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Health and Social Care Act (Regulated Activities) Regulations 2014, see *Care Quality Commission (CQC)*

Health care, see *National Health Service (NHS)*

Health service ombudsman (HSO)

Under the Health Service Commissioners Act 1993, the health service ombudsman (HSO) investigates complaints against the NHS. Normally the complainant must have gone through the NHS body's own complaints procedure first. The ombudsman's remit extends to complaints about NHS-funded health care services provided in a private hospital and to complaints about any NHS-funded health care services for privately funded patients in an NHS hospital.

HSO: MALADMINISTRATION, FAILURE IN SERVICE. The ombudsman looks to see whether hardship or injustice has resulted from maladministration, failure in a service that has been provided or failure to provide a service which it was a function of the NHS body concerned to provide. The ombudsman can question clinical judgements. With increased joint working and integration

within health and social care, the health service ombudsman can investigate jointly with the local ombudsman.[1]

Home adaptations

Housing adaptations, major or minor, can be a cost-effective way of enabling people with a disability or illness to remain in their own homes. Examples range from a handrail or grab rail at one extreme to stairlifts, ceiling track hoists or downstairs bathrooms at another.

Legally, there are different possible routes for obtaining adaptations. The main ones are:

- the Care Act 2014
- the Housing Grants, Construction and Regeneration Act 1996
- the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002
- the NHS Act 2006
- the Equality Act 2010.

(For children, the above list is the same, except section 17 of the Children Act 1989 and section 2 of the Chronically Sick Disabled Persons Act 1970 should be substituted for the Care Act.) For major adaptations, legislation other than the Care Act 2014 will often be the first port of call (see **Housing Grants, Construction and Regeneration Act 1996** and **Regulatory Reform (Housing Assistance) (England and Wales) Order 2002**).

HOME ADAPTATIONS: CARE ACT 2014. The Act itself does not mention adaptations by name. But section 8 of the Act – giving non-exhaustive examples of how care and support needs can be met – appears wide enough to include adaptations. Statutory guidance emphasises the importance of adaptations, both as a preventative measure under section 2 of the Act and as

1 Health Service Commissioners Act 1993, ss.2A, 2B, 3, 18ZA.

a means of meeting need under section 18 of the Act.[1] In addition, regulations stipulate that any minor adaptation arranged by a local authority under the Care Act must be free of charge if its cost is £1000 or less.[2]

HOME ADAPTATIONS: MAJOR ADAPTATIONS. The rule about minor adaptations does not prevent a local authority from assisting with more major adaptations, either preventatively or as a way of discharging its duty to meet eligible need. But this does mean a local authority, under section 14 of the Act, could choose to apply a financial test of resources to an adaptation costing more than £1000.

Government guidance has in the past stated that social care legislation, in its own right, creates a strong duty to meet people's needs for adaptations, and that if a person's need for a major adaptation is not being met either at all or fully under the Housing Grants, Construction and Regeneration Act, 1996, local social services authorities may have a strong duty to assist.[3] This could be, for example, if:

- the cost of the adaptation exceeds the £30,000 limit, above which housing authorities do not have a duty to go
- the adaptation required doesn't come under the 1996 Act at all, because it does not fall within the list of works in that Act
- in a situation of shared care, an adaptation is required in a second dwelling – a disabled facilities grant (DFG) is not normally available in a second dwelling
- the person is genuinely unable to fund their assessed financial contribution to the adaptation, as calculated by the financial test of resources applied under the 1996 Act.

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1 Statutory guidance, 2016, para 15.52.

2 SI 2014/2672. Care and Support (Charging and Assessment of Resources) Regulations 2014, r.3. And SI 2014/2673. Care and Support (Preventing Needs for Care and Support) Regulations 2014.

3 Department of Communities and Local Government *Housing adaptations for disabled people: A good practice guide*. London: DCLG, 2006, paras 2.7–2.8. Superseded in February 2015 by: Home Adaptations Consortium. *Home adaptations for disabled people: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013 (not, though, government guidance).

This guidance referred to previous legislation, the Chronically Sick and Disabled Persons Act 1970, and its gist is supported by case law.[1] The principle would seem to be equally applicable to the position under the Care Act, which has superseded the 1970 Act for adults.[2] Any duty to assist in such circumstances, under the Care Act, would of course depend on assessment, eligible need, the adaptation being the most cost-effective way of meeting that need, and on possible means testing and charging.

HOME ADAPTATIONS: NHS ACT 2006. Government guidance makes clear that in some circumstances the NHS – in the form of clinical commissioning groups – might have responsibility for adaptations to a person's home. This could be when the person has been assessed as having NHS continuing health care status and the need is either outside of, or in excess of, a grant obtainable under the Housing Grants, Construction and Regeneration Act 1996.[3]

Home care visits

Significant concerns have been raised about home care visits commissioned by local authorities from independent care agencies as being too short, truncated, late or missed.[4] Guidance states that commissioned care must be appropriate and adequately resourced to be consistent with meeting need and the well-being principle. It emphasises that 15-minute visits are not appropriate for help with personal care tasks but may be appropriate for

1 *Re Teresa Judge* [2001] NIQB 14, High Court (Northern Ireland). And *Withnell v Down Lisburn Health and Social Services Trust* (2004) High Court (Northern Ireland). And English cases in which this approach seemed to be assumed: *R v Kirklees Metropolitan Borough Council, ex p Daykin* [1996] 3 CL 565, High Court. And *R v Kirklees Metropolitan Borough Council, ex p Good* [1996] 11 CL 288, High Court. And *R(Fay) v Essex County Council* [2004] EWHC Admin 879. And *R(Spink) v Wandsworth LBC* [2005] EWCA Civ 302, Court of Appeal.

2 Statutory guidance, 2016, paras 15.51–15.52.

3 Department of Health *National framework for NHS continuing healthcare and NHS-funded nursing care*. London: DH, 2012, pp.103–104.

4 See e.g. Care Quality Commission *Not just a number: Home care inspection programme, national overview*. London: CQC, 2013, pp.27–28. And Local Government Ombudsman *Review of local government complaints 2015–16*. London: LGO, 2016, p.9.

checking someone has returned safely home from a day centre or that they have taken medication – or if the short visit is through personal choice.[1]

Hospital discharge

The Care Act contains rules about the discharge of patients from acute hospital beds.[2] In summary, the rules provide for hospitals to serve first an assessment notice, followed by a discharge notice, on the local authority. If the local authority has failed to discharge the patient by the discharge date, the hospital can – but does not have to – seek reimbursement from the local authority. The basic rules are as follows:

- **Assessment notice**. The assessment notice must be served on the local authority if the hospital believes that it would not be safe to discharge the patient without care and support being provided by the local authority. Before serving the notice, the hospital must consult with the patient and, if feasible, any carer that the patient has.
- **NHS continuing health care**. Amongst other things, the assessment notice must specify whether the NHS has considered whether to provide the patient with NHS continuing health care and the result of that consideration.
- **Consultation with local authority**. The hospital must then consult the local authority, before deciding what it (the hospital) will do for the patient to achieve a safe discharge.
- **Discharge notice**. The hospital must also give a discharge notice to the local authority, specifying a discharge date. This date cannot be less than a day after the assessment notice is given, and there must be a gap of at least two days between the discharge date and the assessment notice having been given. But if an assessment notice is given after 2pm on a particular day, it is taken to have been given on the following day.
- **Health care provision**. The discharge notice must specify what, if any, health services are going to be provided under the NHS Act 2006.

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1 Statutory guidance, 2016, para 4.101.

2 Care Act 2014, schedule 3. And SI 2014/2823. Care and Support (Discharge of Hospital Patients) Regulations 2014.

- **Local authority assessment**. Having received the assessment notice, the local authority must carry out an assessment of the adult (and sometimes carer) under the Care Act. It must inform the hospital:
  - » whether the patient has needs for care and support
  - » (where applicable) whether a carer has needs for support
  - » whether any of the needs meet the eligibility criteria, and
  - » how the authority plans to meet such of those needs as meet the eligibility criteria.
- **Reimbursement to penalise the local authority**. If the local authority fails either to do the assessment or provide care and support which it proposes to provide – and this is the sole reason why the patient has not been discharged by the date of discharge – the hospital can seek reimbursement for the cost of the patient's subsequent days at the hospital.
- **Rules apply to acute care only**. These rules apply to acute care only. Acute care means intensive medical treatment provided by or under the supervision of a consultant. It lasts only for a limited period, after which the person receiving the treatment no longer benefits from it. Private patients are not covered by the rules. Acute care cannot be:
  - » care of an expectant or nursing mother
  - » mental health care
  - » palliative care
  - » a structured programme of care provided for a limited period to help a person maintain or regain the ability to live at home
  - » care provided for recuperation or rehabilitation.

  In turn, mental health care means psychiatric services or other services provided for preventing, diagnosing or treating illness, the arrangements for which are the primary responsibility of a consultant psychiatrist.[1]

1 Care Act 2014, schedule 3. And SI 2014/2823. Care and Support (Discharge of Hospital Patients) Regulations 2014.

HOSPITAL DISCHARGE: SERVICE FAILURE. Unsafe hospital discharges are regularly referred to the health service ombudsman for investigation, who might identify service failure. In 2016, the ombudsman highlighted the 'harrowing impact of poorly managed hospital discharges on individuals and their families', in the case of highly vulnerable, elderly people. The most frequent, and regularly complained about, problems were:

- patients being discharged before they were clinically ready to leave hospital
- patients not being assessed or consulted properly before their discharge
- relatives and carers not being told that their loved one had been discharged
- patients being discharged with no home care plan in place or being kept in hospital due to poor coordination across services.[1]

The ombudsman noted that matters had not improved since 2011 when she had previously highlighted the 'shambolic and ill-prepared' nature of hospital discharge arrangements.[2] A House of Commons Committee echoed this later in 2016, finding discharge failures to be a wide and persistent problem.[3]

Housing Grants, Construction and Regeneration Act 1996 (HGCRA)

A significant statutory route for major adaptations to a person's home is the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). If certain conditions are met, this Act creates, in its own right, a strong duty on the local housing authority to approve an application for a disabled facilities grant (DFG). Government guidance emphasised in the past that the obligation 'is primary, absolute and remains irrespective of whether other

1 Health Service Ombudsman *A report of investigations into unsafe discharge from hospital*. London: HSO, 2016, pp.2, 5–6.

2 Health Service Ombudsman *Care and compassion? Report of the Health Service Ombudsman on ten investigations into NHS care of older people*. London: HSO, 2011.

3 House of Commons Public Administration and Constitutional Affairs Committee *Follow-up to PHSO report on unsafe discharge from hospital*. Fifth Report of Session 2016–17. London: TSO, 2016, p.3.

assistance is provided by a social services authority or other body' (such as a registered social landlord).[1]

HGCRA: KEY POINTS. A DFG application must be approved if the following conditions are met:

- the adaptation is for a disabled occupant
- the works fall within the list of purposes set out in the legislation
- the works are necessary and appropriate
- the works are reasonable and practicable.

HGCRA: DISABLED OCCUPANT. A disabled occupant is defined as a person who is disabled, or taken to be disabled, because:

- his or her sight, hearing or speech is substantially impaired
- he or she has a mental disorder or impairment of any kind
- he or she is physically substantially disabled by illness, injury, impairment present since birth, or otherwise, or
- he or she is on a sight-impaired or disability register kept by the local authority under section 77 of the Care Act.[2]

HGCRA: STATUTORY PURPOSES OF A DFG. The works must be for one of the following purposes:

- **Access to dwelling**: facilitating access by the disabled occupant to and from (i) the dwelling, qualifying houseboat or caravan, or (ii) the building in which the dwelling or, as the case may be, flat is situated
- **Safety**: making (i) the dwelling, qualifying houseboat or caravan, or (ii) the building, safe for the disabled occupant and other persons residing with him

1 Department for Communities and Local Government *Delivering housing adaptations for disabled people: A good practice guide*, June 2006 edition. London: DCLG, 2006, para 2.13.

2 HGCRA 1996, s.100.

- **Family room**: facilitating access by the disabled occupant to a room used or usable as the principal family room
- **Sleeping room**: facilitating access by the disabled occupant to, or providing for the disabled occupant, a room used or usable for sleeping
- **Lavatory**: facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a lavatory, or facilitating the use by the disabled occupant of such a facility
- **Bath or shower**: facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a bath or shower (or both), or facilitating the use by the disabled occupant of such a facility
- **Wash-hand basin**: facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a wash-hand basin, or facilitating the use by the disabled occupant of such a facility
- **Food**: facilitating the preparation and cooking of food by the disabled occupant
- **Heating**: improving any heating system in the dwelling, qualifying houseboat or caravan to meet the needs of the disabled occupant or, if there is no existing heating system there or any such system is unsuitable for use by the disabled occupant, providing a heating system suitable to meet his needs
- **Power**: facilitating the use by the disabled occupant of a source of power, light or heat by altering the position of one or more means of access to or control of that source or by providing additional means of control
- **Caring role**: facilitating access and movement by the disabled occupant around the dwelling, qualifying houseboat or caravan in order to enable him to care for a person who is normally resident there and is in need of such care
- **Garden**: facilitating access to and from a garden by a disabled occupant, or making access to a garden safe for a disabled occupant.[1]

1 HGCRA 1996, s.23(1), except for gardens. And see SI 2008/1189. Disabled Facilities Grants (Maximum Amounts and Additional Purposes) (England) Order 2008, r.3.

HGCRA: NECESSARY AND APPROPRIATE. The works must be judged by the local housing authority to be necessary and appropriate. The courts have held that this is a 'technical question' and that resources should not be taken into account.[1] In deciding this, the housing authority must consult the social services authority, assuming they are not one and the same authority.[2] In the case of a unitary authority, past guidance pointed out that the housing department should of course consult the social services department. It stated that the purpose of a home adaptation is to 'restore or enable independent living, privacy, confidence and dignity for individuals and their families'.[3]

HGCRA: NOT CONFUSING RULES WITH CARE ACT ELIGIBILITY. When social services is consulted about whether a DFG is necessary and appropriate, it must consider the request under the HGCRA and not the Care Act – legally, because the two Acts are separate pieces of legislation, and practically, because eligibility under the Care Act is not necessarily co-extensive with eligibility under the HGCRA.[4] Muddling up the separate legal eligibility rules would be potentially unlawful and has been held to be maladministration.[5] For instance, a decision seemingly under the Care Act, that a woman did not need access to her bath, but could strip wash instead, did not meant that she was not eligible under the HGCRA 1996, which refers explicitly to a disabled occupant having access to a bath or shower.[6] The ombudsman

1 *R v Birmingham City Council, ex p Taj Mohammed* [1998] 1 CCLR 441, High Court.

2 HGCRA 1996, s.24.

3 Department for Communities and Local Government *Delivering housing adaptations for disabled people: A good practice guide*, June 2006 edition. London: DCLG, 2006, para 1.6. Superseded in February 2015 by: Home Adaptations Consortium. *Home adaptations for disabled people: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013 (not, though, government guidance).

4 Department for Communities and Local Government *Delivering housing adaptations for disabled people: A good practice guide*, June 2006 edition. London: DCLG, 2006, para 4.7. Superseded in February 2015 by: Home Adaptations Consortium. *Home adaptations for disabled people: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013 (not, though, government guidance).

5 *LGO, Neath Port Talbot County Borough Council 1999* (99/0149/N/142).

6 *LGO, Birmingham City Council*, 2016 (15 015 721), paras 8–9.

previously has referred to the importance of dignity in relation to bathing and washing.[1]

HGCRA: REASONABLE AND PRACTICABLE. The works must also be reasonable and practicable. Legally this question can relate to the age and condition of the dwelling only.[2] The local authority's financial resources, however, could be relevant if, for example, the building were old and dilapidated, requiring excessive expenditure to make the adaptation possible.[3]

HGCRA: APPROVAL OF THE GRANT. If the grant application is approved, means testing will establish whether the applicant must contribute.[4] (There is no means testing in the case of children.) Approval must take place within six months of the application being submitted, and payment of the grant must be no longer than 12 months from the date of submission of the application.[5] The maximum payable before any contribution is calculated is £30,000 (£35,000 in Wales). In some circumstances (owner occupation), the local authority can demand repayment of up to £10,000 of any part of the grant exceeding £5000 if the person leaves the dwelling within ten years.[6]

HGCRA: TENURE. Owner occupiers and tenants in private housing can apply for DFGs, as can council and housing association tenants. If local authorities and housing associations carry out adaptations themselves and meet the needs of the disabled occupant – equivalent to what a DFG would

1 *LGO, Bolsover District Council*, 2003 (02/C/08679, 02/C/08681 & 02/C/10389), para 19.

2 HGCRA 1996, s.24.

3 See e.g. comments in *R v Birmingham City Council, ex p Taj Mohammed* [1998] 1 CCLR 441, High Court.

4 HGCRA 1996, s.30. And SI 1996/2367. Housing Renewal Grants Regulations 1996.

5 HGCRA 1996, ss.34, 36.

6 *The Housing Grants, Construction and Regeneration Act 1996: Disabled Facilities Grant (conditions relating to approval or payment of grant) general consent 2008*, Secretary of State for Communities and Local Government, 2008.

have achieved – a DFG might not be necessary. There would be no point. But otherwise, the tenant has a statutory right to apply for a DFG.[1]

Human rights

The European Convention on Human Rights has been imported into United Kingdom law by the Human Rights Act 1998. Human rights law applies to public bodies and other bodies carrying out functions of a public nature. Local authorities and NHS bodies are public bodies.

HUMAN RIGHTS: AND THE CARE ACT 2014. The courts held in the past that independent care providers were neither public bodies nor, in the main, bodies carrying out functions of a public nature.[2] (However, for example, a private hospital, treating a detained patient under the Mental Health Act, is carrying functions of a public nature.)[3]

Section 73 of the Care Act modifies this by stating that a registered care provider exercises functions of a public nature (and is therefore subject to human rights law) but only if a local authority has arranged, or paid for (directly or indirectly), the care and support under sections 2, 18, 19, 20, 38 and 48 of the Care Act. 'Indirectly' means that use of a direct payment would be included in this rule, which means that if an individual themselves arranges care on a self-funding basis, from a care agency or care home, the Human Rights Act would not apply.

HUMAN RIGHTS: RIGHT TO LIFE. Article 2 of the European Convention states that everyone's right to life shall be protected by law. Article 2 arises sometimes in health and social care, requiring procedurally an independent

1 Department for Communities and Local Government *Delivering housing adaptations for disabled people: A good practice guide*, June 2006 edition. London: DCLG, 2006, paras 2.20, 3.26. Superseded in February 2015 by: Home Adaptations Consortium. *Home adaptations for disabled people: a detailed guide to related legislation, guidance and good practice*. Nottingham: Care and Repair, 2013 (not, though, government guidance).

2 *YL v Birmingham City Council* [2007] UKHL 27, House of Lords.

3 *R v Partnerships in Care Ltd, ex p A* [2002] EWHC Admin 529.

investigation into some deaths in which there might have been a breach of human rights, with the State implicated.[1]

HUMAN RIGHTS: INHUMAN AND DEGRADING TREATMENT. Article 3 of the Convention states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The courts have held that ill treatment must reach a minimum level of severity and involve actual bodily injury or intense physical or mental suffering. Degrading treatment would occur if it 'humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[2]

HUMAN RIGHTS: DEPRIVATION OF LIBERTY. Article 5 of the Convention states that 'everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.' One of the categories for who can be deprived of their liberty is 'persons of unsound mind'. Therefore, when people are deprived of their liberty under the Mental Capacity Act 2005, the rules of the 2005 Act must be followed. If they are not, a breach of article 5 will occur – for example, a local authority depriving of his liberty a man who in fact had, during most of the period of detention, mental capacity – meaning that the grounds for holding him did not exist.[3]

HUMAN RIGHTS: RIGHT TO RESPECT FOR PRIVATE LIFE, FAMILY LIFE AND HOME. Article 8 of the Convention states:

- **Right**. Everyone has the right to respect for his private and family life, his home and his correspondence.
- **Interference with the right**. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national

1 *R(Middleton) v West Somerset Coroner* [2004] UKHL 10.

2 *Pretty v United Kingdom* [2002] 2 FCR 97 (European Court of Human Rights).

3 *Essex County Council v RG* [2015] EWCOP 1.

> security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This means that interference with private life, family life and home is possible but must be justified. Private life has been held to include physical and psychological integrity, and therefore a notion of dignity.[1]

Examples of breaches of article 8 by local authorities have included the operation of a blanket manual handling policy,[2] leaving an immobile stroke victim in squalid conditions in her living room for two years,[3] and wholly inadequate assessment of a woman with dementia aged 90 about where she should live.[4]

On the other hand, interference with article 8 rights can sometimes be justified if the interference is according to relevant law, necessary and proportionate. For instance, offering a woman the more cost-effective option of incontinence pads – rather than the night-time carer she wished for – was held to be justified for the economic well-being of the country.[5]

Proper application of the Care Act is, in principle, likely to make a breach of article 8 uncommon[6] since the Care Act is likely to be viewed generally by the courts as broad, humane and all about taking account of private and family life.[7]

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1 *Botta v Italy* (1998) 26 EHRR 241.

2 *R(A and B) v East Sussex County Council* [2003] EWHC 167 (Admin).

3 *R(Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin).

4 *R(Goldsmith) v Wandsworth London Borough Council* [2004] EWCA Civ 1170.

5 *McDonald v United Kingdom* (2015) 60 E.H.R.R. 1.

6 *R(Cowl) v Plymouth City Council* [2001] EWHC Admin 734, para 36. And see Court of Appeal: [2001] EWCA Civ 1935.

7 *R(Khana) v London Borough of Southwark* (2001), unreported. And see Court of Appeal: [2001] EWCA Civ 999.