**HOUSING LAW PRACTITIONERS ASSOCIATION**

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**The Care Act 2014, Part 1: An overview focusing on accommodation issues**

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12. **Introduction**
	1. **The policy aim of the Care Act 2014 Part 1**

The Care Act 2014 Part 1 is intended to give effect to the policies of the White Paper, *Caring for our future: reforming care and support* (Cm 8378, July 2012), following the recommendations of the Law Commission in its May 2011 report on Adult Social Care, and to implement changes put forward by the Commission on the Funding of Care and support, chaired by Andrew Dilnot.

It consolidates a number of pieces of legislation that make up current adult community care law in one Act. The Act imposes some new duties on local authorities and provides a new framework for adult community care law. Outmoded terminology is replaced by terminology centred on the concept of meeting needs for care and support.

* 1. **Territorial extent and application**

The Care Act 2014 Part 1 applies in general to local authorities in England only. Wales has passed its own legislation in this area, the Social Services and Well-being (Wales) Act 2014, which is intended to come into force in April 2016. A detailed explanation of territorial extent and application is given in the Explanatory Notes.

* 1. **Commencement, consequential amendments and transitional provisions**

For the most part, Part 1 will come into force on 1 April 2015. However, the cap on care costs (s 15) will not be in force until April 2016, and the proposed implementation date for a new appeals system is also April 2016. A consultation is currently underway in respect of both these subjects.

The consequential amendments to existing community care legislation are in the *draft* *Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015*. A schedule lists the many pieces of community care legislation which are amended in consequence of the new Act, largely with the effect of repealing existing duties in their application to local authorities in England. This includes that

* ss 21 and 29 National Assistance Act 1948 (NAA 1948) cease to apply to local authorities in England
* the duty under s 2 Chronically Sick and Disabled Persons Act 1970 (provision of welfare services) ceases to apply to local authorities in England (s 29 NAA 1948 having ceased to apply), save that the s 2 duty under the 1970 Act is preserved in relation to disabled children (an important provision in respect of children’s services in that it is an individually enforceable duty);
* the s 47 NHS and Community Care Act 1990 duty to assess needs for community care services ceases to apply to English local authorities save in respect of s 117 MHA 1983 services.

There are transitional provisions in the *draft* reg 3: where support services are being provided or payments towards them are being made immediately before s 1 CA 2014 comes into force, those arrangements can continue in place and the old law will continue to have effect in relation to them, until at the latest 31 March 2016.

Consequential amendments to secondary legislation are made by the *Care Act 2014 (Consequential Amendments) (Secondary Legislation) Order 2015* (e.g to the Housing Benefit Regs 2006).

* 1. **What material will practitioners need when dealing with Care Act 2014 Part 1?**
* The Care and Support Statutory Guidance

(Section 78 states that a local authority must act under the general guidance of the Secretary of State in the exercise of functions given to it under Part 1. The same terminology (in s 7 LASSA 1970) has been interpreted as meaning that the Secretary of State’s guidance must be followed unless the local authority judges that there is a good reason not to do so which is articulated in the course of the decision-making process ( *R v Islington LBC ex p Rixon (1996)1 CCLR 119*)).

* Any regulations made under Part 1 of the Act that are relevant to the subject-matter concerned
* as an aid to understanding the Act, the Explanatory Notes;
* also, as aids to understanding the policy behind the Act there is pre-legislative material (e.g. the Response to the consultation on draft regulations and guidance for implementation of Part 1 of the Care Act 2014 which
* DoH “Factsheets” provide a useful overview of each of the main subject areas in Part 1 and are a good starting point.
1. **General Responsibilities of Local Authorities (Sections 1 – 7 Care Act 2014)**
	1. The first group of sections sets out general duties on local authorities, in contrast to the main individually enforceable duties to provide care and support in s 18 and support for carers in s 19.
	2. **Section 1: Promoting individual well-being.** The first of the general duties has the most prominent role, being referred in the statutory guidance as the “*guiding principle*” in Part 1 (see para 1.2 of the statutory guidance).

*Section 1(1) The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual’s well-being*.

Section 1(2) – well-being is defined by reference to 9 factors which include physical and mental health and emotional well-being, protection from abuse and neglect, control by the individual over day-to-day life, social and economic well-being, and suitability of living accommodation. (This is not a complete list.)

Section 1(3) – lists 8 factors to which a local authority must have regard when exercising its functions under Part 1 in the case of an individual, including beginning with the assumption that a person is best placed to judge their well-being, their views, wishes, feelings and beliefs, the importance of preventing or delaying the development of needs for care and support. (This is not a complete list.)

* 1. The statutory guidance explains how the well-being principle fits with the concept in Part 1 of “meeting needs” – which is distinct from a model based on fitting people’s needs to particular services: everyone’s needs are different and personal to them; care and support can be provided in a number of ways, some aspects of wellbeing will be more relevant to some people than others (1.9 – 1.12 of the statutory guidance); “*During the assessment process the local authority should explicitly consider the most relevant aspects of wellbeing to the individual concerned, and assess how their needs impact on them”* (1.12).

At 1.15 the statutory guidance tells us that all of the matters listed in s 1(3) must be considered in relation to every individual when a local authority carries out a relevant function; also that “*the focus should be on supporting people to live as independently as possible for as long as possible*”.

See also at 15.53, “*Suitability of living accommodation is one of the matters local authorities must take into account as part of their duty to promote an individual’s wellbeing.*” See also 15.54 – 59 on housing and the wellbeing principle.

* 1. The general nature of the duty is made clear: “*Neither these principles, nor the requirement to promote wellbeing, require the local authority to undertake any particular action. ……their purpose is to set common expectations for how local authorities should approach and engage with people*. [1.17]
	2. It is important to note that Chapter 1 of the statutory guidance on the wellbeing principle includes the heading “*Independent living*” and an explanation of how the wellbeing principle is intended to cover the core components of independent living as expressed in the *UN Convention on the Rights of People with Disabilities* (in particular Art 19). See paragraph 1.19.
	3. It has been helpfully pointed out by one commentator, that when the Bill was considered in the House of Lords the Government confirmed that “*emotional wellbeing*” (s 1(2)(b)) incorporates consideration of pets.[[1]](#footnote-1)
	4. **How useful will the well-being principle be?** Concern has been expressed that it is “*too abstract to be effective”*. The government says it has incorporated reference to the wellbeing principles in the case studies in the statutory guidance to demonstrate how it works.[[2]](#footnote-2) As practitioners this principle should provide a tool to help us to help our clients obtain assessments that engage fully with their individual circumstances and wishes and feelings, and genuinely enhance their well-being. (As to the legal duty to meet needs and decisions on how to meet them, see paragraphs 3 and 4 below.)
	5. **Section 2: Preventing needs for care and support**

This is the second of the general duties –

*Section 2(1) a local authority must provide or arrange for the provision of services, facilities or resources, or take other steps, which it considers will –*

1. *contribute towards preventing or delaying the development by adults in its area of needs for care and support;*
2. *contribute towards preventing or delaying the development by carers in its area of needs for support;*
3. *reduce the needs for care and support of adults in its area;*
4. *reduce the needs for support of carers in its area.*

* 1. As made clear in the statutory guidance, services provided under this general duty are to be provided for people regardless of whether they satisfy eligibility criteria and even if they do not have any current support needs. The steps taken can be population- wide measures or targeted to individuals.

* 1. Examples of prevention measures that are given in the statutory guidance are the promotion of exercise classes or befriending schemes, fall prevention clinics, adaptations to housing, handyman services, telecare services, and intermediate care (a programme of care provided for a limited period of time to assist a person to maintain or regain the ability to live independently).
	2. How will people know what prevention services are available? The duty to provide information and advice (s 4) includes that providing information and advice about preventative services, facilities and resources available locally (para 2.40 of the statutory guidance).
	3. Local authorities have a power to charge for the steps they take under s 2, which is subject to the *Care and Support (Preventing Needs for Care and Support) Regs 2014*. There must be no charge
* to a carer for provision made under s 2(1) intended to delay or reduce the carer’s needs, consisting in provision made directly to the adult needing care
* if the service is provision of an aid or minor adaptation to property (defined as costing £1,000 or less)
* for the first 6 weeks of intermediate care and reablement support services (services for specified period of time aimed to enable a person to maintain or regain the ability to live independently in their own home as defined in the regs).
	1. Note paras 15.60 – 64 of the statutory guidance on “***Housing to support prevention needs***” on the importance of suitable housing in terms of well-being and prevention e.g. “*Housing and housing services can play a significant part in prevention, for example, from a design/physical perspective, accessibility….identifying a person who needs to be on the housing register….The links between living in cold and damp homes and poor health and wellbeing are well-evidenced*.”

Passages such as the above do not of course in themselves give rise to specific enforceable duties for individuals. However they are useful material for practitioners to argue for solutions to meet clients’ needs that involve better housing.

* 1. **Integration of services and co-operation: ss 3, 6 and 7**

**Promoting integration of care and support with health services, etc. – s 3**

*Section 3(1) A local authority must exercise its functions under this Part with a view to ensuring the integration of care and support provision with health provision and* ***health-related provision*** *where it considers that this would –*

1. *promote the well-being of adults in the area…….*

*……..*

*(5) For the purposes of this section,* ***the provision of housing is health-related provision****.*

**Co-operation generally – s 6**

* a local authority must co-operate with its *relevant partners* (s 6(1)) defined in s 6(7) to include district councils, the local NHS body, police, probation services, the minister for prisons;
* a local authority must also co-operate, in the exercise of its functions under this Part, *with such other persons as it considers appropriate* who exercise functions, or are engaged in activities, in the authority’s area relating to adults with need for care and support or relating to carers (s 6(2)). An example given of person with whom the local authority may consider it appropriate to co-operate is *a private registered provider of social housing* (s 6(3));
* **internal co-operation** - a local authority must make arrangements for ensuring co-operation between (a) its officers who exercise care and support functions or functions relating to carers, (b) *its officers exercising housing functions (insofar as relevant to care and support functions)*, (c) the Director of Children’s Services (insofar as relevant to care and support functions which includes transition of children to adult care) and (d) the authority’s director of public health (s 6 (4));
* Section 6(6) sets out the 5 aims of co-operation between partners: promoting well-being, improving the quality of care and support, smoothing the transition to adult services for children, protecting from abuse and neglect; and identifying and learning lessons in cases of serious abuse and neglect.

**Co-operating in specific cases – s 7**

This sectionsupplements the general duty to co-operate with **a specific duty**: the local authority may request co-operation from a relevant partner in relation to the case of an individual adult or carer, and the relevant partner must co-operate as requested unless doing so would be incompatible with the relevant partner’s own functions or duties or would otherwise have an adverse effect on the exercise of its function. Subsection (2) creates the same duty but in reverse, with the request made by the relevant partner to the local authority.

If the partner that is asked to co-operate decides not to do so, it must provide written reasons (s 7(3)).

The duty in s 7 is similar to the duty in Children Act 1989 s 27.

This duty may be of particular assistance in relation to the input of other bodies into assessments, by provision of information or specialist input.

* 1. There is quite extensive statutory guidance on these duties at Chapter 15 of the statutory guidance.

It includes, in respect of the integration duty:

“*A local authority* ***must*** *promote integration between care and support provision, health and health related services, with the aim of joining up services*” (15.7).

There are different levels for the mechanisms for integration of services - planning and commissioning, and at the individual level of assessment, information and advice, and delivery of care and support,

“*this may include integrating an assessment with information and advice about housing options on where to live, and adaptations to the home….A housing assessment should form part of any assessment process, in terms of suitability, access, safety, repair, heating and lighting*…(para 15.7 (c)-(d)).

In respect of the general co-operation duty which requires internal co-operation within local authorities (s 6(4)) see paras 15.23 – 24 – “*it is important that local authority officers responsible for housing work in co-operation with adult care and support given that housing and suitability of living accommodation play a significant role in supporting a person to meet their needs and can help and delay that person’s deterioration…*.”

* 1. **Providing information and advice - s 4**

Under this section a local authority must establish and maintain a service for providing people in its area with information and advice relating to care and support for adults and support for carers.

The statutory guidance states at para 15.65 “…*this must include advice on relevant housing and housing services which meet care and support needs*.”

* 1. **Promoting diversity and quality in the provision of services – s 5**

*Section 5(1) A local authority must promote the efficient and effective operation of a market in services for meeting care and support need with a view to ensuring that any person in its area wishing to access services in the market –*

1. *has a variety of providers to choose from who (taken together) provide a variety of services…….*

 The relevant statutory guidance is at Chapter 4 (Market shaping and commissioning of adult care and support). There are also 3 sets of regulations in relation to this general duty.

1. **The new duty to meet needs for care and support (replacing s 21 NAA 1948 and other current community care duties) – s 18**
	1. Section 18 contains the duty to meet an adult’s eligible needs for care and support: this is the principal individually enforceable duty under Part 1. It replaces a number of duties to provide particular community care services to adults: ss 21(1) and (2) and 29(1) National Assistance Act 1948, s 2(1) Chronically Sick and Disabled Persons Act 1970 and s 45 (1) Health Services and Public Health Act 1968.
	2. Section 18 reflects the Law Commission’s proposal that there should be one duty based on having care needs that meet the eligibility criteria, although the Law Commission had also proposed that s 21 NAA 1948 be retained in substance as a “*long-stop*” for cases that did not meet the eligibility criteria (6.32 of the Law Commission Report of May 2011).

The government responded to the idea - “*to include a residual section 21 provision as a standalone duty would be anomalous with our overall approach, and perpetuate the same division we intended to remove. We propose, therefore, to deal with these cases through the eligibility regulations, so that individuals in the scope of these existing duties continue to be eligible for care and support, and in effect are “mainstreamed” into the core processes for the provision of care and support.”[[3]](#footnote-3)*

When the Care Bill was produced, the Government further explained the underlying aim: *“One of the key aims of the new statute is to remove anomalies and difference resulting from the type of care setting, and provide a single route through which consistent entitlement to care and support can be established….Clauses 18 – 19 provide this single route, replacing the precedents with a clear duty to meet an adult’s needs for care and support*”. [[4]](#footnote-4)

* 1. There is also a power to meet needs for care and support in s19 of the Act: where the person is ordinarily resident in the area, or present there but of no settled residence, and having carried out a needs assessment there is no requirement to meet the person’s needs under section 18 (he/she has needs which do not meet the eligibility criteria) or the person’s needs do meet the eligibility criteria but the person is ordinarily resident in the area of another authority.
	2. Section 18 also contains the important provision for meeting urgent needs (the equivalent of ss 47(5) and 47(6) NHS and Community Care Act 1990) that a local authority may meet an adult’s needs for care and support which appear to it to be urgent, regardless of whether the adult is ordinarily resident in its area without having yet (a) carried out an assessment, or (b) made a determination under s 13(1) (a determination whether any of the assessed needs meet the eligibility criteria).
1. **What services can be provided to meet assessed needs?**
	1. Section 8 concerns how eligible needs are met. It provides a non-exhaustive, illustrative list of examples of what may be provided to meet needs under ss 18 - 20.

*How to meet needs*

*Section 8 (1) The following are examples of what may be provided to meet needs under sections 18 – 20 -*

*(a) accommodation in a care home or in premises of some other type*

*(b) care and support at home or in the community*

*(c) counselling and other types of social work*

*(d) goods and facilities*

*(e) information, advice and advocacy*

*(2) The following are examples of the ways in which a local authority may meet needs under section 18 – 20 –*

*(a) by arranging for a person other than it to provide a service;*

*(b) by itself providing the services;*

*(c) by making direct payments*

*(3) Care home has the meaning given by section 3 of the Care Standards Act 2000*.

* 1. The statutory guidance explains at 10.10 that the switch from the terminology “*providing services*” to “*meeting needs*” is intended to introduce a broader concept than the duty to provide a particular service and should encourage diversity in the way needs are met; the purpose of the care and support planning process is to agree how a person’s needs will be met; these may include assistive technology in the home and **adaptations** as well as traditional service options such as care homes and home care.
	2. Paras 10.20 – 27 of the statutory guidance concern considerations relevant to decisions on how to meet needs, including preferences of the individual and cost, and is consistent with current case-law.
1. **The new national eligibility criteria**
	1. The eligibility criteria are of course key to determining who will receive services and these criteria will now determine who gets accommodation as a social care service as well who gets other types of community care service.
	2. They will now be national eligibility criteria, setting a minimum threshold for adult care and support needs (and carer support needs) which a local authority must meet. All local authorities must comply with this national threshold. As mentioned, authorities can also decide to meet needs that are not deemed to be eligible if they choose to do so.
	3. The Government made it clear that it intended to set the national threshold at a level which would in terms of practical outcome be equivalent to “*substantial*” in the current system.[[5]](#footnote-5) This is the level currently operated by the vast majority of local authorities.
	4. The eligibility threshold for adults with care and support needs is set out in the *Care and Support (Eligibility) Regulations 2014*. The criteria are formulated quite differently to the FACS criteria. The questions that must be posed in the process of assessing eligibility under the new national eligibility criteria are whether:
* the adult’s needs arise from or are related to a physical or mental impairment or illness (reg 2(1)(a))
* as a result of the adult’s needs the adult is unable to achieve two or more of the specified outcomes (listed in regulation 2(2)) (reg 2(1)(b))
* as a consequence of being unable to achieve these outcomes there is, or there is likely to be, a significant impact on the adult’s wellbeing (reg 2(1)(c ))
	1. As regards “*arise from or are* *related to a physical or mental impairment or illness*”, this might be considered to be a potentially limiting criterion in comparison to current legislation (s 21 (1) NAA 1948 –includes those who are in need by reason of “any other circumstances”). However, the statutory guidance implies a broad construction: “*Local authorities must consider at this stage if the adult has a condition as a result of either physical, mental, sensory, learning or cognitive disabilities or illnesses, substance misuse or brain injury. The authority should base their judgment on the assessment of the adult and a formal diagnosis of the condition should not be required*”. [6.105]

See 6.105 – 6.112 of the statutory guidance on how to apply the eligibility criteria generally.

* 1. The specified outcomes are at reg 2(2):
1. Managing and maintaining nutrition;
2. Maintaining personal hygiene;
3. Managing toilet needs;
4. Being appropriately clothed;
5. Being able to make use of the adult’s home safely;
6. Maintaining a habitable home environment;
7. Developing and maintaining family or other personal relationships;
8. Accessing and engaging in work, training, education or volunteering;
9. Making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and
10. Carrying out any caring responsibilities the adult has for a child

See reg 2(3) for the meaning of being “*unable to achieve an outcome*”. Note the breadth of this concept.

* 1. The Department of Health commissioned research to evaluate 3 different versions of the eligibility regulations before deciding on the 2 outcome formula that appears in the regulations.[[6]](#footnote-6) Social workers were asked to apply the different formulae in real cases and the outcomes were compared with the outcome under the existing approach (FACS – Fair Access to Care Services). All the versions tested covered the current critical and substantial levels of need. It was the version that set the minimum level at 2 or more outcomes not being achieved that was found to come closest to current practice.
	2. What will the impact of the new eligibility criteria be on people who would currently qualify under s 21 NAA 1948 for residential accommodation? The June 2014 consultation on the draft regulations posed the following question:

“*Section 21 of the National Assistance Act 1948 requires local authorities to provide residential accommodation in certain cases. Under the new framework, the eligibility criteria will apply to the provision of all types of care and support including residential accommodation.*

|  |
| --- |
| *Are you content that the eligibility regulations will cover any cases currently provided for by section 21 of the National Assistance Act 1948?”*The response (in the October 2014 response to consultation document) was - “*the majority of respondents to this question were local authorities, who said they felt confident that the new regulations together with the powers in section 19 of the Care Act would mean people who currently have access to care and support would continue to be supported when the regulations and guidance take effect in April 2015*”. (p. 23) |
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1. **The duty to assess an adult’s needs for care and support; the decision on whether there are eligible needs; the decision on what will be done to meet the eligible needs**
	1. The duty to assess is in s 9. It replaces s 47(1) NHS & Community Care Act 1990 (in England, save as regards s 117 MHA 1983 services). There is similar low threshold to trigger the duty to assess: “*it appears to a local authority that an adult may have needs for care and support*”.

See also the *Care and Support (Assessment) Regulations 2014* for further details of how assessments must be conducted.

* 1. Following an assessment of needs, a determination is to be made as to whether any of the needs meet the eligibility criteria. The local authority must give the person a written record of the determination and the reasons for it (s 13 (1) and (2)).
	2. Where at least some of the adult’s needs for care and support meet the eligibility criteria, the local authority must then go on to make what is conventionally called the “service decision”. The Act requires that the local authority must consider what could be done to meet those needs that meet the eligibility criteria; to ascertain whether the adult wants to have those needs met by the local authority under the provisions of Care Act 2014 Part 1; and whether the adult is ordinarily resident in the area (s 13(3). (The provisions on ordinary residence are at ss 39 – 40.) Looking further to the next stage of preparing a care and support plan (ss 24 - 25), at that stage the local authority must help the person decide how to have their needs met (s 24(1)(c) and the care plan must specify what needs are going to be met and how the local authority is going to meet them (s 25(1)). A copy of the plan must be given to the adult (s 25(9)).
	3. Note at s 11 the provision that where a person refuses to be assessed, the local authority is not required to carry out an assessment, except in 2 situations: the adult lacks capacity to consent and the local authority is satisfied that being assessed is in his/her best interests or the adult is experiencing or is at risk of abuse or neglect.
1. **When will a need for care and support fall to be met by providing accommodation**?

What is the effect of **section 23: “*Exception for provision of housing etc*.**”?

* 1. Section 8 indicates that what can be provided as accommodation either directly or by arranging for someone else to provide it is very wide: “*accommodation in a care home or in premises of some other type*”. It is clear therefore that this includes ordinary housing.
	2. However, it is of course also clear that there must be an identified need for care and support in order to trigger the provision of the service under s 18 (duty to meet needs for care and support) or s 19 (power to meet needs for care and support). The purpose of the assessment carried out under s 9 is to identify whether the adult has needs for care and support. In other words, accommodation can be provided under the Act in order to meet care and support needs.
	3. When will accommodation be likely to be a means of meeting a person’s care and support needs? The list of outcomes in regulation 2 of *the Eligibility Regulations* tells us the type of needs for care and support that fall in the bracket of eligible needs. One can see that some of these needs might sensibly be met by the provision of accommodation e.g. a need based on an inability to maintain personal hygiene or to manage toilet needs could be met by a move to a ground level property; but also less obvious examples such as a need based on an inability to develop and maintain family or other personal relationships which could be met by a move to be nearer relatives (e.g. thereby avoiding travel that is difficult for a person due to their impairment or illness).
	4. The case-law under section 21 NAA 1948 on the meaning of a need for “care and attention” might be thought to be of some relevance in understanding what is a care and support need e.g. *Wahid v Tower Hamlets LBC [2002] EWCA Civ 287* which concerned whether there was a need for care and attention (under s 21 NAA 1948) in circumstances where better accommodation would have had a beneficial effect on the claimant’s mental health: the local authority’s decision that there was no such unmet need for care and attention was upheld on the basis that its conclusion was one that was open to it; and also the explanation of the concept of “care and attention” as meaning “looking after” in *M v Slough BC [2008] UKHL 52; [2008] 1 WLR 1808.* However the concept of care and support is not formulated in terms of “care and attention”. The list of specified outcomes in the Eligibility Regulations tells us the kind of needs that fall in its scope. The duty to meet care and support needs is of course intended to replace a range of duties, not just the duty under s 21 NAA 1948.
	5. Turning to s 23, this states that a local authority may not meet needs under ss 18 – 20 by doing anything which it or another local authority is required to do under Housing Act 1996. The Explanatory Notes tell us that s 23 replaces s 21(8) NAA 1948.
	6. The Government stated during the passage of the Care Bill through the House of Commons: “*The [section] does not place a bar on local authorities providing accommodation where that is necessary to meet care and support needs. What it does is prohibit local authorities from using care and support law to provide general or social housing that is not related to a person’s care and support needs*.” [[7]](#footnote-7)
	7. It has been pointed out that the new prohibition refers to anything a local authority “*is required to do under the Housing Act 1996*”. It does not prohibit any provision “*authorised or required to be made…by or under the Housing Act 1996*” (s 21(8) NAA 1948). Therefore the new prohibition only applies where the local authority is subject to a duty to provide housing under Housing Act 1996; there is no prohibition merely by virtue of the fact that a housing authority is authorised or empowered to provide housing.

Also, the point is made that s 21(8) NAA 1948 has been applied as a factual test in relation to the individual: whether or not the accommodation that is needed is available to that individual.[[8]](#footnote-8)

The same approach should apply under s 23, or otherwise eligible social care needs that can only sensibly be met by providing or arranging for someone else to provide accommodation will be left unmet as a result of a decision made under housing legislation. This is also consistent with the Government’s statement cited above.

* 1. See also the statutory guidance at 15.51 – 52: “*The Care Act is clear that suitable accommodation can be one way of meeting care and support needs*”.

**8. Exception for persons subject to immigration control – section 21: the “destitution-plus test”**

*Section 21 (1)* *A local authority may not meet the needs for care and support of an adult to whom section 115 of the Immigration and Asylum Act 1999 (“the 1999 Act”) (exclusion from benefits) applies and whose needs for care and support have arisen solely –*

1. *because the adult is destitute, or*
2. *because of the physical effects, or anticipated physical effects of being destitute.*

*……………..*

This section performs the same function as s 21 (1A) NAA 1948, but provides for an exclusion in relation to all services for meeting needs for care and support.

The purpose of the provision is explained in the case-law in this area e.g. *R (M) v Slough BC [2008] 1 WLR* – a person whose immigration status puts them in this group will be eligible for services only so long as their need is to any material extent made more acute by some circumstance other than a lack of accommodation and funds. Social services will be responsible for meeting needs rather than the UKBA if the person’s needs meet the test of “destitution-plus”.

However, for persons subject to immigration control who are not asylum seekers the main barrier to receiving services will of course be Schedule 3 National Immigration and Asylum Act 2002, which makes certain groups ineligible for support except to the extent necessary to avoid a breach of ECHR Convention rights or rights under the EU Treaties. An amendment to Schedule 3 to add care and support under Part 1 is provided in the draft regulations referred to in para 1 of this paper.

1. **Choice of accommodation – s 30**
	1. This section implements the principle behind the *NAA 1948 (Choice of Accommodation) Directions 1992* – the right to choose the residential accommodation that is provided subject to certain conditions. The local authority decides to provide or arrange for provision of accommodation of a specified type then the adult can express a preference for particular accommodation of that type which, if specified conditions are met, must be the accommodation that is provided/arranged.
	2. See the *Care and Support and After-care (Choice of Accommodation) Regulations 2014* which tell us that the specified types of accommodation are care home accommodation, shared lives scheme accommodation or supported living accommodation. These are defined in the regulations.
	3. The conditions for provision of the preferred accommodation are at reg 3 including that it is suitable, available and if more expensive, the additional cost will be met by another person, or where certain conditions apply, the adult themselves (reg 5).
2. **Amendments to section 117 Mental Health Act 1983 (after-care services) – s 75**
	1. The after-care duty under section 117 of the Mental Health Act 1983 (MHA 1983) has not been consolidated into the CA 2014, as the duty applies to a specific group of former mental health patients whose needs are directly linked to the MHA 1983 and the duty is a joint duty on social services and the NHS. The duty to provide after-care services therefore remains as a freestanding enforceable duty within the MHA 1983.
	2. However, it has been more integrated in the adult social care framework, with the ordinary residence rules, choice of accommodation provisions and top-up payments all being extended to section 117 users**.**
	3. The Law Commission recommendation that it should become a gateway duty leading to services being provided under the CA 2014 (with the consequent provision that they could be charged for) was rejected, so that it remains the position that there is no power for local authorities to charge for such services, save in relation to choice of accommodation.
	4. The CA 2014 provides, for the first time, a statutory definition of after-care services: services which have both of the following purposes:
* meeting a need arising from or related to the person’s mental disorder; and
* reducing the risk of a deterioration of the person’s mental condition (and accordingly, reducing the risk of the person requiring admission to hospital again for treatment for mental disorder).
	1. This definition is wider than the definition which has been adopted in case law, as it refers not only to needs arising from a mental disorder, but also to needs “related to” the mental disorder, and the second limb (referring as it does to mental condition) makes it clear that it covers more than one form of mental disorder, and is not necessarily limited to the disorder for which a person was previously detained and which gave rise to the right to after-care.
	2. See also the relevant changes to the Mental Health Act 1983 Code of Practice (in force from 1 April 2015) .
1. **Some of the other areas covered by Care Act 2014 Part 1**
	1. **The new duties to carers – s 20**

Section 20 of the CA 2014 sets out a new duty to meet a carer's needs for support. For the first time, local authorities will be required to meet the eligible needs of carers; currently, they only have a power to do so. This duty can be met by providing support to the carer, or through the provision of support to the adult needing care.

Local authorities have a duty to assess whether a carer has a need for support “where it appears to a local authority that a carer may have such needs currently or in the future” (s 10). There is no longer any requirement for a carer to request an assessment or for the carer to provide or intend to provide a substantial amount of care. There is a single duty to assess, regardless of the local authority’s view of the carer’s need for support, or of their financial resources or those of the person they care for (s 10(4)). The assessment must consider whether the carer is willing and able to continue to care, and have regard to whether the carer is working training or in education, or wishes to be so. The new eligibility criteria for carers’ needs for care and support are in the *Care and Support (Eligibility Criteria) Regulations 2014*, reg 3.

* 1. **Charging** **for care and support – ss 14 - 17**
		1. Local authorities will have the power to charge for meeting needs under ss 18 – 20 (s 14(1)). This is a change from the current framework under which, subject to the means assessment, local authorities are required to charge for residential care (s 22 NAA 1948). However it is expected that local authorities will continue to charge for residential care.
		2. Note that there will remain some services in respect of which local authorities cannot charge which include provision of community equipment (aids and minor adaptations) and intermediate and reablement support services for the first 6 weeks (see regs 3 and 4 of the *Care and Support (Charging and Assessment of Resources) Regs 2014.*
		3. It is proposed that from April 2016 the upper capital limit will rise to £118,000 for people in care homes whose property is taken into account in the financial assessment. For those in all other settings or people in care homes whose property is not taken into account in the financial assessment the upper capital limit will be £27,000. (See the consultation document, Care Act 2014: How should we deliver the 2016 reforms to cap care costs and manage appeals?)
		4. **The cap on care costs - ss 15 - 16**
* The Commission on the Funding of Care and Support found that the adult social care funding system in England was “not fit for purpose”[[9]](#footnote-9)and recommended the introduction of a cap on the lifetime contribution to adult social care costs that any individual needs to make. This was intended to address the difficulties that people have when faced with the risk of very high and unpredictable care costs.
* By virtue of s 15 a local authority may not make a charge under s 14 for meeting an adult’s needs under s 18 if the total of the costs accrued in meeting the adult’s eligible needs after the commencement of this section exceeds the cap on care costs. S 15 is expected to be implemented from April 2016 when the cap will be set at £72,000. It is to be uprated annually (s 16) and reviewed every 5 years (s 71).
* It is quite possible that a person will incur higher costs than £72,000 before they meet the cap however, as the costs cap only applies to the costs of meeting needs that a local authority assesses as eligible needs, and based on what the cost would be to the local authority of meeting the eligible needs (which will be set out in an independent personal budget (s 28)). Daily living costs are not included in accrued costs ( s 15(6)), and after a person’s accrued costs have reached the cap they may still be charged if and to the extent that the support that the local authority provides includes daily living costs ( s 15(7)). It is proposed to set daily living costs at £230 per week (see the current consultation document “*Care Act 2014: How should we deliver the 2016 reforms to cap care costs and manage appeals?*”).
* People paying for their own care will need to have their needs assessed in order to identify their accrued costs towards the cap. Local authorities are instructed to identify self-funders and begin assessments from October 2015. £116 million has been made available in funding to enable local authorities to undertake early assessments towards the cap during 2015/16. *See LAC (DH) (2015)2 Care and Support: Getting ready for the cap on care costs – funding to support implementation.*
* Under the new system people who develop eligible care and support needs before the age of 25 will have a zero cap for life. For those who develop a care and support need from the age of 25 the cap will be set, as mentioned above, at £72,000. See s 15(4) (the cap is an amount specified in regulations) and see the consultation document referred to above for the government’s proposals.
	1. **Appeals – s 72:** an appeals system may be introduced by regulations, and this is planned for April 2016; the power in s 72 is broad “appeals against decisions taken by a local authority in the exercise of their functions under this Part in respect of an individual”; the regulations will specify who can bring an appeal and on what grounds, who is to consider the appeal and the powers of the person or body deciding the appeal. The proposal made in the current consultation document is that the local authority will appoint an independent reviewer and the final stage of the process will be a local authority decision, the local authority making a decision having given consideration to the independent reviewer’s recommendation.
	2. **Prisoners – s 76:** an important provision which clarifies that local authorities are responsible for assessing and meeting the eligible care and support needs of people in prisons or “approved premises” in their areas. See also Chapter 17 of the statutory guidance.
	3. **Safeguarding vulnerable adults - ss 42 – 57:** outline the responsibilities of local authorities and other partners in relation to safeguarding vulnerable adults including a new requirement to establish Safeguarding Adults Boards.

(NB: This is not a comprehensive list of all areas covered in Care Act 2014 Part 1.)

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Garden Court Chambers

18 March 2015

1. See T. Spencer-Lane’s commentary in Care Act Manual, First Edition, Sweet and Maxwell [↑](#footnote-ref-1)
2. Response to the consultation on draft regulations and guidance for implementation of Part 1 of the Care Act 2014 Part 1. [↑](#footnote-ref-2)
3. Reforming the law for adult care and support: the Government’s response to the Law Commission, July 2012 [↑](#footnote-ref-3)
4. The Care Bill Explained, including a response to the consultation and pre-legislative scrutiny on the Draft Care and Support Bill, May 2013, paras 71 – 2. [↑](#footnote-ref-4)
5. Draft national minimum eligibility threshold for adult care and support, a discussion document, June 2013 [↑](#footnote-ref-5)
6. See Response to the consultation on draft regulations and guidance for implementation of Part 1 of the Care Act 2014, October 2014, p 21 [↑](#footnote-ref-6)
7. Passage cited in Care Act 2014 Manual, T. Spencer-Lane p 172 [↑](#footnote-ref-7)
8. Care Act 2014 Manual, p 172 - 3 [↑](#footnote-ref-8)
9. Fairer Care Funding: the Report of the Commission on Funding of Care and Support: Vol. 1 (July 2011) p 24 [↑](#footnote-ref-9)