

Disability Law Service

Offering free, confidential legal advice and
representation for disabled people

Overview and Introduction to Community Care

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This fact sheet is confined to the provision of community care services to disabled people living in the community.

The purpose of this fact sheet is not to provide a comprehensive statement on the law but to explain how the law applies to the problems that disabled people commonly encounter.

1 What are community care services?

If an individual needs help to manage at home because he/she is sick or disabled, the local authority social services department can provide or arrange a variety of community care services for the individual.

The services that *may* be available include:

- Personal care to assist with things such as getting up, washing, dressing, bathing, feeding and getting around;
- Domestic help such as cleaning, shopping and laundry;
- Adaptations to a disabled person's home, for example, stair lifts, ramps, handrails, raised toilet seats, lowering work tops, equipment for safety, comfort and convenience (e.g. bath seats, handrails, alarm systems, hoists, movable baths, adapted switches and handles, special beds, chairs and kitchen equipment);
- Transport to and from services;
- Leisure, occupational and rehabilitation activities in day centres, training centres, workshops and holiday homes;
- Respite care if someone is caring for a disabled person; and
- 'Meals on wheels', or lunches in day centres.

Distinction needs to be made between powers and duties to provide social services and health provision, both for people with a disability and elderly people.

2 Duties of Social Services Departments

Services under section 2 Chronically Sick and Disabled Persons Act 1970 (CSDPA)

The local authority is under a duty to make arrangements for the provision of services to disabled individuals, if it is satisfied it is necessary in order to meet their needs. Section 2 services are only available to persons who are "ordinarily resident" in the local authority's area. The services are available to both disabled adults and children.

The services you can obtain under s2(1) CSDPA include:

- Practical assistance in the home (which can include a home help).
- Provision of or assistance in obtaining wireless, television, library or similar recreational facilities.
- The provision of lectures, games, outings or other recreational facilities outside the home or assistance in taking advantage of available educational facilities.
- The provision of facilities for or assistance in travelling to and from home for the purpose of participating in any services provided for disabled people in the community.
- The provision of assistance in arranging for the carrying out of any works of adaptation in the home or the provision of any additional facilities designed to secure greater safety, comfort or convenience.
- Facilitating the taking of holidays whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise.
- The provision of meals in the home or elsewhere.
- The provision of or assistance in obtaining a telephone and any necessary specialist equipment to enable use of the telephone.

Schedule 8, paragraph 3 National Health Service Act 1977

- Duty to provide home helps for households where there is a person suffering from an illness, disabled, or where the person is "aged".
- The local authority must provide this on a scale, which is adequate for the needs of their area.
- Duty to arrange services for the prevention of mental disorder and for aftercare of those suffering from a mental disorder.

3 POWERS

Section 29(1) National Assistance Act 1948 (See further guidance LAC (93)10)

Local authorities have a power to provide the following welfare services under s29(1) for disabled persons:

- A social work service and advice and support at home or elsewhere;
- Facilities at day centres or elsewhere for social rehabilitation and adjustment to disability including assistance in overcoming limitations of mobility or communication;
- Occupational, social, cultural, and recreational facilities at day centres or otherwise. Payment can be made for work at these facilities where appropriate;
- Work at a workshop and hostel accommodation for those engaged in the workshop;
- Holiday homes;
- Provision of free or subsidised travel for those who do not qualify for travel concessions where such concessions are available;
- Assistance in finding suitable accommodation;
- Contributions towards the cost of employing a warden on welfare functions or providing warden services in private housing;
- Information about services provided by the authority for disabled people.

National Health Service Act 1977 Schedule 8 Paragraph 2 (1) (See further guidance LAC (93)10)

Local authorities may make arrangements for the following services to prevent illness or mental disorder, to care for those suffering from these conditions and assist in their aftercare:

- Meals on wheels;
- Night sitting service;
- Recuperation holidays; and
- Facilities for social and recreational activities.

Section 45 Health Services and Public Health Act 1968

Power to make arrangements for promoting the welfare of older people and include:-

- Meals and recreation in the home and elsewhere;
- Information about available services;

- Transport to and from any services provided by the authority or any other similar service;
- Assistance in finding suitable households where individual might stay;
- Support from visitors, advisory services and social workers;
- Practical assistance in the home, including adaptations in order to secure greater safety, comfort or convenience.

4 The Care Standards Act 2000

From April 2002, a single national care standards commission has been responsible for registering and regulating residential and nursing homes as well as domiciliary care agencies who provide services to social services.

National minimum care standards are used when the Commission makes decisions about registering care homes and domiciliary care agencies, fixing conditions of registration and variations.

In April 2004, the Commission for Social care Inspection (CSCI) took over the responsibilities of the National Care Standards Commission in England as a result of s102 Health and Social Care (Community Health and Standards) Act 2003. The CSCI has wide enforcement powers and operate a complaints through which service users and family members can lodge complaints about registered services. Further, the Care Standards Act 2000 brought domiciliary care agencies within the CSCI regulatory framework.

See Care Standards Act factsheet.

5 How to get services?

An individual can only obtain community care services after he or she has been assessed as in need of one or more services that the local authority is empowered to provide.

Section 47(1) NHS and Community Care Act 1990 creates a duty on social services authorities to carry out an assessment of an individual's needs for community care services. It states:

Where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority

- a) Shall carry out an assessment of his needs for those services; and
- b) Having regard to the results of that assessment shall then decide whether his needs call for the provision by them of any such services.

This means that the gateway to all services is via an assessment of need i.e. One can only gain access to community care services after you have been assessed as needing one or more services that the local authority is empowered to provide. There is no legal requirement that a formal request for an assessment has to be made. However in practical terms it will be difficult for an assessment to be arranged without a request by you or someone on your behalf.

Note: A local authority can provide community care services in an emergency situation without an assessment.

The nature of the assessment will depend upon the nature of an individual's case. For example if an individual wants a single service such as a travel pass, the assessment will be very simple, possibly carried out by an administrative worker involving the completion of a simple form and the verification of information. If a person has complex needs then a comprehensive assessment would be appropriate. This will involve a number of professionals from a variety of disciplines such as the health services, housing and occupational therapists. There is a duty for the health authority or housing authority to be notified in cases where health and/or housing needs become apparent and invite them to assist the assessment.

To ensure that a proper risk assessment is carried out the service user should be aware of the categories that should be included in an assessment: personal/social care; health care; accommodation; finance; education/employment/leisure; transport/access. In addition court cases have established that psychological, emotional and cultural needs should also be taken into account.

Once needs have been assessed, the services to be provided or arranged should be agreed in the form of a care plan. An assessment carried out without any care plan is incomplete and therefore unlawful. **The service user should ask for a copy of their assessment and any resulting care plan.**

Local authorities must also publish information about the assessment process, about what it involves, how long it may take and how decisions are made about whether a service will be provided. It is useful to ask the local authority for a copy of its 'Better Care, Higher Standards Charter' and Eligibility Criteria.

A service user should be fully involved in the process, as should the service user's carers (subject to your agreement). An assessment will be flawed and open to challenge if users and carers have not been involved in the process, their preferences ascertained and those with communication or mental capacity difficulties have not been given help with representation to express their views.

The Community Care Assessment Directions 2004 makes it clear that full involvement of individuals and their carers in both assessment and care planning is very important. The involvement of the carer in the assessment and care planning process ensures there is a realistic account taken of the care a carer is able to provide and that the caring relationship is sustainable.

Note: Fair Access to Care Services: Guidance on Eligibility Criteria for Adult Social Care LAC (2002) 13 This guidance provides Social Services Departments with a framework for

determining eligibility for adult care services. **[See factsheet on Eligibility Criteria For Adult Social Care for more information]**

6 Can the local authority refuse to carry out an assessment?

As the threshold for assessment is so low (apparent need) it is difficult for a local authority to legally refuse to carry out an assessment. The assessment must be carried out even if the service user has no sensible prospect of being awarded services because of the local authority's tightly drawn eligibility criteria.

7 What does the - FACS guidance say about assessment?

- The purpose of an assessment is to identify and evaluate an individual's presenting needs and how they constrain or support his/her capacity to live a full and independent life. Individuals should be 'active partners' in the assessment process.
- Better Care, Higher Standards Charters should be developed which detail the assessment process, timescales, eligibility and services (including direct payments).
- Before assessing councils should determine whether a person appears to be in need of services. This should be a low threshold.
- Assessments should be 'rounded and person centred'. It should take account of health needs and other problems (i.e. housing).
- Professionals should look at :
 - the intensity of particular needs – physical pain, distress or disruption, instability and predictability of problems – day to day and over longer periods.
 - external and environmental factors causing or adding to the problems
 - the number of different needs and how the person deals with them.
- Assessments should include evaluation of risks to independence to the individual as well as the carers, in particular: ('key aspects of independence')
 - 'autonomy and freedom to make choices
 - health and safety including freedom from harm, abuse and neglect, and taking wider issues of housing and community safety into account
 - the ability to manage personal and other daily routines
 - involvement in family and wider community life, including leisure, hobbies, unpaid and paid work, learning, and volunteering'
- Councils are to promote development of services that provide interpreters, translators, advocates and supporters to help individuals access and make best use of assessment process.

- Councils should not operate eligibility criteria to determine the complexity of the assessment offered, rather the depth and breadth of the assessment should be proportionate to individual's presenting needs and circumstances.
- Assessment should enable individuals to:
 - gain a better understanding of their situation
 - identify the options that are available for managing their own lives
 - identify the outcomes required from any help that is provided
 - understand the basis on which decisions are based.

The National Service Framework for Long-term Conditions sets 11 quality requirements to change the way health and social care bodies and their local partners support people with long-term neurological conditions to live as independently as possible and improve their quality of life.

The relevant authorities should use the quality requirements in the planning, development and delivery of local services. Please note that there is a ten year implementation period, which means that the authorities have until 2015 to implement fully the recommendations set out in the National Service Framework.

8 Some frequently asked questions

a I have asked for help with telephone rental, they tell me they do not provide that service and so will not assess me.

Assessment and the subsequent decision whether to provide services are two distinct legal processes. Whilst there is a threshold to cross to establish entitlement to an assessment this is very low. If you are disabled the authority must assess your needs for all the services listed at 2 above. It must also assess your needs for all the other services mentioned at 3 if it appears to the authority that you may be in need of those services.

If a refusal to assess is challenged most authorities will conduct an assessment even if there is little likelihood of the person being provided with a service.

Once it has assessed your needs, the authority has to make a decision about whether to provide services to you. In deciding this it will have established criteria describing the level of need which must exist before a service will be provided. For example the eligibility criteria for a telephone might be that the person has a life threatening condition and that they have no other means of summoning medical assistance.

Many authorities have made the eligibility criteria for assistance with telephones televisions and holidays in particular so tight that very few people end up with a service. Even where they do, often they are charged the full cost.

However a 'policy' decision never to provide any of the services at number 2 above is unlawful. An authority can lawfully decide not to provide the services at number 3 but it cannot lawfully refuse to assess a persons needs for those services if it appears to it that a person may be in need of the service.

b I have asked for an assessment but they say I will have to wait 3 months before it starts as they are short staffed.

Unfortunately, the law does not provide timescales for the carrying out and completion of assessments for adults. The only requirement is that the assessment takes place within a 'reasonable time.' What is reasonable will depend on the circumstances of each case. Authorities prioritise cases according to urgency. Ask to see their 'Better Care, Higher Standards' Charter in which they should set out the time within which assessments should be completed in the various priority groups e.g. it might say that non-urgent simple assessments will be completed within 42 days of referral. A very long delay or a failure to specify a time within which an assessment will take place may be interpreted as a refusal to assess. The problem here is deciding when a delay in assessment could amount to a refusal to assess and therefore a breach of statutory duty. However, raising legal arguments about delay generally leads to an assessment being carried out.

One can also challenge the council for failure to carry out its duties under s6 LASSA 1970,

i.e. to ensure that there are 'adequate staff' to assist Directors of Social Services Departments in the exercise of their functions'.

In urgent cases the authority has power to provide services pending the completion of an assessment.

Where there is unreasonable delay in getting an assessment, consider making a formal complaint under the social services complaints procedure. Information on how to use the complaints procedure will be dealt with below.

c My care manager says I should be eligible for services but my care plan has to be approved by a funding panel.

Once your needs have been assessed, the authority will have to decide whether you are eligible to receive a service. Unfortunately even if there is no dispute that a particular need exists, the authority may refuse to provide a service to meet that need if it considers your circumstances are not sufficiently serious ie you do not meet their eligibility criteria.

The decision as to whether to provide services or not must be taken within a reasonable time. Again this will vary from case to case.

Experience has shown that when some individuals have been assessed and the service provision identified and agreed in a care plan, they are then informed that the service cannot be provided (due to lack of resources) and that they will be put on a waiting list until a funding panel meets to agree to fund a placement.

However, several cases have established that once an individual has been assessed as needing a service that the local authority is under a duty to provide, then the duty to provide is triggered and a lack of resources cannot be used to delay a provision of service. Those services cannot be withdrawn or reduced without a reassessment of need. If there is a shortage of physical or human resources case law has established that providing the local authority is making a 'sincere and determined effort' to resolve the problem then the Court will not intervene.

The decision on provision of services is therefore key. In an effort to contain expenditure on services, authorities have developed often complex procedures involving consideration of individual cases by panels of officers. Practice varies from authority to authority but most have them. In simple cases, perhaps involving services up to a certain (low!) cost an individual manager may be authorised to decide whether the service should be provided, in more complex (expensive!) cases the panel will decide.

These panels have no basis in law in the sense that they are not referred to in the legislation or guidance. It would though be difficult to mount a challenge solely on the basis that your case has been referred to the panel. However the panel's decision if adverse may well be susceptible to challenge. For example if your care manager has made a recommendation that is rejected without any explanation. In such cases you should always ask for a copy of

your assessment, any additional report that was considered by the panel and any minutes recording the discussion of your case. You are entitled to this information under Data Protection legislation.

d I have been told there is a waiting list for services.

Once the authority has decided to provide you with a service it must make arrangements for providing that service. There may be some situations in which the authority can delay provision of services for matters outside its direct control. For example if you must attend a specialist day service run by a private agency and they do not have a vacancy immediately available. Special rules apply to the payment of Disabled Facilities Grants, which can be deferred in certain circumstances.

Some authorities seem to operate a panel for allocating resources after a decision has been made to provide a service. Such a process or otherwise operating a 'waiting list' for funding is unlawful.

As with refusals to carry out assessments, the threat of challenge is often sufficient to ensure services are provided.

Where the authority has genuine difficulty in providing a service promptly you should be informed of the reasons and the timeframe within which the service will be provided. The authority should also consider alternative means of meeting your needs in the interim. Case law has also established that just placing an individual on a waiting list and taking no action is not an option. Whilst on a waiting list some short-term provision should be made.

e I have been told my number of hours of home care is to be cut because social services are short of money.

Local authority can only withdraw services in the following circumstances:

- 1) if need no longer exists;
- 2) if need can be alternatively met; and
- 3) if you no longer meet the revised eligibility criteria.

However, services can only be withdrawn or reduced following a reassessment of your needs. It is lawful for your authority to change its eligibility criteria and reassess you against the new and no doubt tighter criteria.

If after a reassessment the authority decides to reduce your services and you disagree - always ask that it defer its decision until you have had the opportunity of challenging it.

f I need a stair lift in my home. I was advised to apply for a disabled facilities grant. My application was granted but I cannot afford the contribution.

If the authority have decided that it is necessary in order to meet your needs that you are provided with assistance with adaptations, it may facilitate this by encouraging you to apply for a Disabled Facilities Grant.

However if you do not qualify for a grant or are unable to afford your contribution (the means test for the grant is not generous) social services still has a responsibility to you. They can assist you in meeting your contribution or by paying for the works in full. Social Services though can recover the cost of any assistance provided e.g. they may agree to loan the money with or without interest or ask for a charge to be secured on your property to be repaid on sale or by some earlier mutually agreed time. It is highly unlikely that any authority would not seek repayment. They will be reluctant to pay you any money so you will need to be very persistent.

Note: If you do not agree with the assessment carried out by the Occupational Therapist and the recommendations for adaptations, then a complaint through the social services complaints procedure is appropriate. If however you are complaining about a decision not to approve your adaptations, then the complaint should be made to the Housing Department.

There are statutory timeframes for approving and completing works under a Disabled Facilities Grant. Upon receipt of a completed application for a Disabled Facilities Grant, the housing department has 6 months to decide whether or not to approve it. After approving it, the works must then be completed within 12 months.

g The carers from the agency are very unreliable. I have told my care manager but he says there is nothing he can do and I should complain to the agency.

Social Services has its own care agencies but can also commission an outside agency from the private or voluntary sector. Many authorities rely heavily on agencies to provide home care. There are many reasons for this not least of which is that pay and benefits in the public sector are more generous than in the other sectors.

Although the authority may 'outsource' the delivery of your service, it can never delegate the legal responsibility it has to meet your needs.

There will be a contract between Social Services and the care agency. It will define the quality of service the agency must provide as well as the cost and other matters. If the agency is not fulfilling the terms of the contract the authority should take action against the agency. This may fall far short of terminating the contract but may be an effective means of improving matters. Your care manager should be willing to raise your complaints with the agency and if necessary provide details to the officer who monitors the contract in the authority.

You can complain to the agency direct as well as through the social services complaints procedure. You should also note the standards contained within the National Minimum Standards for Domiciliary Care Agencies under the regulations of the Care Standards Act 2000. The purpose of these minimum standards is to ensure the quality of personal care

and support which people receive whilst living in their own home. A copy of the Domiciliary Care National Minimum Standards Regulations can be obtained from the Department of Health website - www.doh.govt.uk.

- h I get home care from social services in the mornings and evenings. My niece cooks and cleans for me. I pay her some money from my DLA. I have asked to receive direct payments so that I can employ my niece to provide the other care. She may as well have it as opposed to a carer I do not know. My care manager has said this may not be possible, as she is a relative**

The authority is able to make payments to people to enable them to make their own arrangements to purchase care, which would otherwise be provided by the authority. The recipient of these 'direct payments' is responsible for the arrangements made. For example he or she would have all the responsibilities of an employer if carers were employed direct. They would be bound by any contractual arrangements made with an agency.

The authority has a responsibility to monitor how direct payments are used and there are some restrictions imposed by parliament preventing people from engaging close relatives to provide services. Your niece is not sufficiently 'close' for these purposes and you may engage her. Spouses may never be engaged to provide services unless the authority is satisfied that it is necessary to meet satisfactorily a person's needs a local authority may not allow people to use direct payments to secure services from a spouse. Whether other close relatives (or their spouses) can, will depend on the relationship and whether they live with you or not.

- i I am told that a charge is to be made for the services I need. I don't think this is right and I am refusing to complete the financial assessment form.**

You are not alone in objecting to paying for services. Nevertheless legally an authority can charge for most of the services it provides to disabled people. The services for which charges are made and the level of charges vary between authorities. Charges for domiciliary care and other non-residential social services are discretionary. The Government has issued Guidance on charging policies. The Guidance is called Fairer Charging Policies for Home Care and other non-residential Social Services and can be found on www.doh.uk/scg/homecarecharges. The aim of the guidance is to produce more consistent charging policies, which in the past have varied a lot from one local authority to another. Local authorities must, by law, comply with the guidance.

Any charge levied must be 'reasonable' and the authority cannot require somebody to pay more than it appears that it is 'reasonably practicable' for them to pay.

The charges you pay must be based on your weekly income after making allowances for your housing costs and your disability related costs (where appropriate); and the charges you pay must not reduce your weekly income below a minimum level (basic income support levels plus 25%). The local authority must decide the level of income you must be left with after paying your charges. In practice, for example, if you are only getting income support or

incapacity benefit, you are automatically exempt from charges and it is not necessary to assess your disability costs. Your savings and other capital however can be taken into account. If you have savings of over (currently) £20,000 then the local authority can ask you to pay the full cost of the service you receive.

If a person complains they cannot afford the charge they have a legal right to request a review and a more detailed means assessment will be carried out. If a person is dissatisfied with the outcome of the review, he or she can use the council's complaints procedure to try to get the charge reduced. The authority has a discretion to reduce charges or waive them altogether if satisfied that the person cannot pay the normal charge for their service.

If you refuse to complete an assessment form the authority will simply assume you can afford to pay the maximum charge and will bill accordingly. It is up to you to demonstrate you cannot afford the charge. You will only be able to do this by disclosing your means.

If you do not pay charges, the authority cannot withdraw your services. However it can take court action against you to collect outstanding charges.

j My spouse provides a lot of my care but is finding it difficult to cope. She needs a break but I don't think she is entitled to community care services.

The Carers and Disabled Children Act 2000 allows a person who provides or intends to provide a substantial amount of care on a regular basis to a disabled person to request their own community care assessment (regardless of whether or not the disabled person is having an assessment). In accordance with the Practice Guidance for this Act, the assessment of the carer's need for support has to look at the impact of the whole caring situation. Your carer will be entitled to services in their own right, such as training or help around the home. The outcome of their assessment may also result in an increase of services you are provided including perhaps respite care.

Even if your carer does not request an assessment the authority in any event is required to have regard to their ability to continue to provide substantial care on a regular basis during your assessment.

k Following a review of my care plan my care manager says I need 7 hours care a day and as this will cost more than a residential home, I must either go into a home or have care at home limited to the cost of a placement in a home.

This is a very complicated area. Practice guidance states that though cost ceilings can be used as a guide, they should not be used rigidly. In some cases, but by no means all, an authority can choose the cheaper of two alternatives when deciding what services to provide. They can only do this where both alternatives are capable of meeting your needs. If the authority says you need 7 hours care daily and the 'cap' is 5 hours, then the capped service is not capable of meeting your needs. Offering you a choice in these terms is therefore unlawful. You should not agree to such a suggestion.

The authority may however say that as your needs are capable of being met in a residential home that is the service it will provide. Such an approach whilst apparently lawful may still be susceptible to challenge. Firstly the approach runs counter to the philosophy of community care which is to provide people with the right level of support to enable them to achieve maximum independence and control over their own lives. Secondly it may be an interference with your human rights, in particular your right to privacy and family life. Thirdly you may have a psychological need to remain at home. If you do, a placement in a home would not be capable of meeting your needs and could not lawfully be put forward as an alternative. As mentioned above authorities cannot have blanket policies that do not allow for exceptions.

The authority cannot compel you to go into a home (save in very exceptional circumstances). It might though say that as you have refused a placement in a home, it has discharged its legal duty to you and withdraw all services. There are many reasons why an authority might not find this an easy decision to take but it is a risk you would have to consider.

9 Remedies

If an individual is unhappy at the way their local authority has dealt with their case there are several ways to challenge it. Which procedure is appropriate to a person's case will depend upon a number of factors including cost, urgency and subject matter. The person should take legal advice about this if they are not sure which procedure is most appropriate. Legal Help and Community Legal Service funding (Legal Aid) may be available and an individual may be able to get free advice from some of the agencies in their local Community Legal Service.

10 Social Services complaint procedure

Please see factsheet on English Social Services complaints procedure for information.

As you will see from the factsheet, the authority is supposed to deal with an individual's complaint within a fixed time limit. Many authorities exceed this limit. If one's social services does it is difficult to take any effective action to speed the process up although in exceptional cases an application to the court may be appropriate.

All authorities are required to publish details about their complaint procedures and an individual's care manager should be able to provide them with this information. There will be an officer in the authority with responsibility for co-ordinating the procedure so if an individual's care manager cannot provide them with the information, or if there are concerns about how a person's complaint is being dealt with, contact him or her. If in doubt address your complaint to the Director of Social Services.

If a person is complaining about a proposed or actual reduction in their services always ask for the service to be maintained or reinstated pending the outcome of the complaint. A failure to agree to such a request may be susceptible to challenge by way of Judicial Review.

Some authorities, but by no means all, will consider making a payment of compensation in appropriate cases.

11 Local Government Ombudsman

The ombudsman investigates complaints about councils where the complaint is about 'maladministration' i.e. where there has been a fault in the way a council has or has not done something and that you have suffered injustice as a result.

Before the ombudsman can investigate a complaint s/he normally requires that the council be given the chance to consider the complaint under its own procedures. It will therefore not normally be possible to complain to the ombudsman until after an individual has exhausted the council's procedure. The ombudsman though may investigate a complaint before the end of the council's procedure for example if the council has unreasonably delayed in dealing with a person's complaint.

An individual must complain to the ombudsman within 12 months of the event they're complaining about occurring. The ombudsman may take many months to investigate the complaint. Although the ombudsman cannot force the council to accept his findings almost all do. The ombudsman regularly recommends the payment of compensation in cases where maladministration causing injustice is found.

12 Local Authority Monitoring Officer

Every authority must designate an officer who is obliged to prepare a report on cases where he/she is of the view that the authority has acted unlawfully. The report is sent to each elected member of the authority who must meet in full council to consider it within 21 days of the report being sent. The decision is suspended until the council meeting has taken place.

The monitoring officer will normally be the chief executive or the head of the legal department. In principle a complaint to the monitoring officer appears a relatively informal and speedy procedure to follow. In practice unless the case is clear cut, the monitoring officer is likely to refer an individual's complaint for investigation under the social services complaint procedure rather than investigate it him/her self.

13 Complaint to the Secretary of State for Health

If the Secretary of State is satisfied that an authority has without reasonable excuse failed to comply with a statutory duty he may make an order declaring the authority to be in default of that duty and may direct the authority to comply with the duty within a certain time limit. Whilst the Secretary of State has never exercised his power to declare an authority in default, he will normally ask the authority to comment on the complaint and this may lead to a resolution in itself. There is no need to exhaust the councils complaint procedure before writing to the Secretary of State but if one does not he may invite the authority to consider the complaint internally before taking any further steps.

14 Judicial Review

This is the process by which the High Court scrutinises the decisions of local authorities. The Court does not normally consider the merits of the decision itself but looks at the way in which the decision was reached.

Before a Judicial Review can be brought, the court will normally have expected the applicant to have exhausted any alternative remedies. This may mean complaining under the council's social services complaint procedure or to the Secretary of State first. A complaint to the local government ombudsman does not have to be pursued.

Whether a Judicial Review can be applied for without first complaining will depend upon the circumstances in each case and the nature of the matter in issue. If there is a general principle as to the local authority's obligations in law then the complaint procedures may not be regarded as an alternative remedy to be pursued before applying for a Judicial Review. If there is no such principle at stake and only factual matters are in dispute then the complaint procedure may be regarded as providing a more suitable means of redress. The fact that the court can make interim orders might in urgent cases mean that an application for Judicial Review would be justified. For example if the authority decides to withdraw services and does not agree to reinstate them whilst considering your complaint you might be able to obtain an order at short notice from the court to compel the authority to reinstate the services. Equally if the authority delays unreasonably in dealing with your complaint the court may be more prepared to deal with an application for Judicial Review.

Judicial Review must be applied for promptly and in any event within 3 months of the decision or action complained of. The court does have power to extend this time limit in exceptional cases but the exercise of this power should not be relied upon.

If successful in a Judicial Review application the court is not bound to make an order in the applicant's favour. The orders that are available do not themselves necessarily provide a practical solution for the kinds of problems experienced by disabled people. The orders mainly concern the decision making process itself. So the court may quash the council's decision in a particular case and order the decision to be taken again but it would be rare for the court to order an authority to provide a particular service.

Although the court can order the payment of damages (compensation), this is unusual in Judicial Review cases.

This is a very complex area, anyone considering making an application for Judicial Review should take specialist legal advice.

15 Claim for damages for breach of statutory duty

It is possible to bring a claim for damages in the High or more usually the County Court if the authority has breached a statutory duty it owes to an individual personally. Such duties

unfortunately are very rare and the statute which creates the duty must expressly or impliedly enables a claim for damages for breach to be brought. However the law in this area is complicated and is rapidly changing and one would need to take specialist legal advice before commencing such a claim.

16 The European Court of Human Rights

The European Court of Human Rights hears complaints made by individuals whose rights under the European Convention on Human Rights 1950 have been breached by their government. Complaint can only be made once all domestic remedies have been exhausted and within 6 months of the final decision made by the highest domestic court or authority. The process is very lengthy often taking several years from start to finish.

17 The Human Rights Act 1998

This Act came into force on the 2nd October 2000. The effect is to incorporate the European Convention on Human Rights into UK law.

It will be unlawful for a public authority to act in a way which is incompatible with the Convention rights. 'Public Authority' includes bodies who perform functions of a public nature. This is unlikely to include bodies who provide services on behalf of social services under contractual arrangements.

It is possible to include a claim under the Act within any proceedings. For example if an application for Judicial Review is made to challenge an unlawful decision to move somebody to a residential home against their wishes, the application can include a claim that the decision violates the Convention right to privacy and family life.

Freestanding proceedings must normally be brought within 12 months of the act complained of. However if an application for Judicial Review is to be made the 3 month time limit will still apply.

Where the court decides the authority has acted unlawfully in contravention of a Convention right it may make such orders within its jurisdiction as it considers just and appropriate damages may be awarded in some cases.

For further advice on these matters contact the Community Care Solicitor at the Disability Law Service:

Legal Disclaimer

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For further advice on these matters please contact:

The Disability Law Service

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