

# MS and the Law

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## Introduction

*MS and the Law* has been written for the MS Society by the Disability Law Service. It is intended as a guide for MS Society volunteers, branches and others who may find the contents helpful. Although comprehensive and accurate at the time of going to press, the publication is not intended as a substitute for individual legal advice and this should be sought where necessary.

The contents reflect the situation in England and Wales, except where stated. In Scotland and Northern Ireland, where the law may be different, you should contact specialist legal advisers.

The MS Society has worked in partnership with the Disability Law Service for some years. Our partnership has helped people affected by MS to obtain high quality legal advice and support on a range of issues including community care and disability discrimination issues in employment.

This partnership has now been extended. The MS Society now funds a dedicated MS Legal Officer, based at DLS, who is the first point of contact for people affected by MS who are seeking legal advice. The Legal Officer will respond to enquiries, whether by telephone, email or letter, and will be able to assist with questions about community care and disability discrimination in employment, access to goods, facilities and services and education. The Legal Officer will provide information and, where appropriate, arrange access to DLS legal practitioners.

**You can contact the MS Legal Officer on 020 7791 9826**

You may feel that you need additional support. Local advocacy organisations may be able to help with this. Advocacy workers are trained to take time to properly understand your needs and concerns, and reflect your wishes to professionals and organisations, so that you get the support you need. They may be able to phone professionals on your behalf, attend an appeal tribunal with you and attend meetings with health and social care professionals with you. For details of a local advocacy organisation, go to [www.actionforadvocacy.org.uk](http://www.actionforadvocacy.org.uk) or contact the Advocacy Finder Helpline on 08451 228 633 (Monday to Friday 2-5pm)

This publication does not cover employment law. For information on employment, please see *Working with MS*, available for download on [www.mssociety.org.uk](http://www.mssociety.org.uk) or by phoning 020 8438 0799.

For over 30 years the DLS has provided high quality information and advice. DLS provides an advice line and casework service.

Lynda Finn  
Former head of education for the MS Society  
May 2008

# Overview and introduction to the NHS

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## Overview

The National Health Service (NHS) provides medical and nursing services as well as services to provide aftercare (care after treatment or an operation). These services are provided in nursing and care homes and seek to prevent illness. They include community nursing, continence services, palliative care (care for terminally-ill people), respite care (short-term care to give someone's carer a break), chiropody and physiotherapy.

However, the NHS responsibilities are not affected by community care laws. So, for example, an organisation within the NHS is not responsible for assessing your needs in the same way a local authority has to, in line with the NHS and Community Care Act 1990.

This is a complicated area and there are some issues that arise:

- Are you entitled to NHS continuing care (free care provide by the NHS)?
- Are you entitled to nursing care paid for by the NHS?
- Are social services or the NHS responsible for your care?
- Are the NHS and social services failing to work together to provide your care?

## Specific legal duties

The NHS duties are more general than social services' duties.

- Section 1(1) of the National Health Service Act 2006 says that the Secretary of State must continue to promote an NHS with a full range of services for your physical and mental health; and
- preventing, diagnosing and treating illness in line with this act.

So, section 1(1) does not say that the Secretary of State must provide a full health service. Their duty is 'to continue to promote' a full health service.

In general, health services must be provided free of charge.

The Secretary of State has the authority to:

- provide services they consider appropriate to fulfill their responsibilities under the act; and
- do anything that will help them carry out these responsibilities.

The Secretary of State has a general responsibility to provide any services they consider necessary to meet the reasonable conditions of the act. Section 3 says the Secretary of State is responsible to provide the following services throughout England;

- Hospital accommodation
- Accommodation for any service provided under this act
- Medical, dental, nursing and ambulance services
- Services or facilities for pregnant women, women who are breastfeeding and young children, as part of the health service, as appropriate
- Services or facilities to prevent illness, to provide care for people suffering from illness and their aftercare, as part of the health service, as appropriate
- Services or facilities to diagnose and treat illness

Although these legal responsibilities are set out as the Secretary of State's responsibilities, it is also the responsibility of the relevant health authorities and trusts.

**Strategic Health Authorities** cover large areas. There are 10 in England which are responsible for developing plans for improving health services in their local area, making sure local health services are of a high quality and are performing well and increasing how many people local health services can treat.

**Primary Care Trusts (PCTs)** control 80 per cent of the NHS budget. They directly provide a range of community-health services, provide funding for GPs, dentists, prescriptions and so on and also buy hospital and mental-health services from appropriate NHS trusts or from the private sector. PCTs are responsible for working with local authorities and other agencies that provide health and social care locally to make sure that the local community's needs are being met.

**NHS Trusts** provide services locally – the main ones are hospital services, ambulance services and mental-health services.

**Special health authorities** provide a health service throughout England. Examples include the National Blood Authority, Health Protection Agency and the Mental Health Commission.

## Continuing care

The use of jargon and various medical terms can be confusing. The following are useful definitions.

‘Continuing care’ (or ‘long-term care’) is a general term that describes the care which people need over a long period, as the result of disability, accident or illness to cover their physical and mental-health needs. It may include services from the NHS or social care. It can be provided in a range of settings (for example, at home or in nursing homes). It is different from intermediate care (which has specific results for rehabilitation or recuperation for a limited period) and transitional or interim care (care as the patient recovers and returns home or goes into a nursing home from hospital), where the care setting is temporary and different from where people are expected to receive any continuing care they need.

‘Continuing NHS health care’ describes a package of care arranged and funded by the NHS. The conditions people must meet to qualify for it are set by a level of overall care needs (including, but not limited, to care provided by a registered nurse), which means that the person must have a **‘primary need’** (a serious need) for health care and needs more specialist care than the care social services are able to provide under section 21 of the National Assistance Act 1948.

‘Continuing health and social care’ describes a package of care that involves services from the NHS and social care.

NHS continuing care services are provided by the NHS free of charge, but services provided by Social Services will usually be provided in line with a means assessment.

Strategic Health Authorities must bring together continuing care review panels to review a decision made about your entitlement to NHS continuing care. The review panels make sure authorities have followed the proper procedures to reach their decisions about providing you with continuing NHS health care and applied the appropriate eligibility conditions to assess you for it.

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## Nursing care

Section 49 Health and Social Care ('HSC') Act 2001 says that local authorities are no longer responsible for arranging care from a registered nurse as part of community care and have now introduced free nursing care.

Section 49 (2) HSC Act 2001 defines nursing care from a registered nurse as follows. Services provided by a registered nurse involve:

- providing care, or
- planning, supervising or employing others to provide care except services which would not normally be provided by a registered nurse.

Guidance has been issued to put section 49 'Guidance on Free Nursing Care in Nursing Homes' in place. This guidance does not change the duties of health authorities to arrange and fully fund services for people whose primary needs are for health care rather than for social care.

A trained nurse will carry out one assessment to decide if nursing care is the most appropriate care and what level is needed. The Registered Nurse Care Contribution (referred to as 'RNCC') is used to decide the care needed from a registered nurse for a care package provided in a nursing home. The NHS will then make a contract with each home for care to be provided from a registered nurse, in line with the agreed three bands – low, medium or high (there is only one band in Wales and Scotland).

The RNCC contribution ('free nursing care') will only be relevant if you are not eligible for continuing NHS health care and only usually happens if your local authority arranged your residential accommodation.

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## Joint working

Local authorities and health authorities have a legal responsibility to consult and cooperate with each another – you should never have to contact one on behalf of the other. You should never be told that there is nothing social services can do 'because it's not their responsibility'.

You should never have to wait for services after an assessment while health and social services argue over who is responsible for these services. In this type of situation, they must make temporary care arrangements until they have agreed who is responsible and have taken the relevant action.

Local authorities and health authorities must agree jointly how they assess who is eligible for continuing health and social care, setting out each of their responsibilities for meeting these care needs. This makes sure that services are consistent.

Authorities must coordinate care and make sure that a full range of services are available to everybody who needs them. They should also set out clearly who is responsible for providing each service so that if there is a problem, you know who to contact.

### NHS complaints procedure

The National Health Service (Complaints) Regulations (SI 2004 No 1768) made the Healthcare Commission (HCC) responsible for reviewing all complaints made about the NHS.

Every PCT Trust must set up a Patient Advice and Liaison Service (PALS). PALS provide information that helps patients access the services they require, sort out complaints and can tell you who to contact for independent advice.

#### Time limits

You should make your complaint within six months of the event. This time limit can be increased in cases where it was not reasonable for you to make it any earlier and if it is still possible to look into the matter. You can ask the Health care Commission if you want this time limit increased.

There are three stages to making a complaint about the NHS.

#### Stage one

This stage encourages the NHS to sort out your complaint as quickly as possible. You do not need to make it in writing however, you can ask the NHS to respond to you in writing. This stage will sometimes involve a detailed investigation, meetings or the chief executive of the service involved may take action.

The complaints manager of the service you are complaining about must acknowledge that they have received your complaint within two working days and explain your rights and the help available.

Throughout this process the complaints manager must take reasonable steps to make sure they tell you about any progress and the reasons for any delays.

The complaints manager must look into your complaint and send you a response in writing, within 20 working days, or

as soon as possible. The draft Guidance says that if the complaints manager is not able to respond to your complaint within 20 working days, they should tell you and give you another date for their response.

The response you receive should tell you that if you are not satisfied with the result of your complaint, you can refer it to the HCC. The letter should tell you that you have **two months** to make this request.

## Stage two

HCC independently reviews complaints made about the NHS. How they deal with the complaint can be broken into three stages.

### 1 Initial review

A case manager will decide whether or not it is appropriate for the HCC to look into your complaint. The case manager may gather more evidence and speak to you and the relevant NHS organisation. They will then decide to:

- take no further action;
- refer the complaint back to the healthcare provider or NHS organisation to take further action (for them to look into your complaint further or take remedial action (action to put right what they did wrong));
- refer the complaint to another organisation for further action (for example, the Health Service Ombudsman or General Medical Council);
- look into your complaint fully or
- refer your complaint to a panel hearing.

The initial review should be completed within **20 working days**.

### 2 Full investigation

This investigation can involve interviewing relevant people, for example asking professionals for independent advice. At this stage, the case manager might even decide to ask a panel to hear and consider your complaint in line with regulation 18.

The case manager will prepare a report and send it to everyone involved. This investigation will normally be completed within **six months** of the date it is referred to the HCC.

## 3 Review panel

If you are still not satisfied with the result of the investigation, you can ask for a panel hearing to hear the parts of the investigation you are not happy with. The panel is made up of three independent members and the case manager and chairperson will decide what the panel will look at in line with the case. This process normally takes **four months** from the date of your request.

HCC cannot award compensation.

If you are still not happy with the review panel's decision (or, if you are not happy during any stage of the complaint process), you can refer your complaint to the Health Service Ombudsman to look at.

## GPs

GPs have to have their own complaints procedure for their practice. There are national conditions which they must keep to, including:

- providing you with information;
- responding to your complaint within two days; and
- providing an explanation within two weeks.

## Health Service Ombudsman (see [www.ombudsman.gov.uk](http://www.ombudsman.gov.uk))

The Health Service Ombudsman looks into complaints about the NHS failing to provide you with a service or a service which has not treated you fairly and so on.

The Ombudsman will not normally agree to look into your complaint unless you have gone through the relevant trust's or health authority's complaints procedure first. A health authority can refer a case directly to the Ombudsman under section 10 of the Health Service Commissioners Act 1993, if they think that this will provide you with a more satisfactory response.

You should make your complaint to the Ombudsman within 12 months of the event you are complaining about. This time limit can be increased, usually when the health authority or NHS organisation has taken an unreasonably long time to respond to you through their own complaints procedure.

For further advice, contact the Disability Law Service.

# Overview and introduction to social care

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This chapter tells you about social care services for disabled people living in the community.

Its purpose is not to provide a full statement of the law but to explain how the law applies to the problems that disabled people commonly experience.

### 1 What are social care services?

If you need help to manage at home because you are sick or disabled, the local-authority social services department can provide or arrange a variety of social-care services for you.

The services that **may** be available include:

- personal care to help you with things such as getting up, washing, dressing, bathing, eating and getting around;
- domestic help such as cleaning, shopping and laundry;
- adaptations to your home, for example, stair lifts, ramps, handrails, raised toilet seats, lowered work tops, equipment for safety, comfort and convenience (for example, 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 (a short break from care) if someone is caring for a disabled person, and
- ‘meals on wheels’, or lunches in day centres.

### 2 What Social Services must do

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

Your local authority is responsible for making arrangements to provide services for disabled people, if the authority think it is necessary. Only people who normally live in the local authority’s area can receive services under section 2 of the above act. The services are available for disabled adults and children.

The services you can get under section 2(1) CSDPA include:

- helping you in the home which can include a home help (a person who provides practical help with things like cooking, cleaning and so on);
- providing you with, or helping you to get, wireless connection to the internet, a TV, library services or similar recreational facilities;
- lectures, games, outings or other recreational facilities outside the home or helping you to take advantage of educational facilities in your area;
- facilities to help you travel to and from home to take part in any services provided for disabled people in the community;
- helping you to arrange any work to adapt your home or provide any extra facilities designed to make your home safer, more comfortable or easier for you to live in;
- helping you go on holiday whether this is provided under arrangements made by your local authority or otherwise;
- providing meals in your home or somewhere else and
- providing you with, or helping you get, a telephone and any necessary specialist equipment to help you use a telephone.

### **Schedule 8, paragraph 3, National Health Service Act 1977**

Your local authority must:

- provide home helps for people who are disabled, elderly or are ill;
- provide services which are appropriate for the needs of their area;
- arrange services to care for people with mental illness.

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## **3 Powers**

### **Section 29(1) National Assistance Act 1948**

Local authorities are able to provide the following welfare services under the above act for disabled people.

- A social-work service and advice and support.
- Facilities at day centres or somewhere else for social rehabilitation and helping you adjust to your disability, including helping you deal with the limits of what you can do or how you communicate.

- Occupational, social, cultural and recreational facilities (for example, gardening, basket weaving, printing, flower arranging, lunch clubs, bingo, Christmas lunches, slide shows and so on) at places like day centres. Social Services can pay for these facilities, where appropriate.
- Work at a workshop and hostel accommodation for people who work in the workshop.
- Holiday homes.
- Free or subsidised travel (help with travel costs) if you do not qualify for concessionary (discounted) travel.
- Help finding suitable accommodation.
- Contributions towards the cost of employing a warden on welfare functions or providing warden services in private housing.
- Information about services the local authority provide for disabled people.

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

Your local authority may make arrangements for the following services to prevent mental illness and to care for you if you suffer from a mental illness.

- Meals on wheels (meals delivered to your home).
- Night sitting service (somebody to keep an eye on you and to help you with your needs should you wake up during the night).
- Recuperation holidays (holidays to help you recover if you suffer from a mental illness).
- Facilities for social and recreational activities (day centres and other places where people with a mental illness can play bingo, pool and other games, with other people in a similar position).

### **Section 45, Health Services and Public Health Act 1968**

Your local authority must arrange to improve elderly people's welfare including the following services.

- Meals and activities.
- Information about services available for elderly people.
- Transport to and from any services the local authority provide or any other similar service.

- Help finding you a suitable home.
- Support from visitors, advisory services and social workers.
- Practical help in your own home, including adaptations to make your home safer, more comfortable or easier for you to use.

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## 4 The Care Standards Act 2000

From April 2002, a single national care standards commission has been responsible for registering and monitoring residential and nursing homes as well as domiciliary care agencies (agencies who provide care in your own home) who provide services for social services.

The commission uses national minimum care standards to make decisions about registering care homes and domiciliary care agencies, to make sure they keep to 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 greater power to create and run a complaints service which you and members of your family can make complaints about registered services. The Care Standards Act 2000 also meant domiciliary care agencies have to keep within the CSCI regulatory framework.

For more information please see the fact sheet 'Care Standards Act'.

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## 5 How to get services

You can only receive social care services after your local authority has assessed you and decided that you need one or more of the services they can provide.

**Section 47(1) NHS and Community Care Act 1990** says that social services must assess a person's needs for social care services. It says they:

- must assess a person's need for services; and
- whether the person needs any services in line with the assessment.

This means that you can only receive services if your local authority assesses that you need them and they can provide them. Although you do not have to formally ask for an assessment, it would be helpful if you, or someone on your behalf asked for an assessment. **A local authority can provide social care services without having to assess you, if it is an emergency (if your health or welfare would be seriously at risk if you had to wait).**

How your local authority assess you will depend on your case. For example, if you only want one service such as a travel pass, the assessment will be very simple, and an administrator will probably just ask you to fill in a form and confirm why you need the pass. If you have more complicated needs, your local authority will need to carry out a more thorough assessment. This will involve a number of professionals from a variety of services such as health services, housing authorities and occupational therapists. Your local authority must tell the health authority or housing authority in cases where you have a particular health or housing need and ask them to help with the assessment.

To make sure that a proper risk assessment is carried out you should be aware of the categories that should be included in your assessment.

- personal and social care;
- health care;
- accommodation;
- finance;
- education, employment and leisure; and
- transport and access.

By law, these assessments must also take account of psychological, emotional and cultural needs (for example a need for routine or stability, or if you come from a particular ethnic minority group).

Once your needs have been assessed, your local authority will set out the services you are going to receive in the form of a care plan. By law, you must have a care plan after your assessment. **You should ask for a copy of your assessment and your care plan.**

Your local authority must also publish information about their assessment process, about what it involves, how long it may take and how they make decisions about whether they will provide a service. It is useful to ask your local authority for a copy of its 'Better Care, Higher Standards Charter' and Eligibility Criteria.

You should be fully involved in the assessment process, and so should your carers (as long as you agree). Your assessment will not reflect your needs properly if you and your carers have not been involved in the process.

The Community Care Assessment Directions 2004 makes it clear that it is very important for you and your carers to be fully involved in your assessment and in planning your care. Involving your carer in your assessment and planning your care makes sure we take a realistic account of the care they are able to provide and that it is enough for your needs.

**Fair Access to Care Services (FACS): Guidance on Eligibility Criteria for Adult Social Care LAC (2002) 13**

This guidance provides social-services departments with a framework for deciding who is eligible for adult-care services.

**For more information, see Chapter 3, Eligibility Conditions for Adult Social Care.**

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## 6 Can my local authority refuse to carry out an assessment?

Because the demand for assessments is so low, it is difficult for a local authority to legally refuse to carry out an assessment. They must assess you even if you have no real chance of being eligible for services in line with the local authority's eligibility criteria.

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## 7 What does the FACS guidance say about assessments?

- An assessment should identify and work out what help you need and how specific services will support you to live a full and independent life. You should take an 'active' part in the assessment process.
- Your local authority should develop 'Better Care, Higher Standards Charters' which set out in detail your assessment process, timescales, if you are eligible and the services you may be able to receive (including direct payments).
- Before assessing you, your local authority should decide whether you need help. They should not make the test for this too difficult for you to pass.

- Your assessment should be thorough and concentrate on your needs, taking account of your health needs and other problems (for example, if you need housing).
- Professionals should look at :
  - how severe your needs are day-to-day and over longer periods (for example, if you are in pain or distress and so on);
  - factors which cause you problems or make your situation worse; and
  - what your different needs are and how you deal with them.
- Your assessments should look at risks, to you and your carers, in particular:
  - are you able to make decisions on your own;
  - risks to your health and safety including if you are at risk from harm, abuse and neglect – this should include issues of housing and community safety (whether your home and the area around is safe);
  - are you able to manage personal and other daily routines (like getting up, going to the toilet, getting washed, getting dressed, making a drink or a meal and so on); and
  - do you have contact with or help from your family and the community, including taking part in leisure activities, hobbies, unpaid and paid work, learning and volunteering.
- Your local authority must help to develop services that provide interpreters and translators and support you in getting access to services you need and make the best use of the assessment process.
- Your local authority should offer you services in line with your needs and circumstances.
- Your assessment should help you:
  - understand your situation better;
  - find out what options are available to help you manage;
  - identify the outcomes required from any help that is provided; and
  - understand how your local authority makes decisions.

The National Service Framework for Long-term Conditions has 11 quality requirements to change the way health and social-care organisations and their local partners support people with

long-term neurological conditions and to help them live as independently as possible and to improve their quality of life.

The relevant authorities should use these quality requirements to plan, develop and deliver local services. The authorities have until 2015 to fully put the recommendations set out in the National Service Framework in place.

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## 8 Frequently asked questions

### **A I have asked my local authority for help with paying the line rental for my telephone. They have told me that they do not provide that service and will not assess me.**

If you are disabled, your local authority must assess your needs for all the services listed in section 2 (page 14). It must also assess your needs for all the other services mentioned on (page 14), if they think that you may need those services.

If, at first, your local authority refuse to assess you, it is likely that they will assess you if you ask them again; even if they think that they will not be able to offer you a particular service.

Once your local authority has assessed your needs, they have to decide whether to offer you services. They will base their decision on set conditions which describe the level of need you must have, before they will provide you with a service. For example, your local authority will decide if they can provide you with a telephone by assessing whether you have a life-threatening condition and that you have no other way of calling for medical help.

Many local authorities have specific conditions you must meet to provide you with a telephone, television and holidays, and very few people will get help with these. Even when you do get help, you often have to pay the full cost for the service.

However, it is unlawful for your local authority to decide never to provide any of the services set out in section 2 (page 14). They can lawfully decide not to provide the services set out on page 14, but cannot lawfully refuse to assess your need for these services.

### **B I have asked my local authority to assess me, but they say I will have to wait three months before my assessment because they are short-staffed.**

Unfortunately, the law does not say that local authorities must assess you within a set time. They must assess you within a 'reasonable time.' What is reasonable will depend on your circumstances. Local authorities will make it a priority to assess urgent cases first. You should ask your local authority for a copy of their '*Better Care, Higher Standards*' charter which will set out the time within which they have to carry out assessments in order of priority. For example, they might carry out non-urgent, simple assessments within 42 days of being referred. If your local authority take a long time to assess you or do not tell you when they expect to assess you, this could be classed as refusing to assess you. This means that they are breaking their legal responsibility to you. However, if you tell your local authority that they are breaking their legal responsibility to you, they will generally carry out your assessment.

One can also challenge your local authority for failure to carry out its duties under S6 LASSA 1970. Your local authority may need to make sure that they have enough staff to help directors in their social services departments carry out their duties.

In urgent cases, the local authorities can provide you with services before they have finished your assessment.

You should consider making a formal complaint under the social services complaints procedure if you feel that you have had to wait too long for an assessment. See the information on page 29 about how to use the complaints procedure.

### **c My care manager says I should be eligible for services but my care plan has to be approved by a funding panel. Can they do this?**

Once they have assessed your needs, your local authority will have to decide whether you are eligible to receive a service. Unfortunately, even if it is clear that you have a specific need, the authority may refuse to provide you with a service if they do not consider that your circumstances are serious enough. They must also tell you their decision within a reasonable time, but this will vary depending on your circumstances.

There have been cases where a local authority has assessed someone, agreed a care plan for them and then found that they cannot provide the agreed services (due to lack of resources). The authority will then put the person on a waiting list until a funding panel meets to agree to fund the services to meet the person's needs.

However, there have been several cases where people have been assessed as needing a service, their local authority has a duty to provide this service and cannot use a lack of resources as reason not to provide the service. They cannot withdraw or reduce a service without reassessing a person's needs. If an authority does not have enough staff or resources to provide a service, a court will not decide to take action if the authority is making reasonable effort to sort the problem out.

Local authorities have developed complicated procedures to try and control what they are spending, often involving panels of officers to help them decide whether to provide someone with a service. This varies from area to area, but most local authorities have a panel. In simple cases, perhaps involving services up to a certain (low) cost, an authority may give a manager permission to decide whether a service should be provided. In more complicated (expensive) cases, the panel will decide.

These panels have no legal responsibility to make decisions because they are not included in any laws or guidance. Although it would be difficult to mount a challenge solely on the basis that your case has been referred to the panel, the panel's decision if adverse may well be susceptible to challenge. For example if your care manager has made a recommendation that the panel has rejected without any explanation. In such cases, you should always ask for a copy of your assessment, any extra report that was considered by the panel and any notes about your case. Under data-protection laws, you are entitled to see this information.

**D I have been told there is a waiting list for services. Is this legal?**

Once your local authority has decided to provide you with a service, it must make arrangements to provide that service. Sometimes, the authority can delay providing a service if it is not able to. For example, if you must go to a specialist day service run by a private agency and they do not have a place available immediately. Special rules apply to how Disabled Facilities Grants are paid and these can be delayed in certain

circumstances (please see MS Society publication, *Adaptations and your home* available from the MS Society information team, see page 25).

Some authorities run a panel for allocating resources after they have made a decision to provide a service. This is unlawful.

If your local authority has genuine difficulty in providing a service quickly, they should tell you why and how long it will be before you will get the service. They must also consider other ways of meeting your needs in the meantime. The law also says that a local authority cannot just place you on a waiting list for a service and then take no action. Your authority must always make short-term arrangements for you while you are waiting for a service.

### **E I have been told that my home care is going to be reduced because social services are short of money.**

Your local authority can only withdraw services in the following circumstances.

- 1 If you no longer need the service.
- 2 If they can meet your needs another way.
- 3 If you are no longer eligible for the service.

However, they can only withdraw or reduce a service after reassessing your needs. It is lawful for your authority to change the conditions you must meet to be eligible for a service and then reassess you against the new conditions.

If, after they reassess you, your authority decide to reduce your services and you do not agree with their decision, always ask them to delay their decision until you have had the opportunity to complain.

### **F I need a stair lift in my home. I was advised to apply for a Disabled Facilities Grant. My application was approved but I cannot afford to pay towards the cost. What can I do?**

If your local authority decide you need financial help to adapt your home, it may encourage you to apply for a Disabled Facilities Grant.

However, if you do not qualify for a grant or are not able to afford your contribution towards the work you need, social services still has a responsibility to help you meet your contribution. They may pay the full cost of the work. Social services can ask you to pay back the cost of any financial help they give you. For example, they may agree to let you pay them

back in instalments, over a set amount of time (they may charge you interest on what you borrow). It is very unlikely that a local authority would not ask you to pay them back. You will need to keep asking your local authority if you need financial help because they will want to be sure that you really need their help.

If you do not agree with your assessment and the recommendations you are given for adapting your home, you can complain through the social services complaints procedure. However, if you are complaining about a decision not to approve your adaptations, then you should complain to your local authority's housing department.

By law, your local authority must decide whether to approve a Disabled Facilities Grant within six months of receiving your application. After they approve your grant, they must carry out the work and finish it within 12 months of approving your application. For more information on adaptations and the DFG **(please see MS Society publication, *Adaptations and your home* available from the MS Society information team.)**

**G My carers are not reliable. 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 buy in help from other agencies in the private or voluntary sector. Many local authorities rely on private agencies to provide home care but it is still the authority's legal responsibility to meet your needs.

Your local authority will have made a contract with the care agency. This contract will set out the quality of service the agency must provide as well as how much it will cost and other matters. If the agency is not keeping to the terms of the contract, your authority should take action against them. Your care manager should be willing to discuss your complaints with the agency and if necessary, provide details to the local-authority officer who monitors the contract.

You can complain to the agency direct as well as through the social services complaints procedure. You should also consult the standards set out in the National Minimum Standards for Domiciliary Care Agencies under the regulations of the Care Standards Act 2000. These minimum standards make sure people receive good-quality personal care and support while they are living in their own home. You can get a copy of the

Domiciliary Care National Minimum Standards Regulations by visiting the Department of Health's website at [www.doh.gov.uk](http://www.doh.gov.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 Disability Living Allowance. I have asked to receive direct payments so that I can employ my niece to care for me. My care manager has said this may not be possible, because she is my relative. Is this right?**

Your local authority is able to pay you to help you make your own arrangements for care. You are then responsible for using the money they give you to employ someone to provide your care.

Your local authority will monitor how you use your direct payments and Parliament have set some limits on these payments which prevent you from employing close relatives to provide your care. Your niece is not classed as a 'close' relative for these purposes and you are allowed to employ her. You can never employ your husband, wife or civil partner to provide your care unless your authority agrees. They may allow you to employ other 'close' relatives to provide your care but this will depend on the relationship and whether they live with you or not.

- I I have been told that I am going to have to pay towards the services I need. I don't think this is right. Should I refuse to fill in the financial assessment form.**

By law, your local authority can charge for most of the services it provides for disabled people. The services they charge for and how much they charge will vary depending on the authority. They may charge you for domiciliary care (care provided in your own home) and other non-residential social services, but they will agree this with you. The Government has produced guidance on policies local authorities must keep by law, when charging you for certain services. Any charge must be 'reasonable' and the authority cannot ask you to pay more than you can reasonably afford. This guidance is called 'Fairer Charging Policies for Home Care and other non-residential Social Services' and you can find it on the Department of Health's website at [www.doh.uk/scg/homecarecharges](http://www.doh.uk/scg/homecarecharges). This guidance aims to produce more consistent charging policies, which in the past have varied a lot from one local authority to another.

The authority must base what they charge you on your weekly income, after making allowances for your housing costs and any costs related to your disability (where appropriate). What you pay must not reduce your weekly income below a minimum level (the level basic Income Support plus 25 per cent). For example, if you are only getting Income Support or Incapacity Benefit, you do not have to pay towards your care and you will not need to have your disability costs assessed. However, your local authority can take your savings and other income into account. Currently, if you have savings of over £21,500, your local authority can ask you to pay the full cost of the service you receive.

By law, you can ask your local authority for a review to assess your financial situation in more detail. If you are still not satisfied with the review, you can complain, to try to get the charge reduced. It is up to the authority to reduce the charges or withdraw them completely if they are satisfied that you cannot afford the normal charge for their service.

If you refuse to fill in an assessment form your local authority will assume you can afford to pay the full cost of their service and charge you for it. It is up to you to prove that you cannot afford the charge. You will only be able to do this by filling in an assessment form.

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

**J My partner 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 social care.**

The Carers and Disabled Children Act 2000 says that a person who regularly provides or intends to provide a large amount of care for a disabled person can ask for a social care assessment (whether or not the disabled person is having an assessment). In line with the guidance for this act, the assessment of the carer's need for support has to look at the whole 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 mean your services increase and may include giving you respite care (where someone else cares for you while your carer has a break).

Even if your carer does not ask for an assessment, your local authority must look at your carer's ability to continue to provide regular care for you during your assessment.

**K After a review of my care plan my care manager says I need seven hours of care a day and this will cost more than if I move into a residential home. Do I have to go into a home or will my care at home be limited to what it would cost to live in a residential home?**

This is very complicated. Guidance says that even though local authorities may have a policy on the amount they will pay for someone to be cared for in their own home, they do not have to keep to these limits. In some cases, an authority can choose the cheapest option when deciding what services to provide. They can only do this where both options meet your needs. If the authority says you need seven hours of care a day and their limit is five hours, then they cannot meet your needs. It is unlawful for your authority to offer you a choice in these situations and you should not agree to this.

However, your authority may say that because a residential home can meet your needs, that is the service it will provide. You have a right to ask them to review this decision because it goes against the principles of providing you with social care to help you live as independently as possible. It may also affect your human rights, in particular your right to privacy and a family life. You may have a psychological need to stay at home (for example, if your mental health will be affected if you have to move). If you do, moving into a residential home would not meet your needs and you could not lawfully be offered this as an option. Local authorities must make exceptions in special circumstances.

The authority can never force you to move into a home except in very exceptional circumstances (for example, if a court orders you to live in a home). They may say that because you have refused a place in a residential home, it has carried out its legal duty to you and withdraw all the services it provides you with and you will need to consider this risk.

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## 9 Putting things right

If you are not happy with the way your local authority has dealt with your case you have a number of options. It will depend on your circumstances as to which procedure you should follow (including what your care costs, how urgently you need help and what that help is for). You should get legal advice if you are not sure which procedure is most appropriate. You may be able to get funding from the Legal Help and Community Legal Service (Legal Aid) may be available and your local Community Legal Service may be able to give you free advice.

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## 10 Social Services complaint procedure

Please refer to 'How to complain about social care' (page 70) for more information. Your authority is supposed to deal with your complaint within a set time limit. Many authorities go beyond this limit. If your local authority finds it difficult to take any action to speed up the process, you may, although only in exceptional cases, be able to apply to the court to force them to respond to you.

All local authorities must publish details about their complaints procedures and your care manager should be able to give you this information. There will be an officer in the authority you will be able to contact about your complaint, if your care manager cannot give you the information you need, or if you are concerned about how the authority is dealing with your complaint. If you are not sure, contact the director of social services.

If you are complaining about your services being cut, you should always ask for the service to continue or be restarted until your complaint has been dealt with. If your local authority do not agree to this, you may be able to take legal action against them.

Some authorities will consider paying you compensation in appropriate cases.

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## 11 Local Government Ombudsman

The Ombudsman looks into complaints about local authorities where the complaint is about 'maladministration'. Maladministration is where the local authority has or has not done something which has had a negative effect on you.

Before the Ombudsman can look into your complaint, they normally give the local authority a chance to consider the complaint in line with its own procedures. So, you will not normally be able to complain to the Ombudsman until you have gone through your local authority's complaints procedure.

In certain cases, the Ombudsman may look into your complaint beforehand if, for example, the local authority has unreasonably delayed in dealing with your complaint.

You must complain to the Ombudsman within 12 months of the matter you are complaining about. The Ombudsman may take a long time to look into your complaint. Although the Ombudsman cannot force the local authority to accept what they find, almost all authorities do. The Ombudsman regularly recommends that the local authority pay you compensation if they consider it appropriate.

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### 12 Local Authority Monitoring Officer

Every local authority must have an officer who has to prepare a report on cases where they think that the authority has acted unlawfully. They will send this report to specially chosen members of the authority who must then meet within 21 days of receiving the report to consider it. The authority will not make a decision until this meeting has taken place.

The monitoring officer will normally be the local authority's chief executive or head of their legal department. If you complain to the monitoring officer it should be a relatively informal and quick procedure to follow. Unless your case is fairly straightforward, the monitoring officer is likely to refer your complaint to the social services complaint procedure rather than look into it themselves.

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### 13 Complaining to the Secretary of State for Health

If the Secretary of State is satisfied that an authority has, without reasonable excuse, failed to keep to their legal responsibilities, they may make an order to force the authority to carry out their duties within a certain time limit. While the Secretary of State has never had to do this, they will normally ask the authority to comment on the complaint and this may solve the problem. You do not need to go through the authority's complaints procedure before you write to the Secretary of State, but, they may ask the authority to consider the complaint before looking into it any further themselves.

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## 14 Judicial review

This is the process by which the High Court looks into how a local authority made a decision. The court does not normally consider the full case, but it will look at how the authority reached their decision.

Before you can ask for a judicial review, the court will normally expect you to have gone through the local authority's own complaints procedure and possibly even asking the Secretary of State to look at your complaint. You will not necessarily have to have complained to the Local Government Ombudsman (see page 52).

You may be able to apply for a judicial review first but this will depend on the circumstances of your case.

You must apply for a judicial review within three months of the decision or service you are complaining about. The court can extend this time limit in exceptional cases, but you should not rely on this.

If you are granted a judicial review, the court doesn't have to make an order in your favour. The orders that are available do not necessarily provide a practical solution for the kinds of problems disabled people might have. The orders mainly look at the decision-making process itself. So, the court may rule against an authority's decision in a particular case but it would be rare for them to force an authority to provide a particular service.

Although the court can order an authority to pay you damages (compensation), this is unusual in judicial reviews.

**This is a very complicated area and you should get specialist legal advice if you are considering making an application for a judicial review.**

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## 15 Claiming for compensation when a local authority breaks their legal responsibilities to you

It is possible but rare to claim for compensation at the High Court or County Court if your local authority has broken their legal responsibilities to you. Unfortunately, it is very rare that you would be awarded compensation. However, the law in this area is complicated and is changing quickly, so you would need to get specialist legal advice before you claim for compensation.

### 16 The European Court of Human Rights

The European Court of Human Rights hears complaints made by people whose government has broken their responsibilities to them under the European Convention on Human Rights 1950. You can only complain to this court once you have gone through all the other relevant complaints procedures and within six months of the final decision made by the highest domestic court or authority. Often, the process can take several years from start to finish.

### 17 The Human Rights Act 1998

This act came into force on the 2nd October 2000. This act aims to incorporate the European Convention on Human Rights into UK law. The act means it will be unlawful for a public authority to act in a way which is not in line with the Convention rights. A 'public authority' includes organisations which provide services to the public. This is unlikely to include organisations which provide services on behalf of social services under a contract.

It is possible to make a claim under the act within any proceedings. For example, if you apply for a judicial review to challenge an unlawful decision to put you into a residential home against your wishes, you can include a claim that the decision is against your right under the Convention to privacy and family life.

You must normally use the Convention within 12 months of the decision or service you are complaining about. However, you must still apply for a judicial review within three months of the decision or service you are complaining about.

Where the court decides the authority has acted unlawfully and broken their responsibility to you under the Convention, it may force the authority to pay you compensation.

For more advice on these matters, contact the Disability Law Service.

# Eligibility conditions for adult social care

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You can only get access to social care services after your local authority has assessed you as needing one or more services that they are able to provide.

Once your local authority have assessed your needs, they will decide whether you need help from the services they can provide. They will need to assess you in line with their 'eligibility conditions'. This is a scale which they will assess your needs against, based on a risk assessment that sets out how urgent and serious your need is for certain services.

### 1 General overview

#### **The Fair Access to Care Services Guidance on Eligibility Criteria for Adult Social Care LAC (2002) 13 (FACS)**

- A** The aim of this guidance is to provide local authorities with a framework for setting their eligibility conditions for adult care services. Using this guidance should make assessing people's needs for care consistent and fair across the UK.
- B** Local authorities are entitled to take into account local resources when setting their eligibility conditions. They will review these conditions in line with their budget reviews.
- C** The guidance introduces the terms 'presenting needs' and 'eligible needs'. Presenting needs are the issues and problems identified when you contact or are referred to social services for help. Eligible needs are needs included in a local authority's eligibility conditions which mean they have a duty to meet these needs.
- D** If your local authority assess you and find you do not meet their eligibility conditions (you are not assessed as having 'eligible needs'), they should provide you with information, advice and, if necessary, refer you.
- E** If you have received a service and you no longer fall within your local authority's eligibility conditions, they should make sure that withdrawing the service will not increase your needs or make them worse so that you are not able to live independently.
- F** This guidance can be used alongside eligibility conditions set by continuing health, social care and health authorities to assess your needs.
- G** Local authorities should publish their eligibility conditions in local 'Better Care, Higher Standards' charters. You can ask Social Services for a copy of these charters.

## 2 Setting the eligibility criteria

The framework local authorities must use is graded into four bands, based on how serious your needs are.

### A The four bands are as follows:

- 1 **Critical** – This is where your life is or will be at risk, you have significant health problems, or you are at risk of serious abuse or neglect. You could have little or no choice or control over important parts of your home. You cannot carry out your own personal care or domestic tasks (getting dressed, washing, cooking, cleaning and so on). You are not able to work or get access to education. You cannot maintain contact with society or take part in family life.
- 2 **Substantial** – This is where you have limited choice and control over your living environment or you are at risk of abuse or neglect. You are not able to carry out most of your personal care or domestic tasks. You are not able to work or get access to education. You cannot maintain full contact with society, take part in family life and other social roles and responsibilities.
- 3 **Moderate** – This is where you are not able to carry out several tasks relating to your personal care or domestic tasks. You are not able to maintain a lot of contact with society or take an active part in family life.
- 4 **Low** – This is where you are not able to carry out one or two tasks relating to your personal care or domestic tasks. You are only moderately able to get involved in work or education. You are able to take part in society and family life, but this could be improved.

- B** Local authorities can take local resources into account when they set their eligibility conditions. However, if a local authority has a limited budget and can only meet people's needs that fall into the 'critical' band, other people may not be able to get access to social care even if they fall into the 'substantial' band. A local authority may decide to use the 'critical' band as its eligibility conditions when assessing a person's needs.
- C** Local authorities should review their conditions at least every year. If there are any major changes, financial or otherwise then they may review their conditions more often.
- D** The guidance stresses the need for taking action to prevent situations where local authorities are not able to provide care for people who really need it. It gives them advice on how to develop risk assessments to help them identify whose needs

appear relatively low, but are likely to become more serious over time. The guidance also suggests that local authorities should make it a priority to help groups whose needs would get worse if they did not receive help straight away.

### 3 Deciding who is eligible

- Local authorities decide who is eligible for help by comparing the risks to a person's independence, health, safety, their ability to manage daily routines and if they get involved in family life and their community life with the eligibility criteria.
- If a person is eligible for services, local authorities should record and develop care plans in line with the assessment process.
- A person's eligibility to services might be affected by the level of support they get from their existing carers. A local authority should not assume that someone has this support available. They may need to carry out a separate assessment of the needs of the person's carers.

### 4 Services

- Some local authorities set a limit on the amount they will spend on home-care packages. The FACS guidance says that local authorities can use cost ceilings but only as a guide. A local authority may also need to spend more on services for certain groups of people because the cost of providing specific services are higher than for other groups.
- Local authorities should not have a policy not to provide certain services. They should always be able to provide a full range of services.
- All service providers should be able to provide a 'Statement of Purpose' (a document which sets out what the organisation is supposed to do).
- Local authorities should promote direct payments (cash payments to let you buy your own care services) and set aside a budget for them. They should be flexible with their conditions for direct payments so that anyone who wants them, can receive them.

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## 5 Care plan

Your local authority should develop your care plan with you. As a minimum your care plan should include:

- what your needs are and any related risks;
- what service you would prefer;
- a plan in case of an emergency;
- details of the services you are going to receive, anything you have to pay towards these services or if you have been awarded a direct payment;
- any care your carers are willing and able to provide; and
- a date to review the care plan.

Your local authority should give you a copy of your care plan. The services it includes should be suited to your needs and circumstances (for example, taking account of what the services are going to cost). Your local authority should provide you with services as soon as possible, and if it is likely that this will take some time, they must make other arrangements until they can provide these services.

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## 6 Changes

Your local authority should make arrangements to adapt your services as you get older and as your needs change. If you move to another local authority, the new authority should assess your needs, taking account of the services you were receiving before you moved.

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## 7 Reviews

Your local authority should review your care plan within three months of creating a new care package, and then review it every year after that. You can also ask your local authority to review your care plan at any time. You and your carers should normally be involved in each review. Local authorities must bear in mind that sometimes, it may be best for an independent social-care consultant to carry out an assessment, instead of someone they employ.

- Your local authority must keep a record of each review and update your care plan as necessary.

### 8 Emergencies

In an emergency, your local authority can sometimes provide you with services immediately before they have carried out your assessment.

### 9 Your financial situation

Your local authority should not take your financial situation into account until they have carried out your assessment. They should carry out a financial assessment after they have decided what care you need, to decide how much you should contribute towards your care. They should let you see all the information they have relating to your financial assessment.

### 10 Supporting you if you are not eligible for help

If your local authority decides that you are not eligible for services, they must be satisfied that your needs will not get significantly worse or increase in the near future. They should be sensitive to your circumstances if they decide to withdraw your services and look at what they agreed with you when they first created your care package.

If your local authority cannot offer you services or withdraw them, they should write to you telling you why and provide you with information and details of other agencies that may be able to help. They should also give you information about their complaints procedure.

### 11 Where you can get a copy of the FACS guidance

The Policy Guidance on Fair Access to Care Services was published on 28 May 2002, under cover of a Local Authority Circular, LAC (2002) 13. You can find the guidance and the LAC can be found on the Department of Health's website at [www.doh.gov.uk/scg/facs](http://www.doh.gov.uk/scg/facs).

There is also a document called 'Practice Guidance-Implementation Questions and Answers'. This is a particularly useful document that gives some good practical examples of problems that may happen as a result of the FACS guidance.

For more information, contact the Disability Law Service.

# Charging for non-residential social care

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41	The law on charging for social care services

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## Introduction

Under the Health and Social Services and Social Security Adjudication Act 1983 (the HSS Act), local authorities are allowed to charge you for most of the social care services they provide you with, but they do not have to. Most local authorities do charge for some, if not all, of their services. They can only charge a reasonable amount for a particular service. It is up to each local authority to decide what a 'reasonable' amount is. See the guidance below on charging policies.

Services which local authorities can charge for include:

- home care and 'home helps' (practical support and care with for example, getting up, washing, getting dressed, cleaning and so on);
- day centres;
- 'meals on wheels' and lunches in day centres;
- transport;
- services for carers;
- aids, adaptations and equipment.

Guidance for local authorities on charging for non-residential social care services was issued in October 2002. The guidance is called Fairer Charging Policies for Home Care and Other Non-residential Services. The aim of the guidance is to produce more consistent charging policies, which in the past have varied greatly from one local authority to another.

By law, local authorities must keep to the guidance. The guidance is just the minimum. Authorities can still decide not to charge for a particular service and must decide what a 'reasonable' charge is for services they do charge for.

You can get a copy of the guidance from the Department of Health's website at [www.doh.gov.uk](http://www.doh.gov.uk).

## **1 Charges and income**

The guiding principles for charging for services say that the charge must not reduce your income below a certain level. This means that you should not be charged an amount which reduces your weekly income below the level of income support, plus 25 per cent, after making allowances for housing costs and anything you need to pay for your disability (if you have one).

You will not have to pay charges for the services you receive if your income is below this amount. However, you will be assessed financially and this will take your savings or investments into account if you are able to use these as your weekly income. If you are receiving Income Support and are not on disability benefit you will not have to pay for the services you receive. Guidance says that local authorities can also choose not to charge you for services if you receive Income Support or income-based Jobseeker's Allowance, even if you receive disability benefits.

If your local authority takes your disability benefits into account as income when they assess ability to pay for services, they should also assess the amounts you have to pay out for things related to your disability.

## **2 Income**

Your local authority may take all types of income into account when they assess your ability to pay for services you receive, including income from benefits such as Income Support, Incapacity Benefit, State Pension, an occupational or private pension and disability benefits. However, this does not include the following.

- A** Mobility component of Disability Living Allowance (DLA)
- B** War Pensioners Mobility Supplement
- C** The first £10 of any War Disablement or War Widow's or Widower's Pension
- D** Any income from work
- E** Disabled Person's Tax Credit or Working Tax Credit

Your weekly income is worked out by assessing your total weekly income less your housing costs and costs related to your disability, where this applies.

Local authorities can take into account the following disability benefits when they work out your weekly income.

- A Constant Attendance Allowance or Exceptionally Severe Disablement Allowance, which are paid with Industrial Injury Benefit or War Pension
- B The care component of Disability Living Allowance (they must not take the mobility component into account)
- C Attendance Allowance
- D Severe Disability Premium which is paid with Income Support

They should not take any part of your disability benefit into account if you use it to pay for night care, if social services are only providing or arranging your day care. If you receive only day care, they will also take the following benefits into account;

- Lower-rate Attendance Allowance
- Middle-rate care component of Disability Living Allowance
- Day rate of Constant Attendance Allowance

Local authorities can also take off the following amounts from your income when they assess you.

- Your rent (less any Housing Benefit you receive)
- Council Tax (less any Council Tax Benefit you receive)
- Mortgage payments
- Water rates
- Home insurance.

### 3 Savings

Your local authority can take your savings and investments into account when they assess you but they do not have to. The guidance has made it clear that your local authority can only ask you to pay the full cost of the service you receive if you have savings or investments of over £21,500.

## **4 Who can be charged?**

Your local authority will only assess you, not your family or anyone else. If you have joint income or savings with another person, your local authority may ask for their details to work out your share and only your share can be taken into account. If it is not clear what your share is, your local authority will assume that it is equal to the other person.

## **5 Carers**

If you have a carer, your local authority can also charge them for services they receive for being your carer. Your local authority can only take your carer's financial circumstances into account when they are working out what they must pay towards the services they receive. They should also take off any expenses your carer has to pay related to their role as your carer, including:

- A** transport costs;
- B** your laundry and cleaning;
- C** making adaptations to your home (related to your condition); and
- D** paying for private care to give them a break from caring for you, or to help them work or look after their children.

## **6 Direct Payments and Independent Living Fund**

If you are receiving direct payments, you can still be assessed for charges in the same way as if you were receiving services direct from your local authority. Your local authority may take charges for the services you receive from your Direct Payments before you receive them.

If you are receiving payments from the Independent Living Fund, your local authority should take off any charges you pay to Social Services from any contribution you have to make towards the cost of your care paid by the fund.

### 7 Who assesses income and charges?

Your local authority will decide who assesses you. Your assessment may be carried out by their specialist financial staff, social workers or care managers.

**Always ask your local authority to reassess you if your financial circumstances change.**

### 8 What if I cannot afford to pay the charges?

If you think you cannot afford the charges the authority has assessed that you must pay, it is your responsibility to prove this. You can ask your local authority to review their decision, which you must ask for in writing, and explain why you cannot afford to pay. You may have to provide details and evidence of your costs. If your local authority do not reduce your charges, they should explain why. If you are still not happy with the decision, you can go through their complaints procedure to try to get the charge reduced.

Your local authority has a legal right to reduce or cancel a charge if it is satisfied that you cannot afford to pay it. Some local authorities have a formal review procedure relating to charges, while others carry out reviews informally.

If you refuse to provide reasonable information about your finances, your local authority is entitled to ask you to pay the full charge. However, your local authority must make sure that they give you clear and accurate information about any charges you have to pay and how you can ask them to review their decision, should you think it is unreasonable.

## **9 Information about charges**

The guidance has made it clear that your local authority should give you full information about charges. For example, social services should publish information about charges in a leaflet and give this to you during your care assessment.

Your local authority should also provide you with written details of the charges and how they have been worked out, once they have made a decision about your care needs and the services they will provide for you. They should give you this information before you receive your first bill. The guidance says that you should not be asked to pay any charges until you receive these details.

Your local authority must tell you before they increase your charges. If they don't, you should make a complaint.

## **10 What happens if I refuse to pay the charges?**

If you refuse to pay the charges for your care, your local authority cannot legally withdraw or refuse to provide a service. This is because they have a duty to meet your assessed needs and this is a separate issue from the way they charge for the services they provide. If your local authority refuse to provide or withdraw a service, you should get legal advice immediately or make a complaint.

However, your local authority can take legal action to claim back the charges from you, but, it will not be able to recover these charges unless it has gone through a proper appeal or review procedure.

You should always make sure that your local authority has assessed your financial circumstances accurately and that they have considered extra amounts you have to pay because of your disability (if this applies). If you do not agree with something in your assessment you should try to sort this out using the social services complaints procedure.

### **11 Challenging the local authority's charging policies**

If you do not agree with some or all of your local authority's charging policies you can challenge them in various ways.

You could complain to your local councillor or the monitoring officer, and get legal advice about whether a policy is unlawful. It is usually better and easier to ask others to get involved by contacting local disability groups or voluntary organisations. You can also ask the Coalition on Charging for support and advice. This is a group of organisations which have come together to campaign against charges. You can contact them by visiting their website at [www.mencap.org.uk/coc](http://www.mencap.org.uk/coc).

For more information, contact the Disability Law Service

# Charging for residential care

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Charging for residential care is a compulsory scheme. It is set out in section 22, National Assistance Act 1948 which applies to residential accommodation provided for eight weeks or more. The charge applied has to be the 'standard rate' which means the full cost to the local authority of the residential placement.

Your local authority has to assess you to see if you are financially able to pay for your accommodation. If, having carried out an assessment, the authority is satisfied that you are not able to pay the standard rate the authority must decide what you should contribute to the cost of your accommodation, based on the assessment. The Charging For Residential Accommodation Guide or 'CRAG' (you can get a copy of this on the Department of Health's website at [www.doh.gov.uk](http://www.doh.gov.uk)) says that authorities have to make sure that they explain clearly (usually in writing) how they worked out what you must contribute to the cost of your accommodation and why this figure may change.

### Savings and investments

Currently, the law says that if you have savings or investments of £21,500 or more, you must pay the full cost of your residential accommodation. If you have savings and investments below this amount, what you will have to pay will depend on how much you have in savings and investments.

If you are married or have a civil partner, this limit applies only to your savings and investments, or your share of your joint savings and investments.

If you have savings and investments of less than £13,000, you will not have to pay anything towards the cost of your accommodation.

If you have less than £21,500 of savings and investments, but more than £13,000, the amount you will have to pay towards your accommodation will be £1 for every £250, you have over £13,000 and class this as your weekly income.

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## Income

Assessing your income is complicated. Guidance says that couples must be assessed individually and their income will be split equally. However, authorities are able to ask a person's husband, wife or civil partner to make payments towards the cost of their partner's care under the Government's 'liable relatives rule'. In general, only one person's income is taken into account. Authorities must allow you to have a weekly personal expenses allowance of at least £20.45, and not take this into account when they assess your income. In some circumstances (for example, if you are younger and more independent), authorities can vary the amount of personal expenses allowance you may have before they take it into account.

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## Property

For most people the single largest asset they have will be their home. There are certain circumstances where authorities must not take its value into account and some circumstances where they must take its full value into account.

Your local authority should not take account of the value of your home if you are:

- only going to be staying in a residential care or nursing home temporarily (for up to 52 weeks); and
- going to return to your home; or
- taking reasonable steps to sell your home so that you can move into another, more suitable home.

Your local authority must not take account of the value of your home for your first 12 weeks in permanent residential care, to allow you enough time to consider how you are going to pay for your accommodation.

If you no longer live in your home, your local authority should not take account of its value if there is someone living in your home who is your:

- partner or former partner (except when you are divorced or your relationship has broken down) is still living in your home;

- former partner (you are divorced or estranged from) and they are looking after a dependant child; or
- relative (as defined in CRAG) who is:
  - 60 or over;
  - under 16 you have a responsibility to look after them; or
  - incapacitated (not able to look after themselves).

However, your local authority will take account of the value of your home if that person moves out.

Your local authority may not take account of the value of your home if someone else lives there who is not in one of the categories above. It may be reasonable, for example, if the person living there has given up their own home to care for you, or if they are elderly and gave up their home to live with you.

### Jointly owned property

If you own your home with another person and would be able to sell your home to the other joint owner, your local authority will assess the value of your share of the home as what the willing buyer would pay. This is shown in the example below.

You own your home jointly with two of your relatives. You have paid your mortgage in full and it is valued at £90,000. You have been admitted to a residential home. If your home was sold, your share would be worth £30,000. However, one of your relatives offers to buy your share for £15,000. Your local authority would assess your share of the home as being £15,000, as this is the amount you could get from a willing buyer. In this case, your local authority would actually assess the value of your share as being £13,500 (after taking off 10 per cent to cover the cost of transferring the deeds).

If you have no interest in the value of your home then you cannot be treated as owning a share in it. It can be dangerous to transfer your share of your home to other people for less than the market value. By law, a local authority can assume that you sold your share of your home for less than it is worth to avoid having to pay more towards the cost of your residential accommodation. If you transfer your share of your

home to someone else three months before you move into residential accommodation and receive no payment, your local authority may find this suspicious. If you transfer your home in this way two years before you move into residential accommodation, your local authority may not think this is suspicious. However, if you transferred your share of your home this way to avoid charges sometime in the future, your local authority may still treat you as owning your share of your home.

If your local authority still consider you own your share of your home, they will charge you for your residential accommodation in line with how they have assessed you financially. If you do not pay these charges, your local authority may take action against you to force you to pay. In this situation, you will have various options. If you transferred your home to someone else within six months of moving into residential accommodation, the person you transferred it to will be responsible for that share of your home and your local authority could sue them. But, your local authority would have to prove that you transferred your share of your home (for less than its full value), knowing that you would be able to avoid paying for your residential accommodation.

If the transfer took place more than six months before you moved into residential accommodation, your local authority may apply to the court to make you bankrupt. The Insolvency Act 1986 gives the court the power, in certain situations, to force you to become responsible for your share of your home again.

It is impossible to know whether your local authority will want proof as to why you transferred your share of your home to someone else without accepting any or full payment for its value.

This is an extremely complicated area and you should get advice from a solicitor.

Before you consider transferring your share of your home you should contact your care worker and make sure that you have an income-assessment form and a full explanation of the charging assessment process. If your local authority do not give you these documents, you can complain under the social services complaints procedure or direct to the Local Government Ombudsman (please see our factsheet on complaints procedures for more information).

For more information see page 46.

For further advice, contact the Disability Law Service.

# Residential care

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### Assessments

Section 47 of the National Health Service and Community Care Act 1990 says that local authorities must assess your needs when it looks like you might need a social care service.

This assessment must be focused on you and your circumstances and involve all relevant agencies – for example, the National Health Service (NHS). Often, the NHS will be contributing to your accommodation package which is why it is very important that they are part of your assessment, and then later, in creating your care plan.

(For more information, see chapter 1, Overview and introduction to the NHS and Chapter 3, Eligibility conditions for adult social care).

Once your local authority has assessed your needs, government guidance says that they should agree the services they are going to provide or arrange for you in the form of a care plan.

Government policy guidance on care management says your local authority must:

- agree a care package with you, your carers and any relevant agencies, to meet your needs within the care resources available, including help from carers who are willing and able to help you;
- aim to give you the most cost-effective package of services that meets your care needs, consulting you and your carers, taking account of what you both want; and
- take account of what your carers want and not assume that they are willing to continue to provide your care.

If you are disabled, your local authority must produce your care plan in line with government guidance. Your local authority must follow policy guidance unless it can provide clear and appropriate adequate reasons for its decision not to.

You should always make sure you ask for a copy of your assessment report and your care plan. The assessment must also include the opinions of other professionals who are dealing with you (for example, a health consultant or doctor).

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## Residential accommodation

Social Services must provide residential accommodation in line with Part 3 of the National Assistance Act 1948 (NAA), and in particular in section 21.

This means they must make arrangements to provide you with residential accommodation if you are:

- 18 or over; and
- you need specific care because of your illness, disability or other circumstances that is not otherwise available.

The Secretary of State issued directions (LAC(93)10) which say that local authorities must make arrangements for people who live in that area and for those who urgently need residential accommodation.

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## You need care

Your local authority will decide if you need care by assessing you. It is important that they make sure that your assessment clearly says that you need support 24 hours a day. If you have medical needs, your doctor will need to provide evidence of these needs.

Your need for accommodation can include a psychological need to have a particular type of accommodation.

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## You are not able to get care any other way

The Community Care (Residential Accommodation) Act 1998 was passed to confirm various decisions made by the courts and make it clear that local authorities must not use your financial circumstances as a factor when deciding whether to provide you with care.

Even if you have enough money to pay for your care yourself, your local authority will still need to make sure that you are able to make your own arrangements for care.

Currently, the law says that if you have savings of more than £21,500, you must pay the full cost of your residential accommodation. If you have savings of less than £21,500 you may have to pay towards your cost of residential accommodation, but this will depend on how much savings you actually have. Please ask us for our fact sheet '**Charges for residential accommodation**' if you would like more information.

### National Assistance Act 1948 (Choice of Accommodation) Directions 1992

This act says that your local authority must make arrangements to provide you with residential accommodation in an area of your choice (within England and Wales), after they have assessed you as needing residential care under section 21 of the National Assistance Act 1948.

Paragraph 13 of this act also says that if you are not able to say where you would prefer to live, it would be reasonable to expect your local authority to provide you with residential accommodation based on where your carers suggest you should live, unless this is against your best interests.

The accommodation you or your carers choose must:

- meet your needs;
- have a place available;
- be provided in line with your local authority's usual terms and conditions; and
- not cost more than your local authority would usually expect to pay for your particular needs.

If your accommodation costs more than your local authority would expect to pay, you can still have the accommodation that you would prefer if you or someone else is willing to pay the extra amount (called a 'top up').

### Top ups

If your accommodation costs more than your local authority are willing to pay, you can pay with a 'top up' if the following conditions apply:

- The usual amount your local authority would pay would be enough to provide you with a place in accommodation that meets all your assessed needs (including your psychological needs).
- Your local authority must not set a limit on the amount they are willing to fund and expect you or someone else to pay the extra.
- Your local authority must be able to show that the amount it would normally pay towards your care would be enough to provide you with the level of service you could reasonably expect if you could not afford to pay any extra amount towards your care.

Currently, if your care is provided in full by your local authority you cannot use a top up to pay for extra services. This is because your financial assessment covers you for the full cost of your care and takes into account the contributions that you and your local authority should make to meet your assessed needs. However, in some cases, you may use your own money to move into residential care which is more expensive than your local authority would normally cover to meet your assessed needs. For more information see 'National Assistance (Residential Accommodation) (Additional Payments) (England) Regulations 2001). You can get this document on the Office of Public Sector Information's website at [www.opsi.gov.uk](http://www.opsi.gov.uk). Or you can get a paper copy form any legal bookshop.

Paragraphs 11.1 –11.14 of the act sets out who is responsible for meeting the costs of your accommodation. It advises local authorities to make a written agreement with you, the agency that provides your accommodation and anyone else involved if you want to move into accommodation which is more expensive than the local authority would normally pay for.

It is unlawful for your local authority not to pay for your accommodation in another area if there is no accommodation in the area you currently live which is suitable for your needs, or if the cost of a home outside of the area you currently live is within the limit your local authority would normally pay.

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## Care Standards Act 2000 and National Minimum Standards for Care Homes for Younger Adults

These regulations set out the main conditions which apply to all care homes providing accommodation for adults aged 18 to 65. In particular, these conditions make sure that the facilities, resources, policies, activities and services in the home lead to positive results for your care. Any care home will have to meet these standards, making sure that:

- the service they provide can meet your needs;
- they have staff trained appropriately to deal with your needs;
- they allow you to make your own choices and decisions; and
- they provide you with a safe and secure environment to live in.

If you are looking at different residential care homes then make sure you ask for a copy of their 'Statement of Purpose' and their 'Service User's Guide'.

### Resources

A local authority is entitled to take its financial resources into account when deciding whether you have a need for a service and whether they should meet that need. However, once they have identified that you have a need and decided to meet that need, their financial resources are no longer relevant.

However, your local authority cannot use the availability of resources alone to decide whether to provide services or not. The Court of Appeal says that your needs must always be a priority above the resources your local authority has available.

If you would be at severe physical risk if your local authority did not provide the services you need, their resources will not be a relevant factor. By law, in these circumstances, an authority will be considered to be acting unreasonably if it uses a lack of resources as a reason for not providing a service.

### Summary

You should always keep copies of any letters you write or receive relating to your care, and ask for copies of the following documents:

- Social service's assessment report and any other relevant documents from the various agencies involved with your assessment.
- Your care plan (current or proposed) and any reviews of your care plan.
- Your local authority's 'Better Care, Higher Standards Charter' (their general information guide setting out their policies and practices, what services they provide, and who they provide them to). Most local authorities have a copy of this on their website.
- Your local authority's eligibility conditions (these set out exactly what your needs must be before they will provide you with services).
- Any policy your local authority has relating to residential accommodation.
- Your local authority's complaints procedure.

For more information, contact the Disability Law Service.

# How social care is regulated

## The Care Standards Act 2000

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## The Care Standards Act 2000

### 1 Overview

- A** The Care Standards Act 2000 (CSA) reformed the regulatory system for care services in England and Wales. It replaced the Registered Homes Act and associated regulations to create the National Care Standards Commission (CSCI) for England and the Care Standards Inspectorate (CSI) for Wales. On 1 April 2004, two new inspectorates replaced the CSCI – the Commission for Social Care Inspection (CSCI) and the Commission for Healthcare Audit and Inspection (CHAI). These are independent organisations whose purpose is to inspect, monitor and set standards for social and health-care services which were previously monitored by local councils and health authorities.
- B** They also monitor services like domiciliary-care agencies (agencies who provide people with care in their own homes), fostering agencies and residential family centres.
- C** CSA sets out a broad range of regulations including management, staff, premises and behaviour of social and health-care agencies. Section 23 gives the Secretary of State power to publish statements of national minimum standards that CSCI and CSI must take into account when it makes its decisions.
- D** The CSCI and CSI have wide enforcement powers and run a complaints procedure through which you and your families can make complaints about registered services.

### 2 National Minimum Standards for care homes

- A** Section 3 of the Care Standards Act 2000 defines a care home as a place which provides accommodation, together with nursing or personal care, for any of the following.
  - People who are or have been ill
  - People who have or have had a mental disorder
  - People who are disabled or infirm (ill)
  - People who are or have been dependent on alcohol or drugs

The purposes of the act, a care home cannot be

- a hospital;
- an independent clinic;
- a children's home; or
- a place exempt (not covered) by the regulations.

- B** All care homes had to register with the CSCI and CSI on April 1 2002. Care homes that were already registered with a local council or health authority were automatically registered with the CSCI and CSI, as long as they had filled in a 'transfer of registration' form before that date.
- C** Care homes registering for the first time after 1 April 2002 will be registered only if they keep to the regulations. The standards are used as measures to help the CSCI and CSI decide on matters of registration.
- D** The National Minimum Standards set out how the CSCI and CSI decide whether a service should be registered or cancel its registration, or whether to take any action against a service for breaking the regulations.
- E** All service providers must keep to the national minimum standards which are designed to make sure the people who use these services are protected and to promote their health, wellbeing and quality of life. The following themes set out how the standards were formed.

Care homes and related services must:

- focus on the people they serve;
  - be fit for purpose (suitable);
  - provide a full range of care;
  - provide positive choices for the people who use them;
  - meet people's assessed needs;
  - provide good-quality services; and
  - employ good-quality staff.
- F** 'Personal care' is defined as any activity where a carer has to have close personal and physical contact with a person who, for reasons associated with a disability, being frail, ill and so on, are not able to look after themselves.
  - G** The Care Home Regulations place legal conditions on care managers in how they run their homes day-to-day. If they do not keep to any of the regulations the CSCI could take action to close the care home unless it takes action itself to make sure it keeps to the conditions.
  - H** Among the main regulations are the following:

- **Statement of purpose (regulation 4).** Each registered care home must produce a statement of purpose which sets out its aims and objectives and the facilities and services it will provide for its residents.
- **Service user's guide (regulation 5).** The registered care home must produce a written guide for its residents including the following information:
  - 1 A summary of the statement of purpose.
  - 2 Terms and conditions for the accommodation, including the fees and how to pay them.
  - 3 A standard contract for the services and facilities the home will provide for the resident.
  - 4 The most recent inspection report.
  - 5 A summary of the home's complaint's procedure (all care homes must have one).
  - 6 The address and phone number of the CSCI (regulation 5).
- 1 The main standards are similar to the standards for domiciliary care (set out below), however, standard 5.1 is important.

It says that the manager of a registered care home must develop and agree a contract and statement of terms with the resident, in writing, which includes the cost of their care. The contract should also say what the care home's and resident's rights and responsibilities are and what will happen if either break the terms in the contract. They must both sign and keep a copy of the contract.

### 3 National Minimum Standards for domiciliary-care agencies

- A The Care Standards Act 2000 said that domiciliary-care agencies (including those run by local authorities) must now work in line with the Commission for Social Care Inspection and the Care Standards Inspectorate for Wales regulatory framework.
- B This regulation applies to all agencies which provide personal care for people in their own homes because they are ill, infirm or disabled and not able to look after themselves without help.

This includes:

  - elderly people;
  - people with a physical disability;
  - people who are blind or deaf (or both);

- people with mental-health problems;
  - people with learning disabilities
  - children and their families; and
  - personal or family carers.
- C** The term 'agency' includes all organisations that provide personal domiciliary-care services in the private, voluntary and public sectors including the local authority's own services, NHS Trusts and supported housing or living schemes, where this applies.

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## 4 Definition of personal care

- A** For the purposes of the regulations 'personal care' activities include, for example, helping someone:
- get up and get dressed or undressed and helping them go to bed;
  - wash (have a shower or bath), including washing their hair, shaving and brushing their teeth;
  - go to the toilet;
  - eat and drink;
  - take their medication or carry out other tasks related to their health in line with the local agreed policy; and
  - get in or out of a chair.
- B** The provision of personal support to enable people to undertake these activities as far as they are able themselves is included in this definition. This includes support workers for families with a child who has disabilities, people with learning disabilities, physical disabilities including dual sensory impairment or mental health problems.
- C** Agencies providing personal care at any time will need to register.
- D** The Standards are grouped under six key topics and the outcome for service users identified in relation to each theme. The topics are:
- User focused services (Standards 1–6)
  - Personal care (Standards 7–10)
  - Protection (Standards 11–16)
  - Managers and staff (Standards 17–21)
  - Organisation and running of the business (Standards 22–27)

- E The standards have been designed to achieve the outcomes they specify. The standards provide a tool for Commission for Social Care Inspection to assess the quality of care and support people receive from domiciliary-care providers through:
  - holding discussions with people who receive care, their families and friends, care and support staff, managers, and others;
  - looking at the daily life of the person receiving care and the organisation providing their service; and
  - looking at written policies, procedures, and records.
- F Inspecting domiciliary-care services will help make sure these services focus on getting better results and providing a better quality of life for people who receive these services.

The following themes set out how the National Minimum Standards for the providing personal domiciliary-care services are formed:

- **Service must focus on the people who use them.** Services must be able to prove that they apply the standards for personal care and support and provide in a way that achieves positive results for the people who use the services.
- **Services must be fit for purpose.** The Care Standards Act has been designed to make sure that organisations providing personal domiciliary care and the managers and care staff it employs are 'fit for their purpose'. Organisations must be able to prove that they are meeting their aims and objectives, in line with the standards.
- **Organisations must provide a full range of services.** Domiciliary-care services are often made up of a range of separate, but sometimes related, activities and services which will vary depending on the person's needs. The total care package provided must contribute to a person's overall personal and health-care needs and how they want to receive this care. The organisation providing this care must work with other services and professionals to help the person live as independently as possible and make sure they are able to take part in their community.
- **Meeting assessed needs.** Organisations must be able to prove that the care they provide meets a person's assessed needs and continues to meet their needs as they change over time. They should reassess a person's needs at least every year. Organisations must also be able to prove that their care and support staff are able to be flexible enough to meet the changing needs of the people they care for including on a

short-term or temporary basis.

- **Good quality services.** The Government's modernising agenda, including the new regulatory framework, aims to make sure people can be sure the services they receive are good quality. Organisations must be able to prove that they are committed to keep improving the quality of their services and support, ensures the people who receive these services have a good quality of life, and that the services help them to keep living as independently as possible.
- **Good quality staff.** Organisations must be able to prove that their managers and staff are well-trained and able to do their jobs. The National Training Organisation for Social Care (TOPSS) is developing National Occupational Standards for care and support staff, including programmes to improve their skills, knowledge and relevant experience to help them carry out their jobs to a high standard.

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## 5 Services focused on the people who use them

### Introduction to standards 1 to 6

- A** The needs of the people who use domiciliary-care services (the service users) lie at the heart of how personal care should be provided. Service users must be told about their services and have the opportunity to make choices about their care and take part in the care process. This helps service users to maintain their independence. Services should meet the needs of the service user, as set out in their care plan, and respect their rights and their privacy.
- B** To make sure that service users and their carers are able to make informed choices about their care, they must have access to a range of information that is up to date and available in an appropriate language or format.
- C** Every agency that provides personal domiciliary care must produce a 'statement of purpose' and a guide for service users setting out its aims, objectives, the range of services it offers and the terms of their services. They should also have access to a copy of the organisation's most recent inspection report. This way, service users and their carers can make a fully informed choice about whether or not the organisation is suitable for, and able to meet, their needs. The statement of purpose will help inspectors to assess how well an organisation is achieving its aims.

**D** Research into what service users think about their personal care has found that a constant standard of care is very important. Service users want to feel comfortable, relaxed and secure with the home carers who provide their care. This means that, within reason, they want to have one or two carers who are reliable. Service users and their carers want to know beforehand if someone else is going to provide their care so they can be prepared for someone different.

## 6 Personal care

### **Introduction to Standards 7 to 10 (Also see the section 'personal care' in the bibliography)**

- A** Organisations must base the care they provide on principles which make sure that they treat all service users and their carers with respect. It will be up to the service user to decide whether or not the organisation which provides their care keeps to these principles. Service users should ask themselves the following questions:
- How do my home carers treat me when they are bathing me and helping me dress?
  - How do my home carers speak to me?
  - Does the organisation that provides my care consult me in matters to do with my own care and do they let me make decisions about my care?
  - Do my carers respect what I want?
  - Do my carers take my views into account?
- B** Home care should help a person to keep living in their own home and improve their independence. They should be involved in all decisions relating to their care, which also means involving them and supporting them to take part in the care activities themselves rather than taking over and doing everything for them. This also means making sure that care workers are able to vary the care they provided to meet a person's changing needs. For example, if a carer helps someone get up, wash and get dressed and give them breakfast, the care worker must be able to respond appropriately if they find that the person has a cold and wants to stay in bed.

### Introduction to Standards 11 to 15 (See protective section of bibliography) Health and Safety

- A** Health and safety of service users, home carers and support workers is a major concern in personal domiciliary-care services. Even though there are laws in place to protect service users and their carers, accidents do happen. Failing to keep to health and safety standards is a major cause of long-term illness for home-care staff. So, home-care staff must receive training on all issues to do with health and safety to make sure that they can respond appropriately and work safely so they do not place themselves or the people they are caring for, at risk.
- B** An organisation must carry out a detailed risk assessment before they start providing care services in a new care home to make sure they keep to all relevant laws. This assessment must be carried out by someone who is trained and able. This may be the registered manager or an experienced home carer or support worker. The assessment must include the risks involved in helping people take their medication as well as any risks involved in travelling to and from the service user's home, particularly late at night.
- C** An organisation must carry out a separate assessment for the risks involved with manual handling (lifting and moving a person without aids or equipment). They must discuss in full all the risks they identify with the:
- service user and any of their family who help provide care;
  - home carer or support worker and their line manager;
  - commissioner (the person or agency paying for the care) of the care (if they are involved).

The organisation should then create a plan to manage these risks and everyone involved must agree to it. The organisation must review the plan regularly after reassessing the risks.

### 8 Managers and staff

#### **Introduction to standards 17 to 21 (Also see the section 'Managers and staff' in the bibliography)**

- A** Service users and their families expect a lot from their home-care staff. Care work places a lot of responsibility on all home carers who mainly work on their own, in other people's own homes, without supervision. The quality of the care they provide directly reflects an organisation's quality of staff and their level of skill, knowledge and relevant experience. It is important that home carers are able to show their skills, knowledge and relevant experience and how they relate to their work. Organisations must make sure their staff (at all levels) have opportunities to develop and receive the training they need.
- B** As the care needs of people living at home become more complicated and as more people are discharged early from hospital, the need for care workers to have specialist training to meet the particular care needs of people with certain conditions increases. This training must also consider the needs of the carers.

This document is only a summary of the National Minimum Standards for Care Homes and Domiciliary Care. You can get more information and see the full version of these standards on the CSCI website at [www.csci.org.uk](http://www.csci.org.uk).

For more information, contact the Disability Law Service.

# How to complain about social care (England)

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Local Government Ombudsman

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By law, all local authorities must have a complaints procedure to deal with complaints about social care.

All local authorities must publish details about their complaints procedures and the person who arranged your assessment (or your care manager, if you have one) should be able to provide you with this information. Local authorities have to employ a complaints manager who is responsible for co-ordinating the complaints procedure, registering complaints as soon as they are made and providing information about the procedure. If you have any concerns about how your complaint is being dealt with, contact the complaints manager.

The Local Authority Social Services Complaints (England) Regulations 2006 and Department of Health Guidance 'Learning from Complaints Social Services Complaints Procedure for Adults' 2006 set out the procedure.

Regulation 4 says who can make a complaint under the regulations. It allows you or a person on your behalf to make a complaint.

Regulation 5 says that your complaint will not be considered under the regulations if:

- you withdraw it;
- it has already been investigated;
- it relates to care provided by an organisation or agency registered under the Care Standards Act 2000;
- it relates to legal or disciplinary proceedings;
- it relates to criminal proceedings or proceedings under section 59 of the Care Standards Act 2000;
- it relates to a complaint you made over a year ago and cannot be sorted out effectively or fairly because of the delay, or because the details are not clear.

Regulation 6 says that if your complaint is about care provided by an organisation or agency registered under the Care Standards Act 2000 it must be referred to the registered person in charge of that organisation or agency.

Regulation 7 says that local authorities must try to sort out complaints informally within 20 working days. Regulations eight and nine say that a local authority must take formal action if you ask, or if you do not agree with the result of the informal procedure.

Under regulation 10, if your local authority has looked into your complaint formally under regulation nine, they must send you a report of their investigation and explain what action, if any, it is going to take.

After the local authority has looked into your complaint formally or the time they said they would take to look into your complaint has passed and you have not received their response, regulations 11 to 13 say that you are entitled to ask for your case to be referred to a review panel. This panel is made up of three people (which will include at least two members who do not work for the local authority).

Under regulation 14, if the review panel think the local authority has not dealt with your complaint appropriately, the local authority must tell you what action, if any, it is going to take and must give you information about contacting a local commissioner to look into your complaint (under section 26(1) of the Local Government Act 1974). The local authority will not have to keep to the review panel's recommendations. However, the local authority would have to provide appropriate and reasonable reasons for not following the panel's recommendations.

Regulation 15 says that a local authority must refer your complaint to the local health authority if it relates to a service you have received from the health authority and if you ask for this. If your complaint relates to a local health authority, they must work with the local authority and both authorities must respond to your complaint.

Regulation 16 says that each local authority must employ a complaints manager to help co-ordinate complaints under these regulations.

Regulation 17 says that local authorities must guide you through their complaints procedure, as necessary, or explain where you can get help.

Regulation 18 says that local authorities must monitor and report on the how they keep to these regulations.

Regulations 19 to 21 say that there are some exceptions to complaints you may have made before 1 September 2006. These complaints must be dealt with in line with the old Complaints Procedure Directions 1990 (the Directions), unless, after 1 September 2006, you want your local authority to consider your complaint using a review panel. In this case, the new regulations will apply.

Often local authorities will say that they cannot take any action (for example, make a care plan or carry out an assessment), until your complaint has been sorted out. This is unlawful and your local authority must still take action to provide you with a service until your complaint has been sorted out.

Although local authorities are supposed to deal with your complaint within fixed time limits under each of the three stages (the informal stage, the investigation stage and the review stage as set out in the regulations and described above), many authorities take longer. In exceptional cases you may be able to apply to the court to force your local authority to deal with your complaint sooner. You might also like to think about contacting your Local Government Ombudsman (see below).

Some authorities will consider paying you compensation in appropriate cases, but not always.

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### Local Government Ombudsman

A Local Government Ombudsman looks into complaints about local authorities where the complaint is about 'maladministration'. Maladministration is where the authority has or has not done something which has had a negative effect on you as a result.

Before the Ombudsman can look into your complaint, they will normally ask you to go through your local authority's own complaints procedure. The Ombudsman may start to look into your complaint before the end of the local authorities complaints procedure if, for example, the authority has taken an unreasonably long time to deal with your complaint.

You must complain to the Ombudsman within 12 months of the event you're complaining about.

The Ombudsman may take many months to look into your complaint. Even though the Ombudsman cannot force your local authority to accept what they find, almost all authorities do. The Ombudsman regularly recommends that local authorities pay compensation in cases of maladministration.

For more information, contact the Disability Law Service

# Mental Capacity

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‘Capacity’ is the ability to do something. The Mental Capacity Act 2005 gives a legal definition of ‘mental capacity’ and is intended to protect and empower people who may not be able to make their own decisions, particularly about their health care, welfare or finances.

The legal definition is explained more fully in this chapter, but put simply, a person’s ‘capacity’ in this context is their ability to make decisions that may have legal consequences for themselves and/or for others affected by the decision.

Where a person does not have capacity to make decisions, the law provides safeguards and protection, including giving limited powers to third parties to take decisions on their behalf. In cases where there is a real dispute about whether something is in the best interests of a person without capacity then an application can be made to the Court of Protection for it to decide the issue.

This chapter includes details of ‘lasting power of attorney’ and ‘court appointed deputies’.

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## The Mental Capacity Act 2005

The Mental Capacity Act 2005 provides a statutory framework to empower and protect vulnerable people who may not be able to make their own decisions. It makes it clear who can take decisions in which situations, and how they should go about this. It also enables people to plan ahead for a time when they may lose capacity.

The Act is written in numbered sections. Here we look at the first six, which look at the principles of the Act, definitions of capacity, protections for people without capacity and for their carers.

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## Section 1 The basic principles underpinning the Act

- Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
- The right for individuals to be supported to make their own decisions - people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
- That individuals must retain the right to make what might be seen as eccentric or unwise decisions;
- Anything done for or on behalf of people without capacity must be in their best interests; and
- Anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

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## Sections 2 and 3 The meaning of capacity and assessing someone's capacity

The Act sets out (in section 2) a definition of a person who lacks capacity. It focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates, not on any theoretical ability to make decisions generally. A person can lack capacity even if the loss of capacity is partial or temporary or if their capacity fluctuates. Also, a person may lack capacity in relation to one matter but not in relation to another matter.

The Act makes it clear that the inability to make a decision must be caused by an impairment of, or disturbance in the functioning of, the mind or brain. This could cover a range of problems, such as psychiatric illness, learning disability, dementia, brain damage or even a toxic confusional state – anything which has the necessary effect on the functioning of the mind or brain, which causes the person to be unable to make the decision.

The Act also makes it clear that a lack of capacity cannot be established merely by reference to a person's age, appearance, or any condition or aspect of a person's behaviour which might lead others to make unjustified assumptions about capacity.

The Act sets out (in section 3) the test for assessing whether a person is "unable to make a decision" and therefore lacks capacity. It is a "functional" test, looking at the decision-making process itself. Four reasons are given why a person may be unable to make a decision:

If they are unable

- to comprehend the information relevant to the decision
- to retain this information for long enough to make the decision
- to use and weigh it to arrive at a choice
- to communicate the decision in any way

## Section 4 What is in the best interests of the person who lacks capacity?

The Act confirms that everything that is done for, or on behalf of, a person who lacks capacity must be in that person's best interests. The Act provides a checklist of factors that decision-makers must work through in deciding what is in a person's best interests. A person can put their wishes and feelings into a written statement if they so wish, which the person making the determination must consider. Also, carers and family members have a right to be consulted.

## Sections 5 and 6 Liability for carers

The Act makes it clear that, where a person is providing care or treatment for someone who lacks capacity, they can provide the care or treatment without incurring any liability (criminal or civil). This is designed to cover situations that would otherwise result in legal liability if someone has to interfere with the person's body or property in the ordinary course of caring. For example, by giving an injection or by throwing away old clothes. A carer will only be able to benefit from this provision if the other person lacked capacity and the carer was acting in that person's best interests.

There is however a limitation on the protection provided for carers, as the Act makes it clear that 'restraint' is only permitted if the person using it reasonably believes it is necessary to prevent harm to the incapacitated person, and if the restraint used is proportionate to the likelihood and seriousness of the harm. 'Restraint' is defined as the use or threat of force where an incapacitated person resists, and any restriction of liberty or movement whether or not the person resists. So, restraining somebody for a short time to prevent them seriously injuring themselves is covered but preventing them switching channels with the TV remote control is probably not covered.

However the Act does not provide protection for an action which deprives someone of their liberty as defined by Article 5 of the European Convention on Human Rights.

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## Public bodies supporting the Mental Capacity Act 2005

The Act created two public bodies to support the statutory framework, designed around the needs of those who lack capacity.

### The Court of Protection

The Court of Protection has jurisdiction in relation to the Act and will hear cases about finance, health and welfare matters relating to people who lack capacity to make particular decisions for themselves. So as well as having jurisdiction over the financial affairs of persons without capacity, the Court also deals with health and welfare matters relating to adults who lack capacity. Health and welfare cases were previously heard in the High Court.

### The Public Guardian

The Public Guardian and their staff will be the registering authority for Lasting Powers of Attorney and deputies (see below, 'Acting on behalf of someone who lacks capacity'). They will supervise deputies appointed by the Court and provide information to help the Court make decisions. They will also work together with other agencies, such as the police and social services, to respond to any concerns raised about the way in which an attorney or deputy is operating. A Public Guardian Board has been appointed to scrutinise and review the way in which the Public Guardian discharges their functions. The Public Guardian is required to produce an Annual Report on their own work.

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## Acting on behalf of someone who lacks capacity

The Mental Capacity Act 2005 deals with two situations where a designated decision-maker can act on behalf of someone who lacks capacity:

- 1 **Lasting powers of attorney (LPAs)** – The Act allows a person to appoint an attorney to act on their behalf if they should lose capacity in the future. The Act allows people to let an attorney make health and welfare decisions.

## What is it?

Creating a power of attorney is a legal process by which an individual gives another person or persons the power to decide what is done with their financial affairs and property or about particular health and welfare decisions. The person appointed is known as the "attorney" and the person giving the power is known as the "donor". However, a power of attorney can only authorise what the donor of the power could do themselves. Unless it is a lasting power of attorney (LPA), it ceases to be valid once an individual is not mentally capable of handling their affairs. However, an LPA will remain in force in this situation, as long as it is correctly registered with the Court of Protection.

## Who can make an LPA?

Anyone can make an LPA as long as they could, at the time, with the help of such explanation as given, understand the nature and effect of the power. They do not need to have a particular reason for making an LPA and they don't need to prove to anyone else that they 'need' to make an LPA.

- The attorney can take authority over the donor's affairs if the donor becomes mentally unable to manage them for themselves.
- The attorney will, in general, be able to do anything with the donor's property that the donor would be able to do him or herself.
- The power will continue if the donor is, or becomes, mentally incapable. It can only be brought to an end by the Court of Protection.

## When does an LPA begin?

The attorney can be appointed to act straight away (as if it were an ordinary power) while the donor still has mental capacity, or when the power is registered, at a later date.

It is permissible for a donor to make several LPA's appointing different attorneys to do different things or different attorneys doing the same thing at different times. There is no limit to the number of LPA's that an individual can make, but it may not be practical to have too many attorneys.

## **Making an LPA**

An LPA should be made on a specific LPA form, available from the Court of Protection, or Legal Stationers. If the donor cannot make a mark because of an illness or physical disability they can select someone else to sign it for them. That person must be independent (not an attorney or a witness).

## **Attorneys – appointing jointly and severally**

The donor, if appointing more than one attorney, can decide how they are to act. If attorneys are appointed jointly, they all have to act together (for example, all their signatures will have to appear on cheques). This creates a greater safeguard for the donor. However, a disadvantage of this is that if one attorney cannot act for some reason, the power will fail. If the donor chooses to appoint ‘jointly and severally’, any of them can act separately or together. This allows the attorneys to decide between them as to who does what. This flexibility can be limited by inserting certain restrictions (for example, requiring them all to sign for transactions over £1,000).

## **Registering the LPA**

The attorney must register the LPA as soon as he has reason to believe that the donor is, or is becoming, mentally incapable of handling his or her own affairs. Once the attorney has made the application they have limited powers to maintain the donor and prevent any loss to their money and property. However full powers are not obtained until registration is complete.

There are detailed procedures to be followed regarding the notice to be given to the donor and others when the application to register is made. Those entitled to notice are also entitled to object to the registration of the LPA. The Court of Protection will then decide whether the LPA should be registered.

## **Refusal to Register**

The Court of Protection has no power to appoint any further attorneys. In such a case the Court may have to appoint a deputy to manage the donor's financial affairs.

## **Attorneys – what they can do and their restrictions**

In order to be an attorney an individual must be at least 18 and not bankrupt when applying for registration or at any time in the future. It is important to note that a person who holds office (for example, a director of social services) cannot be an attorney.

Donors can impose restrictions on the scope of the attorney's power or can give a general power. If an attorney is given general authority they are able to do everything the donor could have done, such as sign cheques, pay bills or deal in shares. In addition, when drawing up an LPA, conditions can be attached – such as requiring the attorney to provide yearly accounts to someone such as a solicitor or accountant.

## **Attorney obligations after registration**

Once registered, the attorney must answer to the Court of Protection if anyone questions his or her actions. Furthermore, it is only the Court that has power to discharge the LPA. An attorney must act in the best interests of the donor.

## **Ending an LPA**

A donor can revoke an LPA at any time up until it is registered as long as they have the capacity to do this. The best way for a donor to do this is by signing a 'Deed of revocation'. Once the LPA is registered with the Court of Protection it can only be revoked by the Court of Protection. Before revoking a registered LPA, the Court will require medical evidence that the donor has recovered or is mentally able to revoke the LPA themselves.

The LPA automatically comes to an end when the donor dies.

- 2 Court appointed deputies** – The Mental Capacity Act 2005 provides for a system of court-appointed deputies to replace the old system of receivership in the Court of Protection. Deputies will be able to take decisions on welfare, health care and financial matters as authorised by the Court but will not be able to refuse consent to life-sustaining treatment. They will only be appointed if the Court cannot make a one-off decision to resolve the issues.

Examples where the court might be approached in welfare cases:

- Whether feeding tubes could be removed from a patient in a permanent vegetative state.
- Where the person without capacity should live
- With whom a person without capacity should have contact
- Whether the person without capacity should receive an experimental medical treatment

There is a threshold to be satisfied before the court will intervene. The subject of the application must be mentally incapable of making the disputed decision, There also has to be a serious issue to decide – one that is sufficiently important to require the court to exercise its jurisdiction.

The application for appointment of a deputy may be brought by relatives or carers of the person lacking capacity or by a public body (for example, a Hospital Trust or local authority). There is no particular reason why the application could not be brought by the person without capacity, with the assistance of an advocate. The person without capacity will always be a party to the proceedings and thus be entitled to be legally represented.

### **Financial and Property matters**

When an individual is incapable of handling their own property and affairs and has not already made an LPA, the Court of Protection has power to appoint a deputy to manage those affairs.

### **Who and when to apply**

The applicant might be a relative, friend or professional, such as a solicitor, an accountant or an officer from a local authority. The person making the application can ask to be appointed themselves, or for someone else to be appointed. If nobody is willing or able to take on the responsibility, the Court may consider appointing the Public Guardian.

An application should be made if an individual ('patient'):

- Is no longer able to manage their own affairs
- Has not made an LPA and is not mentally capable of doing so
- Has money or property that needs to be looked after (such as selling a house) or used for their benefit

There are formal procedures to be followed for the giving of notice to the person without capacity and others. There are

also court procedures enabling the person without capacity and others to object to the appointment of a deputy.

### **Urgent Matters**

If there are urgent matters that need to be dealt with, the Public Guardianship Office should be notified of these when the application is made. If it is clearly in the interests of the person without capacity, the Court of Protection can make “interim directions”, which allow an individual to act before they are appointed as a deputy.

### **Other provisions to protect vulnerable people**

### **Independent Mental Capacity Advocate (IMCA)**

An IMCA is someone appointed to support a person who lacks capacity but has no one to speak for them in connection with important decisions made by the NHS and local authorities about serious medical treatment and changes of residence (for example, moving to a hospital or care home). NHS bodies and local authorities have a duty to consult the IMCA in such decisions involving people who have no family or friends.

The IMCA makes representations about the person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge the decision-maker on behalf of the person lacking capacity if necessary.

People who have the support of family or friends, or those who have an LPA or a deputy under the Act will not have access to an IMCA.

## **Advance decisions to refuse treatment**

The Mental Capacity Act 2005 confirms that people may make a decision in advance to refuse treatment if they should lose capacity in the future. The Act makes clear that strict formalities have to be complied with: the decision must be in writing, signed and witnessed. In addition, there must be an express statement that the decision stands ‘even if life is at risk’. If these formalities are not met, an advance decision will not apply to any treatment which a doctor considers necessary to sustain life.

## **A criminal offence**

The Act introduces a new criminal offence of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years.

## **Code of Practice**

The Act sets out a complex legal framework and, probably in recognition of this, provides for a statutory Code to provide information for those acting under its terms and applying its provisions on a daily basis. The Code helps in interpreting and implementing the Act.

The Code of Practice for the Act must be followed by those working with people who may lack capacity.

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## **Other provisions for the protection for those without capacity**

### **Appointeeship**

An appointee is a person who is responsible for managing the (Department for Work and Pensions) benefits of another, if that person (referred to as a “patient”) is incapable of managing their own benefit matters. There is no need for an appointee if an LPA is in existence or the Court of Protection has appointed a deputy. In such circumstances the attorney or deputy will deal with the Department for Work and Pensions (DWP) benefit matters.

### **How to Apply**

Application is made on a prescribed form, available from the local benefits agency. Once the completed form has been received the benefits agency officer may visit the person, or ask for medical or other evidence to satisfy themselves that the person is no longer able to act for himself or herself.

The benefits agency officer should then visit the prospective appointee to check that they are suitable and explain their responsibilities. Wherever possible the benefits agency will appoint a close relative who either lives with the claimant or visits frequently. In certain circumstances they may appoint a friend, neighbour or a caring professional.

## **Role of an appointee**

Appointees are responsible for:

- Establishing which benefits the claimant is entitled to.
- Completing the necessary forms.
- Receiving payments of benefits and ensuring the benefit is applied in the best interests of the claimant.
- Informing the office dealing with the payments immediately about any change in the claimant's circumstances and replying to any questions or letters.
- Ensuring the office dealing with the payments know about any changes to payment details.
- In certain circumstances, repaying overpayments of benefits.
- Where the claimant is a non-taxpayer, signing for bank and building society interest to be paid without deducting income tax.
- Acting reasonably, accounting for and protecting all money from misuse. The appointee is personally liable for such money and complaints from others about how the appointee was handling the person's savings. In addition, the appointee may be personally liable for non-disclosure in relation to any of the above.

Benefits being paid via Direct Payments can be paid into an account in the joint name of the customer and the appointee, or the name of the appointee only.

## **Accountability of appointees**

Once a person has been appointed to act, the appointment is open-ended. At present, the DWP does not routinely monitor appointee arrangements. However, the Secretary of State can revoke an appointeeship at any time if it is brought to their attention that the appointee is not complying with the conditions on which it was granted. There is no procedure for appealing the appointment of, or the refusal to appoint, an appointee.

## **Ending appointeeship**

Appointeeship can be ended in the following ways:

- The appointee may resign if no longer able to carry out the task.
- The Secretary of State has power to revoke the appointeeship .
- On registration of an LPA or the appointment of a deputy.

## **Guardianship**

Section seven of The Mental Health Act 1983 enables a guardianship order to be made where a person over the age of 16:

- 1 is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment; and
- 2 it is necessary in the interest of the welfare of the patient or for the protection of other persons that an order is made.

### **How is a guardianship order made?**

Guardianship takes effect when an application, based on two medical recommendations, is officially received and accepted by a local social services department. The application can only be made by an approved social worker or the person's nearest relative. Any application by a person other than the local social services department must be to that department and must have their consent. The person making the application must have seen the patient within the past 14 days.

### **Powers of the Guardian**

A person named in a guardianship order has the following powers:

- To require a patient to live at a place specified by the guardian.
- To require the patient to attend places specified by the guardian for the purposes of occupation, training or medical treatment.
- To require access at the place where the patient is living to the patient by a doctor, social worker or other specified person.

Successful exercise of the powers above depends on the cooperation of the patient and others. Guardianship does not give the right to detain in, or remove a patient from, a particular place. However, if the patient leaves the place where they are required to live, without their guardian's consent, they can be taken into custody and returned. There is no right to use force to make the person attend treatment or therapy, and the patient's consent is required for medical treatment.

## **Duration of guardianship**

The guardianship order can last for up to six months in the first instance. It can then be renewed for a further six months and then a year at a time after that.

## **Discharge of guardianship**

- The local authority can decide themselves not to renew the order, or at the request of the patient's nearest relative.
- The patient can apply to the Mental Health Review Tribunal to discharge the order.

For further advice, contact the Disability Law Service.

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## **Legal disclaimer**

Although great care has been taken in the compilation and preparation of this work to ensure accuracy, DLS cannot accept responsibility for any errors or omissions. All information provided is for education / informative purposes and is not a substitute for professional advice. Any organisations, telephone numbers and links to external web-sites have been carefully selected but are provided without any endorsement of the content of those sites.

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For further advice on these matters please contact:

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