

# Information Sheet

## 18 Community Care: Legislation, Guidance and Case Law

This information sheet lists the main sources of community care law and guidance. These relate to the rules and procedures for community care services and funding that are explained in our leaflets *Care Homes and Help in Your Home* and our information sheets no. 10 *Paying for Your Care Home* and no. 13 *Care at Home*.

Most people who need community care won't need to be familiar with the law and guidance. But if you do come across difficulties it can put you in a stronger position if you can demonstrate that you are aware of the relevant law. This can be particularly useful if you want to make a complaint. If you need advice on complaining to your local authority, see our information sheet no. 27 *How to Make a Complaint*.

For further advice on community care law contact our free advice line **SeniorLine** on **0808 800 6565** (**0808 808 7575** in **Northern Ireland**).

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# England

## Care assessment

- 'NHS and Community Care Act 1990' s.47(1) and (2)

Places a **duty** on local authorities to carry out a needs assessment for anyone who might require community care services and to decide whether their needs call for the provision of any services (including residential care). It also places a duty on local authorities to notify health and housing authorities and invite them to take part in the assessment where it appears there may be a need for the provision of their services.

- 'Disabled Persons (Services, Consultation and Representation) Act 1986'

Places a duty on local authorities to consider the needs of a disabled person if they or their carer request this.

- HSC 2002/001 'Guidance on the single assessment process for older people'
- LAC (2004)24 'The Community Care Assessment Directions 2004'

The 2002 guidance sets out four levels of assessment: contact, overview, specialist, comprehensive. Annex E contains detailed guidance for each stage of assessment and care management. The 2004 Directions creates legal duties regarding consultation (involving service users and carers in the assessment), agreement and information about charges.

## Carers

- 'Carers and Disabled Children Act 2000'
- 'Carers (Equal Opportunities) Act 2004'

The 2000 Act places a **duty** on local authorities, when requested by a carer, to carry out a carer's assessment and decide whether to provide services for them. The 2004 Act (in force from April 2005) places a **duty** on local authorities to inform carers of their right to an assessment; and to take into account in the assessment the carer's involvement in (or wish to do) work, training, or a leisure activity.

## Care plans

- LAC(2002)13 'Fair access to care services: guidance on eligibility criteria for adult social care'
- HSC 2002/001 'Guidance on the single assessment process for older people', Annex E

Care plans are not required by law, but this guidance makes it clear that, if an individual is eligible for help, local authorities should develop a care plan. The person receiving services should get a copy of the care plan, which should include details of the objectives of the plan, services, charges and unmet needs.

## Care standards

- 'Care Standards Act 2000'
- SI 2001 no.3965 'The Care Homes Regulations 2001'
- SI 2002 no.3214 'The Domiciliary Care Agencies Regulations 2002'
- 'Health and Social Care (Community Health and Standards) Act 2003'
- 'Care homes for older people: national minimum standards'
- 'Domiciliary care: national minimum standards'

The care standards describe the minimum standard of service provision each individual person can expect from the service provider. They focus on the quality of life that the person using the service actually experiences.

## Charging for non-residential care services

- 'Health and Social Services and Social Security Adjudications Act 1983' s.17
- 'Fairer Charging Policies for Home Care and other non-residential Social Services: Guidance for Councils with Social Services Responsibilities', DH, September 2003

According to the 1983 Act local authorities may make reasonable charges for domiciliary services. The 2003 guidance contains the rules on charging that local authorities should follow, including guidance on treatment of benefits and earnings. The guidance states that the income and savings of your spouse, partner or anyone else you live with should not usually be taken into account, unless you have a legal entitlement to them. If the authority takes into account any disability related benefits (for example Attendance Allowance or Disability Living Allowance) you receive it must look at any expenses you have because of your disability. Extra expenses could include things like heating or laundry costs.

## Charging for residential care

- 'National Assistance Act 1948' s.21 and s.47

Places duty on local authorities to provide residential accommodation for people in need of care and attention 'otherwise not available to them'; and obliges local authorities to charge for this accommodation.

- 'National Assistance (Assessment of Resources) Regulations 1992'
- 'Charging for Residential Accommodation Guide (CRAG)'

Contains the bulk of rules governing the financial assessment of people assessed as needing to move into a care home. The treatment of all capital and income are governed by CRAG.

- 'Community Care (Residential Accommodation) Act 1998'

This is an addition to the National Assistance Act 1948 s.21 and came about as a result of legal action taken against Sefton Council by Help the Aged. This clarifies that if a person's capital is below the upper savings limit, the local authority **cannot** argue that care and attention is 'otherwise available' to them and consequently refuse to fund.

## Choice of accommodation

- LAC(2004)20 'Guidance on National Assistance Act 1948 (Choice of Accommodation) Directions 1992'

Guidance on what individuals should be able to expect from the local authority responsible for funding their care when arranging a care home place for them, describing the minimum of choice that councils should offer individuals.

## Continuing NHS health care

- HSC(2001)15/LAC(2001)18 'Continuing health care: NHS and local council's responsibilities'
- 'The Continuing Care (National Health Service Responsibilities) Directions 2004'

Sets the general criteria which local health authorities must consider when deciding whether somebody qualifies for continuing NHS funded health care (ie fully-funded NHS care). The 2004 Directions outline the duties of Strategic Health Authorities in establishing eligibility criteria; and the duties of PCTs in assessing and applying the criteria.

HSC2001/17 and HSC2003/006 (see **Nursing care contribution**) make it clear that when you are being assessed as to whether you need nursing care, the first consideration should be whether you meet the criteria for continuing NHS health care.

Deprivation of assets

- 'Health and Social Services and Social Security Adjudication Act (HASSASSA) 1983' s.21

This is the source of the 'six month' rule: if an asset has been transferred within six months of a placement being arranged by the local authority, they can transfer liability to pay the fee to the person that received the asset. This applies if the transfer took place 'knowingly and with the intention of avoiding charges for accommodation'.

Deferred payments and top-up payments

- 'Health and Social Care Act 2001', ss.4 and 5
- LAC(2001)25 'Charging for residential accommodation: CRAG amendment number 15'
- LAC(2004)20 'Guidance on National Assistance Act 1948 (Choice of Accommodation) Directions 1992

LAC(2001)25 sets out the rules for deferred payments (whereby councils take legal charges on a person's home instead of contributions towards the cost of residential accommodation).

LAC(2004)20 makes it clear that the only circumstance in which a third party can be asked to make a top-up payment is if you choose to move into a different home than the one offered by your local authority, and the cost is greater than the local authority would normally expect to pay.

Hospital discharge

- Community Care (Delayed Discharges) Act 2003

Sets timescales and procedures for discharge. Local authorities are required to make a payment to the relevant NHS body where it has not succeeded in putting together a discharge plan for an individual within the specified number of days or where a patient's discharge has been delayed because (and only

because) the local authority has not been ready to provide services to the patient or their carer at the specified time of discharge, whichever of these is later.

### Direct Payments

- 'Community Care (Direct Payments) Act 1996
- 'Health and Social Care Act 2001
- SI 2003/762 'The Community Care, Services for Carers and Childrens Services (Direct Payments) (England) Regulations 2003
- 'Direct payments guidance: community care, services for carers and children's services (direct payments) guidance 2003

The 2003 regulations make it a **duty** on local authorities to offer Direct Payments to everyone assessed as needing community care services, including carers.

### Eligibility criteria (fair access to care)

- LAC(2002)13 'Fair access to care services: guidance on eligibility criteria for adult social care'

Guidance on setting and applying eligibility criteria. The guidance stresses that local authorities should not have blanket policies not to provide particular services. It also states that an assessment of risk to independence is not just physical; but should also take account of education, work, social and family roles, relationships and responsibilities. It also stresses that your ability to pay should not affect the carrying out or completion of your community care assessment.

### Mental health

- 'Mental Health Act 1983' s.117

Places a duty on social services and the health authority to provide free after-care services to people being discharged from section 3, 37, 47 or 48 of the Act. After-care services can include residential care.

### Nursing care contribution

- 'Health and Social Care Act 2001', s.49
- HSC(2001)17/LAC(2001)26 'Guidance on Free Nursing Care in Nursing Homes'
- HSC 2003/006 'Guidance on NHS Funded Nursing Care'

The Act provides a definition of registered nursing care and establishes that local authorities can't provide this. The guidance sets out the procedures for the assessment of entitlement to free nursing care (ie the 'registered nursing care contribution').

Vouchers (for respite care)

- 'Carers and Disabled Children Act 2002' s.3

Provides for local authorities to run short-term-break voucher schemes. These are to enable people to make arrangements for support when their carer needs a break.

## Wales

Care assessment

- 'NHS and Community Care Act 1990' s.47(1) and (2)
- NAFWC 9/02 'Health and social care for adults: creating a unified and fair system for assessing and managing care'

The Act places a **duty** on local authorities to carry out a needs assessment for anyone who might require community care services and to decide whether their needs call for the provision of any services (including residential care). It also places a **duty** on local authorities to notify health and housing authorities and invite them to take part in the assessment where it appears there may be a need for the provision of their services. NAFWC 0/02 provides guidance on single assessment for older people.

Carers – as for England

Care plans

- NAFWC 9/02 'Health and social care for adults: creating a unified and fair system for assessing and managing care'

Although there is no legislative requirement for care plans, this guidance emphasises that agencies should record and develop 'Personal Plans of Care', to include a summary of the assessed needs; the objectives and preferred outcomes of the plan; details of the services to be provided and the providers; a record of unmet needs; and a review date.

## Care standards

- 'Care Standards Act 2000'
- SI 2002 no.324 (W.37) 'The Care Homes (Wales) Regulations 2002'
- SI 2004 no.219 (W.23) 'The Domiciliary Care Agencies (Wales) Regulations 2004'
- 'National Minimum Standards for Care Homes for Older People'
- 'National Minimum Standards for Domiciliary Care Agencies in Wales'

The care standards describe the minimum standard of service provision each individual person can expect from the service provider. They focus on the quality of life that the person using the service actually experiences.

## Charging for non-residential care services

- NAFWC 10/2004 'Fairer Charging Policies for Home Care and other non Residential Social Services'

Guidance on charging for non-residential care services. This guidance has not been fully implemented.

## Charging for residential care – as for England

### Choice of accommodation

- 'National Assistance Act 1948 (Choice of Accommodation) Directions 1993'
- WHC(2004)066 'Guidance on National Assistance Act 1948 (Choice of Accommodation) Directions 1993'

Guidance on what individuals should be able to expect from the local authority responsible for funding their care when arranging a care home place for them, describing the minimum of choice that councils should offer individuals.

## Continuing NHS health care

- WHC(2004)54/NAFWC(2004)41 'NHS responsibilities for meeting continuing NHS health care needs: Guidance 2004'

Outlines general eligibility criteria and arrangements for review, disputes, complaints, hospital discharge and commissioning.

## Deprivation of assets - as for England

Deferred payments and top-up payments

- 'Health and Social Care Act 2001'
- WHC(2004)066 'Guidance on National Assistance Act 1948 (Choice of Accommodation) Directions 1993'

The 2004 Guidance makes it clear that the only circumstance in which a third party can be asked to make a top-up payment is if you choose to move into a different home than the one offered to you by your local authority and the cost is greater than they would normally expect to pay.

Direct payments

- 'Health and Social Care Act 2001'
- SI 2004/1748 'The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004'
- 'Community Care, Services for Carers and Children's Services (Direct Payments) Guidance Wales 2004'

Local authorities have a **duty** to offer Direct Payments to those potentially eligible. The 2004 regulations extend eligibility to all people aged 65 and over assessed as needing community care services, from March 2005. Previously, this duty only extended to disabled people and carers.

Eligibility criteria (fair access to care)

- NAFWC 9/02 'Health and social care for adults: creating a unified and fair system for assessing and managing care'

Guidance on the setting and application of eligibility criteria for the purpose of assessing community care needs.

Mental health – as for England

Nursing care contribution

- 'Health and Social Care Act 2001'
- 'NHS Funded Nursing Care in Care Homes: Guidance 2004'

The Act provides a definition of registered nursing care and establishes that local authorities can't provide this. The guidance sets out the procedures for the assessment of entitlement to free nursing care (ie the 'registered nursing care contribution').

# Scotland

## Care assessment

- 'NHS and Community Care Act 1990' s.55
- 'National Assistance Act 1948' s.21 and s.47
- 'Social Work (Scotland) Act 1968'

The local authority has a **duty** to carry out an assessment of need for anybody who might require community care services. If you have community care needs you will receive a single assessment for all services. This saves repeated visits to your home and will give you a named contact who will know your background and circumstances.

- 'Social Work (Scotland) Act 1968 Community Care (Disregard of Resources) Scotland Order 2002'

Makes it clear that the local authority must disregard entirely your resources when determining whether to make available community care services.

## Carers

- 'Community Care and Health (Scotland) Act 2002'
- CCD2/2003: 'Community Care and Health (Scotland) Act 2002 new statutory rights for carers: guidance'

Places a **duty** on local authorities to inform carers of their right to a separate carers' assessment. Local authorities should provide direct support (but not services) to carers, for example information, training or advocacy, free of charge.

## Care plans

- CCD8/2001 'Single shared assessment of community care needs'
- CCD8/2004 'Guidance on care management in community care'

Although there is no legislative requirement for care plans, this guidance emphasises that as well as a single, shared assessment for community care needs, there should be one single care plan. The latter makes it clear that unmet needs should be recorded in the care plan.

## Care standards

- 'The Regulation of Care (Scotland) Act 2001'

- SSI 2002 No. 114 ‘The Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002’
- ‘National care standards: Care at home’
- ‘National care standards: Care homes for older people’
- ‘National care standards: Support Services’ [ie day care]
- ‘National care standards: Short breaks and respite care services for adults’
- ‘National care standards: Housing support services’ [eg sheltered housing]

The regulations set out requirements which must be complied with by providers of care services under the Regulation of Care Act. The national care standards describe what each individual person can expect from the service provider. They focus on the quality of life that the person using the service actually experiences.

Charging for non-residential care services

- ‘CoSLA Guidance on Charging Policies for Non-residential Services’, May 2002 (updated January 2006)
- See also **Nursing care and personal care contributions**

People aged 65 and over can no longer be charged for personal care services provided in their own home. You can however be charged for domestic services such as help with shopping or housework but any charge would be means tested.

The CoSLA guidance recommends that local authorities should follow some general rules when working out how much you should pay for non-residential care services. It doesn’t say that councils have to charge anything, neither does it stop them from being more generous about your circumstances than the guidance actually recommends. Local authorities don’t have to follow these rules, but should at least consider them when making their charging policies.

Charging for residential care

If you are aged 65 or over and your local authority agrees that you need **personal care** they will pay £145 a week towards your care. If you are any age and need **nursing care** they will pay an additional £65 a week. You will still have to pay for normal accommodation costs which do not involve personal or nursing care.

Charging - Nursing care and personal care contributions

- 'Community Care and Health (Scotland) Act 2002'
- 'Community Care (Personal Care and Nursing Care) (Scotland) Regulations 2002'
- 'Community Care (Assessment of Needs) (Scotland) Regulations 2002'
- 'Free personal and nursing care in Scotland: guidance for local authorities, the NHS and other service providers', July 2003

Set the rules for funding care and for care assessments for people aged 65 and over in Scotland.

Choice of accommodation

- SWSG5/93 'Social Work (Scotland) Act 1968 (Choice of Accommodation) Direction 1993'
- SWSG6/94 'Choice of Accommodation – Cross Border Placements'
- CCD8/2003 'Choice of Accommodation – Discharge from Hospital'

Guidance on what individuals should be able to expect from the local authority responsible for funding their care when arranging a care home place for them, describing the minimum of choice that councils should offer individuals.

Continuing NHS health care

- NHS MEL(1996)22 'NHS responsibility for continuing health care'

Sets out the general eligibility criteria for continuing NHS health care and the general procedure for patient appeals.

Deprivation of assets – as for England

Deferred payments and top-up payments

- CCD6/2002 'Topping up of Care Home Fees'
- CCD13/2004 'Deferred Payment of Care Home Fees'

The former makes it clear that 'a topping up arrangement should only arise where a person chooses a more expensive care home place than the authority would usually expect to pay for someone with that person's needs'. The latter makes it clear that deferred payments should be offered to all eligible residents.

## Direct Payments

- 'Community Care and Health (Scotland) Act 2002'
- CCD4/2003 'Social Work (Scotland) Act 1968, Sections 12B and 12C Direct Payments: Policy and Practice Guidance'
- 'The Community Care (Direct Payments) (Scotland) Amendment Regulations 2005'
- CCD 3/2005 'Roll out of Direct Payments to older people aged 65+ years and change to guidance on employing close relatives'

Local authorities have a duty to offer Direct Payments to those potentially eligible (2002 Act). The 2005 regulations extend eligibility to all people aged 65 and over who have been assessed as needing community care services. Previously, Direct Payments were only available to disabled people.

## Hospital discharge

- CCD8/2003 'Choice of Accommodation – Discharge from Hospital'

Provides guidance on timescales for discharge.

## Mental health

- 'Mental Health (Scotland) Act 1984'

Places a duty on social services and the health authority to provide after-care services, but they can charge for certain services.

## Northern Ireland

### Care assessment

- 'Health and Personal Social Services (NI) Order 1972'
- 'People first, care management: Guidance on assessment and the provision of community care, 1993'

The Act contains a **duty** for local authorities to 'make arrangements to such extent as the DHSS&PS considers necessary for the prevention of illness and the care and after care of a person suffering from an illness'. While the Act does not explicitly require local authorities to make a care assessment, the 'People First' guidance makes it clear that local authorities should carry out an assessment of anyone who appears in need of community care services, including residential care. Whilst there is nothing in the legislation which says

that people must be given a written copy of an assessment, guidance says that a written statement should always be provided on request.

- Disabled Persons (NI) Act 1989

Places a **duty** on local authorities to make a care assessment of people who are defined as 'chronically sick or disabled'. An assessment must be carried out when asked for by either a disabled person or a carer.

Carers

- 'Carers and Direct Payments (Northern Ireland) Act 2002'

Places a **duty** on local authorities to carry out a carers assessment, when requested by a carer, and to decide whether to provide services for them (in force since March 2003). Guidance on carers' assessments states that the carer must always receive a copy of their assessment without any need for a formal request.

Care standards

The Regulation and Quality Improvement Authority is responsible for monitoring and inspecting health and social care services in Northern Ireland and at improvements of those services.

Charging for non-residential community care services

- HSSI/80 'The Future Provision of the Home Help Service in Northern Ireland'

This makes it clear that you shouldn't be charged for the home help service if you are aged 75 or over. You should also not be charged if you are receiving Pension Credit (guarantee credit, savings credit or both) or Income Support.

Charging for residential care

- 'Health and Personal Social Services (Assessment of Resources) Regulations 1993'
- 'Charging for Residential Accommodation Guide (CRAG)'

Contains the bulk of rules governing the financial assessment of people assessed as needing to move into a care home. The treatment of all capital and income are governed by CRAG.

Continuing NHS health care

- There is no guidance on this in Northern Ireland.

Deprivation of assets

- ‘Health and Personal Social Services Order 1972’ Article 101A (in force from 1 April 1993)

If a resident has transferred an asset to another person up to six months before a placement is arranged, or while they are living in the accommodation, the local authority can transfer liability to pay the fee to the person that received the asset. This applies if the transfer took place knowingly and with the intention of avoiding charges for the accommodation.

Direct Payments

- ‘Carers and Direct Payments (Northern Ireland) Act 2002’

Places a **duty** on local authorities to offer Direct Payments to everyone assessed as needing community care services, including carers (in force since April 2004).

Housing

- ‘Health and Personal Social Services Order 1972’ Articles 4 and 15

States that housing is one of the main areas which should be assessed as part of a community care assessment. The law says that the local authority must meet an assessed need including a need for residential or other accommodation.

- ‘Chronically Sick and Disabled Persons Act (Northern Ireland) 1978

Places a **duty** on local authorities to help arrange for assessed adaptations to the home to be carried out.

Mental health

- ‘Mental Health Order 1986’ Article 18

Places a **duty** on health and social services to provide free after-care services including residential care.

Nursing care contribution

- ‘Health and Personal Social Services Act (Northern Ireland) 2002’

- BP 436/2002 (as amended) 'Guidance on implementation of HPSS payments for nursing care in nursing homes'

The Act provides that the cost of nursing care for people in nursing homes will not be recoverable by the local authority. The guidance establishes how this should work in practice and on the nursing care rate.

## Case law

### **R v Bristol City Council ex p Penfold (1998)**

This case confirmed that local authorities have duty to assess even if the local eligibility criteria means there is unlikely to be any service provided. The local authority's resources are not relevant to their duty to assess someone's needs.

### **R v Gloucester County Council ex parte Barry - House of Lords (1997)**

This case established that it is perfectly legitimate for a local authority to take its own resources into account when setting its eligibility criteria for services. Once a person has been assessed as having particular needs, however, the local authority is then obliged to provide the services. The local authority can revise its eligibility criteria for financial reasons; but cannot withdraw services without a re-assessment taking place first

### **R v Lancashire County Council ex parte Ingham - Court of Appeal (1996)**

This case established that local authorities can choose the cheapest option when deciding which services to provide.

### **R v North and East Devon Health Authority, ex parte Coughlan Court of Appeal (1999)**

Established that where the primary need is a health need, the responsibility lies with the NHS to fund care. This should be measured in terms of both the quality and quantity of nursing care needed. The case also emphasised that the setting of a person's care is not determinative of eligibility for continuing NHS health care.

### **R v Richmond LBC ex p Watson; R v Redcar and Cleveland BC ex p Armstrong; R v Manchester CC ex p Stennett; R v Harrow LBC ex p Cobham (1999)**

Confirms that local authorities are not entitled to charge for residential accommodation provided under the Mental Health Act 1983 s117. The duty to provide aftercare services lasts so long as such services are required because of the service user's mental condition.

### **R v Sefton MBC ex p Help the Aged (1997)**

This case established that once the local authority had decided that someone had particular housing needs, in this case residential care, it had a duty to make

sure suitable housing was provided. The local authority was not allowed to say that it couldn't provide suitable housing just because of a lack of resources.

**R v Wigan BC ex p Tammadge (1998)**

This case established that a local authority is allowed to take its own resources into account to a certain extent when deciding whether a need for services exists. Once it has decided that a need does exist it has a duty to provide services and cannot use its own limited financial resources as an excuse for not doing so.

**R v South Lanarkshire Council ex p MacGregor (2001)**

This case established that the availability of local authority resources was not relevant to an assessment of need but it was relevant when deciding how to meet that need. Once a person has been assessed as having a need for residential care, the local authority cannot then just put someone on a waiting list and simply do nothing because of a lack of resources. Some sort of service must be provided to meet the assessed need.

For further information contact:

Information Resources Team  
Help the Aged  
207–221 Pentonville Road  
London N1 9UZ  
Tel: 020 7278 1114

People with access to the Internet can download our information sheets and advice leaflets by logging on to: [www.helptheaged.org.uk](http://www.helptheaged.org.uk)

**SeniorLine** is the free welfare rights advice and information service run by Help the Aged for older people and their carers. Trained advice workers offer free, confidential and impartial advice about:

- Welfare and disability benefits
- Community and residential care
- Housing options and adaptations
- Access to health and community services
- Equipment to assist independence
- Support for carers
- Agencies offering local practical help

Freephone: **0808 800 6565**

Textphone (Minicom): **0800 26 96 26**

**9am to 4pm, Monday to Friday**

If you are in **Northern Ireland**, contact **Senior Line** on **0808 808 7575**.

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Help the Aged is a registered charity No. 272786, registered in England at the above address.