding whether a child aged 16 or 17 has the ability to make a decision or take an action of the type described above, a LA should apply the capacity test in ss2 & 3 of the Mental Capacity Act 2005.
- For children under the age of 16, the LA should apply a test based on the functional element of the capacity test in section 3 of the Mental Capacity Act 2005 and should regard the child as able to make the decision if they are able to understand, retain, use and weigh the relevant information, and communicate their decision.
- A LA should be required to 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.

Advocacy

A disabled child should have the right to an independent advocate during local authority assessments and care planning if they would otherwise struggle to understand, retain, use, or communicate information. However, this does not apply if:

- there is already an appropriate person supporting the child, or
- the child is capable of refusing an advocate and chooses to do so.

Seven-minute briefing

Law Commission: Disabled Children's Social Care

North West ADCS Leading Children's Services

Transition to adult social care

- Assessment of whether a disabled child is likely to have care and support needs after 18, should begin by the school year in which they turn 14.
- Statutory guidance they recommend should clarify that this process can begin earlier, if the LA feels it is appropriate.

The intersection between disabled social care and health care

- Legislation should set out the existing dividing line between social care and health care for children, based upon the quality and quantity of the care being provided, emulating s22(1), Care Act 2014.
- Statutory guidance should contain a section, co-produced between LA and NHS representatives, and parents and carers, addressing the intersection between social care and health care in relation to children. It should make the following matters clear:
    - How children with health care needs are to be identified, and by whom.
    - Local authority responsibilities to meet the health care needs of disabled children.
    - NHS responsibilities to meet the health care needs of disabled children.
    - Expectations for joint working and joint accountability where LA and NHS responsibilities overlap in the meeting of such needs.
    - What mechanisms exist for dispute resolution.
    - An expectation that disputes as between LA and NHS organisations should not affect the meeting of the needs of the child in the interim.
- There should be a single provision setting out when a LA with responsibilities under s117, Mental Health Act 1983 is required to assess a disabled child's social care needs. That provision should be contained in the single assessment duty that they recommend.

Assessing need and securing sufficient services to meet that need

- LAs, and their partner integrated care boards, should be required to prepare a joint strategic needs assessment covering the social care needs of disabled children in the area. This should replace the requirement on LAs to open and maintain a register of disabled children in their area.

Co-operation and joint working

- LAs should be required to have a designated social care officer. Further operational detail about the role, such as the level of seniority, should be set out in the statutory guidance they recommend.

Remedies

- There should be a fair, accessible, independent and effective system for resolving disputes about social care for disabled children. Further work is required on the part of Government to decide what the appropriate system should be.
- The SEND Tribunal should have an express power to recommend that LA carry out a social care assessment in an extended appeal.