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Supported Housing and Care Homes

Guidance on Regulation

August 2002

Supported Housing and Care Homes

Introduction

This is guidance for councils with social services responsibilities in England, issued as statutory guidance under section 7 of the Local Authority Social Services Act 1970. The guidance is also issued to the National Care Standards Commission under section 6(2)(b) of the Care Standards Act 2000.

The guidance will also be relevant to NHS Primary Care Trusts and councils with housing responsibilities concerned with joint planning and commissioning of supported housing models.

The guidance should be read in conjunction with the following documents:

- the conditions for use of *Supporting People* Grant, issued by the Office of the Deputy Prime Minister, available on the *Supporting People* Knowledge Web www.spkweb.org.uk under General Documents and Discussions – General Docs – Finance and Contracting – Financial Package Chapter 1. If you have any problems downloading the document, please call the SP Help line on 020-7944-2556 and
- the Department for Work & Pensions circular HB/CTB A47/2001 on the Transitional Housing Benefit Scheme, dated 31 October 2001, available on <http://www.dss.gov.uk/hbctb/index.htm>

Queries may be made:

On National Minimum Standards for Care Homes, to Paul Whitbourn (020-7972-4572) (e-mail: paul.whitbourn@doh.gsi.gov.uk)

On Adult Placements, to Kirt Ghelani (020-7972-4500) (e-mail: kirt.ghelani@doh.gsi.gov.uk)

On general aspects of this draft guidance, to Crispin Acton (020-7972-4036) (e-mail: crispin.acton@doh.gsi.gov.uk) or Catherine Alexander (020-7972-4058) (e-mail: catherine.alexander@doh.gsi.gov.uk)

Supported Housing and Care Homes

Guidance

Summary

1. Government policy for community care aims to promote independence, while protecting service users' safety. Promotion of independence implies recognition of individuals' own choices regarding housing, care, and support, including their choices in relation to risk and protection.
2. The new regulatory framework under the Care Standards Act, 2000 aims to ensure high standards of care and to protect vulnerable people, but the Act will not fundamentally change the definition of a care home as compared with the current legislation.
3. Transitional Housing Benefit and, from April 2003, the *Supporting People* grant are not in general payable for care homes. Their main aim is the promotion of independence through non-intensive, housing-related support in the community.
4. Government policy would support changes to care homes and their replacement with other provision in cases where assessments/care plans of the individuals in the scheme lead to changes that might promote greater independence. Government policy is to enable people to receive care and support in their own home, where they wish and wherever possible. In some cases, the greater consistency of regulation applied by the National Care Standards Commission after April 2002 may lead to re-designation of care homes.
5. Government policy would not support inappropriate changes to care homes which do not promote genuine independence, but seek primarily to secure funding through Transitional Housing Benefit and *Supporting People*. Such changes risk removing necessary protection from vulnerable people and may be unlawful. They also risk future disruption to funding, if the National Care Standards Commission later decides that registration as a care home is required.
6. This guidance aims to explain in broad terms where registration as a care home is required and how to distinguish care homes from supported housing of various kinds. The distinction is not always a simple matter. Advice must be sought from the National Care Standards Commission, wherever a change to registration of a care home is contemplated.
7. This guidance applies both during the currency of Transitional Housing Benefit up to March 2003 and after the introduction of the *Supporting People* grant from April 2003.

Personal care

8. The Care Standards Act, 2000 did not include a definition of "personal care" (except that regulations may be made excluding prescribed activities from personal care). Its established, ordinary meaning includes four main types of care, which are:
 - assistance with bodily functions such as feeding, bathing, and toileting
 - care which falls just short of assistance with bodily functions, but still involving physical and intimate touching, including activities such as helping a person get out of a bath and helping them to get dressed
 - non-physical care, such as advice, encouragement and supervision relating to the foregoing, such as prompting a person to take a bath and supervising them during this
 - emotional and psychological support, including the promotion of social functioning, behaviour management, and assistance with cognitive functions
9. In summary, in relation to personal care, the requirement under the Care Standards Act for registration as a care home is only triggered where personal care is provided and, in addition, the most intensive kind of personal care (1st bullet) is available, when such assistance is required.
10. It is only the two more intensive kinds of personal care (1st and 2nd bullets), which trigger the requirement under the Care Standards Act for registration as a domiciliary care agency, although other kinds of personal care and support may also be provided by such an agency.
11. Non-physical care, emotional and psychological support do not of themselves trigger a requirement for registration with the National Care Standards Commission. Such care and support may be provided by various agencies according to the context and the person's overall needs. In certain circumstances, these will be part of housing-related support, funded through Transitional Housing Benefit, or, from April 2003, *Supporting People*. Funding responsibilities for these types of care and support is further discussed in:
 - the conditions for use of *Supporting People* Grant, issued by the Office of the Deputy Prime Minister, available on the *Supporting People* Knowledge Web under Emerging Policy/Administrative Guidance] – www.spkweb.org.uk and
 - the Department for Work & Pensions circular HB/CTB A47/2001 on the Transitional Housing Benefit Scheme, available on <http://www.dss.gov.uk/hbctb/index.htm>

Care Homes

12. The Care Standards Act, 2000 specifies two elements to determine which establishments must be registered as care homes from April 2002. This is, firstly, establishments that provide accommodation together with nursing or personal care

(as described broadly at paragraph 8) for people who are or have been ill, who have or have had a mental disorder, who are disabled or infirm, or who are or have been dependent on alcohol or drugs (section 3 of the Act).

13. Secondly, to fall within the definition of a care home, an establishment must also meet the requirement in section 121(9) of the Act, which provides that an establishment is not a care home unless the care it provides includes assistance with bodily functions, where such assistance is required. This does not mean that personal care provided by a care home is limited to assistance with bodily functions, but that this type of assistance must be available and given, if required, for an establishment to be registrable as a care home. Such assistance with bodily functions need not be given ordinarily and regularly, to come within the definition of a care home. Such assistance might only be required occasionally, but, if that requirement cannot be met, there would be no eligibility for registration as a care home. This requirement replicates that in the Registered Homes Act 1984.
14. The definition of a care home in the Care Standards Act 2000 differs slightly from the definition in the Registered Homes Act 1984 in that it does not refer to the provision of board. The intention behind this change was to close the loophole whereby unscrupulous care homeowners could avoid registration by charging residents for their food on a pay-as-you-eat basis.
15. Beyond this, there is no intention to extend regulation to new types of accommodation, which have not previously been required to register. The type of care provided in a home, which will trigger registration, is the same under the Care Standards Act as it was under the Registered Homes Act.

Domiciliary Care

16. Where an agency arranges to provide personal care (as described at paragraph 9) to a person in their own home, it must register as a domiciliary care agency. A sole individual home care worker may provide paid, personal care to a person in their own home, but will not need to register as a domiciliary care agency.
17. A domiciliary care agency is defined in section 4(3) of the Act as "an undertaking which consists of or includes arranging the provision of personal care in their own homes for persons who by reason of illness, infirmity or disability are unable to provide it for themselves without assistance". The words "unable to provide it for themselves without assistance" mean that personal care - in this context - has a narrower application than in the context of a care home. It will include assistance with bodily functions and physical care, which fall just short of that assistance, such as helping a person to get dressed. But it could not, within this definition, extend to encouragement and emotional support, since this is not a form of personal care which a person could be said to be able or unable to provide for themselves.
18. Personal care delivered to people in their own homes will be regulated under the provisions in the Act covering domiciliary care agencies and the Domiciliary Care Agency Regulations. This will ensure that vulnerable people receiving personal care in their own homes get the protection they need.

Housing and care schemes and registration as a Care Home

19. Concerns have been raised about whether ‘very sheltered housing’ or ‘extra care housing’ for older people, or group homes (supported housing) for learning disabled people, or people with mental health problems, will be registrable as a care home. While it is not possible to say categorically that, any scheme describing itself as providing very sheltered housing, or extra care, or supported housing, will necessarily not be registrable as a care home, the following paragraphs aim to provide guidance on good practice schemes. There is no intention to extend regulation to new types of accommodation, which have not previously been required to register. The type of care provided in a home, which will trigger registration, is the same under the Care Standards Act as it was under the Registered Homes Act.

Extra care or very sheltered housing for older people

20. Government policy strongly supports the promotion of independence for older people. Extra care housing models have an important and growing role to play, within the whole spectrum of housing and care options for people with various levels of need. One possible role for extra care housing is as an alternative option to residential care.

21. Good practice models of extra care housing provide a high degree of choice over everyday living. In contrast to care homes, a fundamental feature is that users live in their own self-contained dwelling, ie, with their own kitchen and bathroom and other features of an ordinary dwelling. This is often described as people having their “own front door”. Service users also have housing rights, usually through a tenancy, which gives them greater control.

22. This form of housing may be built as either houses or flats and will often be in a group, with some communal facilities, such as a lounge, assisted bathing facility, laundry, hairdressing, and dining facility. In some schemes, a meals service may be provided, in others this may be arranged through social services.

23. There are different models for the provision of care and accommodation, which may be provided separately or by the same organisation, and may be managed in various ways. Each has its merits. The Department wishes to encourage the development of good practice models of extra care housing for older people, as one way of promoting partnership in the provision of care and housing and encouraging independent living for older people.

24. As part of a preventive, enabling (or re-enabling) philosophy, some extra care housing schemes have a mixed dependency population, of which a proportion would otherwise be in residential care, although it is not possible to be categorical about this. Flexibility in care should be built into schemes, so that, if a person’s care needs change, their care plan will change accordingly. In some cases, people who move in may improve or recover, so that they no longer have a need for personal care. Unless this was part of the original care plan, eg, as part of intermediate care prior to returning to the person’s permanent home, the person should not be asked to leave. They would have the right to refuse to leave, if

asked, as they will have an assured tenancy, or in the case of private schemes a lease.

25. Many, but not all, schemes also focus on supporting other older people in the surrounding community, as well as those living in the scheme. This may, for example, be through provision of home care in older people's own homes outside the scheme or through day care.
26. As a matter of policy, the Department does not envisage good practice extra care housing of the kinds described here being registered as care homes. Provision of personal care within these schemes would usually be expected to lead to registration as a domiciliary care agency. Further advice below aims to help NCSC inspectors to distinguish good practice extra care housing schemes from other schemes which should properly be registered as care homes, and to explain the legal basis for making the distinction.

Housing and Support for people with learning disabilities

27. The White Paper, *Valuing People* (2001) is underpinned by four key principles - Rights, Independence, Choice and Inclusion. The way in which housing, care and support are offered to people with learning disabilities should reflect this.
28. The Government objective in this area of services is to develop person-centred services which enable people with learning disabilities and their families to have greater choice and control over where and how they live. Housing, care and support options should enhance opportunities for people with learning disabilities and their families to exercise choice and control in their lives.
29. People with learning disabilities with all levels of support need can live successfully in different types of housing. They can cope with the full range of tenures. Expanding the range and choice of housing care and support services is central to giving individuals more choice and control in their lives.
30. Widening the housing, care and support options available creates the potential for choice, but many people with learning disabilities will need advice and support to do this. This advice should include the strengths and weaknesses of different options within the context of the four key principles - Rights, Independence, Choice and Inclusion.

Meaning of establishment - Who provides the personal care and the accommodation?

31. As stated above and discussed further below, a care home must be an "establishment". Under section 3 of the Act, an establishment is a care home if it provides accommodation, together with nursing or personal care for certain categories of person. Note that section 3 says that an establishment is a care home if *it* (i.e. the establishment, not the provider) provides accommodation.
32. It must first be established whether, as a matter of fact, the establishment meets this definition. The factual situation would include the way the accommodation

and care are provided. Whether accommodation and care are provided by separate individuals or companies is not necessarily the most important issue.

33. There must be a considerable range of permutations, depending upon the particular facts of each case. At one end of the spectrum will be where a person rents a flat and receives domiciliary care, where there is no connection between the landlord and the care agency. At the other end you could have two or more separate companies all engaged in running the *establishment*. The point is not whether a particular company provides accommodation or care, but rather whether it carries on an establishment which provides (through however many companies) accommodation together with nursing or personal care. **Where it is clear that the domiciliary care provisions do not apply**, separate provision of accommodation and care by different companies will not necessarily escape the conclusion that there is an establishment providing accommodation together with nursing or personal care. Once it has been found that, as a matter of fact, the establishment is a care home, it would then be necessary to consider who carries on or manages the care home.

Provision of personal care in a person's 'own home' – Extra care or very sheltered housing

34. The underlying intention of the Care Standards Act provisions is that, whereas care homes involve a fully integrated package of accommodation and care, a person receiving domiciliary care would be expected to have a high degree of autonomy in relation to their accommodation, like that enjoyed by most persons living in ordinary housing with secure tenure. In the vast majority of 'very sheltered housing' or 'extra care' schemes, personal care is being provided to people in their own homes, whether they are an owner-occupier or a tenant. Where it is clearly the case that personal care is being provided in a person's own home, then registration as a domiciliary care agency of the person or body providing personal care is likely to be required. There will be no registration as a care home, irrespective of the level of personal care available.
35. What is meant by a person's "own home"? This is not defined in the Act and it should be given its ordinary meaning. If a person is an owner-occupier (freehold or leasehold) then there is unlikely to be any argument about it. If it is clear that they have an assured tenancy¹, this is a strong indication that they are living in their own home. Further advice on the distinction between assured tenancies and licences is included at Annex A.
36. A fundamental point is that whether a person has an assured tenancy or a licence is a question of fact in each case. There have been a number of court rulings which found that licences so described were in fact assured tenancies, and *vice versa*. In the case of extra care housing or supported housing, possession of an assured tenancy will generally mean that a person has a right to deny entry to other people, including any care workers, without this having an effect on their right to occupy the dwelling. There may be practical difficulties about exercising choices over personal care, meals, or laundry. For example, the commissioning of

¹ For local authority provided schemes and some Registered Social Landlord schemes, "secure tenancies" are equivalent to assured tenancies.

care may not allow for particular choices of care provider by a user. Nevertheless, the fact that the person's security of housing tenure would be unaffected by denying entry to a care worker, in the same way as for any person living in ordinary housing, is a crucial difference from most care home provision and a factor in their greater independence. It means that the person is genuinely living "in their own home".

Provision of personal care in a person's 'own home' – Supported housing and group homes/shared accommodation

37. Can a person's "own home" be in shared accommodation? It is common for supported housing to be shared accommodation, usually in small group homes, for learning disabled people, people with mental health problems, and for some other groups.
38. As noted in Annex A, it is legally possible to have an assured joint tenancy in shared housing. This may be joint tenancy as a group for the whole of the property. Alternatively, there will be individual tenancy of part of the dwelling, such as a bedroom, with access to common areas. Each of these may be properly assured tenancies.
39. As stated in paragraph 35, possession of an assured tenancy is a strong indication that personal care is being provided in a person's "own home". Particular issues arise in determining whether shared accommodation is supported housing, where registration of a domiciliary care agency is needed, or registration as a care home. It will be necessary to look beyond the question of whether there is an assured tenancy/tenancies in the shared accommodation.
40. The scale of any shared accommodation is a relevant issue to be taken into account in considering whether personal care is being provided in a person's "own home". The Domiciliary Care Regulations are designed for application where care is delivered in small scale, domestic settings, where it can reasonably be said that service users exercise a high degree of control. Where shared accommodation goes beyond a small, domestic scale, a higher level of organisation is needed in the delivery of care, users' own control of their environment and delivery of their care may be less, and the need for regulation of the delivery of care and of accommodation greater.
41. As general guidance, particular care will need to be exercised over shared accommodation for service users with highly intensive care needs, where the number of users is more than might be expected in a family or a domestic setting. Account should be taken, eg, of factors such as the mixture of care needs, or where residents include relatives or informal carers. But there will be cases where it is not realistic to regard shared accommodation larger than family or domestic scale as each person's "own home" in the terms of the Act, despite the fact that each person may have an assured tenancy. The approach should be to assess all the facts involved in each case, rather than applying any rigid rule as to scale. In some cases, registration as a care home, rather than as a domiciliary care agency, might better reflect the reality of the situation.

Capacity

42. A service user's capacity may be relevant both to whether the person has an assured tenancy and to whether personal care can truly be said to be delivered in the person's "own home", particularly for shared accommodation. The approach to be adopted in relation to tenancies is summarised in Annex B, and is consistent with that set out in '*Making Decisions – the Government's proposals for making decisions on behalf of mentally incapacitated adults*'².
43. This does not mean any generalised assumption that certain groups are incapable of exercising such rights. The aim should be to protect vulnerable persons, but not to inhibit self-determination. Due weight should always be given to the person's own wishes in relation to their care and accommodation, as part of a proper assessment of the person's needs and as part of an individual care plan. Even where users have a limited understanding of the detail of tenancies and contracts, no assumption should be made that they cannot be supported to achieve the maximum degree of rights, choice, inclusion, and independence.
44. Assessing a user's ability to understand, to communicate their wishes, and to exercise control over the delivery of care in their own home should allow for the contribution of care workers, relatives or informal carers, who are actively involved in the user's care and can aid their understanding or ability to communicate.

Adult Placements

45. Adult placement³ provides short or long term accommodation and/or care and support normally to between one and three adults, placed through and supported by an adult placement scheme or by an adult placement carer approved by the scheme. Adult Placements may include:
- accommodation with personal care, or intermediate care, in the family home of an AP Carer registered under the Care Standards Act;
 - housing with support administered under Supported Living;
 - home based day services;
 - respite care, where personal care is not provided; and
 - extended family ("kinship") support in the community
46. An Adult Placement Scheme, managed by a local authority or independent (profit-making or non-profit-making) agency, is responsible for recruiting, assessing, training and supporting AP Carers; for taking referrals, matching and placing service users with AP Carers; and for supporting and monitoring the Placement.

² Lord Chancellor's Department, October 1999

³ See regulations 45-46 of the Care Home Regulations

47. In cases where personal care (including assistance with bodily functions, where this is required, as provided for care homes) is provided, AP Carers who are formally approved by an Adult Placement Scheme are the registered person under the Care Standards Act. They are registered in respect of their own home for the limited purpose of providing Adult Placements. Registration under the Care Standards Act means that the registered person (the AP Carer) will be responsible for complying with relevant legislative requirements. The Commission must take into account the National Minimum Standards when making decisions about registration. These will apply only to those placements that provide personal care.
48. Service users in Adult Placements may receive personal care and/or housing related support. Service users who have a licence agreement are able to claim Transitional Housing Benefit for housing-related support costs and, after April 2003, funding could be provided from *Supporting People*.
49. Adult Placement Schemes and Carers work in a highly flexible way and provide a wide range of different services. They are subject, therefore, to a number of different regulatory requirements. Adult Placement Schemes have to comply with:
- the Guidance issued by the Department of Health for Adult Placement Schemes
 - the National Minimum Standards and regulations for Domiciliary Care Agencies
 - Supporting People quality and monitoring requirements
50. AP Carers have to comply with:
- the National Minimum Standards and regulations for adult placements registered with the NCSC (if they provide accommodation and personal care)
 - Supporting People quality and monitoring requirements

Regulatory Frameworks – How do these interrelate?

51. This guidance seeks to help decisions on whether schemes should be subject to regulation as care homes, or other regulatory frameworks. In broad terms for care homes and adult placements, the National Minimum Standards for Older People, the National Minimum Standards for Younger Adults, the National Minimum Standards for Adult Placement, and the National Minimum Standards for young people aged 16 and 17 regulate the areas of:
- a) user choice, information, dignity, privacy, and involvement in assessment of needs
 - b) proper management and administration, financial probity, staff supervision, and safe working practices
 - c) complaints, user rights, and protection
 - d) staffing, including staff complement, qualifications and training
 - e) quality
 - f) the environment, space, facilities and fittings, heating, hygiene and control of infection

52. In broad terms also, the National Minimum Standards for Domiciliary Care cover areas (a) to (e) above. It is clearly not possible, or appropriate, to seek to regulate the environment (f) when care is delivered to a person's own home, when this will usually be ordinary housing in which the person has lived for many years. Within area (d), the National Minimum Standards for Domiciliary Care focus on requirements for proper assessment of each individual's need and development of an individual care plan, in consultation with the service user. A domiciliary care agency is expected to demonstrate its capacity to meet the assessed needs of individuals accepted by the agency (Standard 3). The Domiciliary Care Agency Regulations provide that, where an agency is acting otherwise than as an employment agency, then the registered person must (having regard to the nature of the agency and the number and needs of service users) ensure that at all times there is an appropriate number of suitably qualified, skilled, and experienced persons employed for the purposes of the agency.
53. The Housing Corporation regulates registered social landlords, generally known as housing associations. The key aims of the Housing Corporation's regulatory function are to ensure that housing associations are viable, properly governed, and properly managed. The Corporation's regulatory remit includes elements of (a), (b), (c), and (f).
54. Housing association stock, which falls under the Housing Corporation's regulatory control, may include sheltered housing, extra care housing, supported housing, and some registered care homes. The Housing Corporation seeks to minimise possible regulatory duplication by working with other regulators, including the National Care Standards Commission.
55. Extra care housing or supported housing, whether provided by housing associations or local authorities, may be fully or partly funded by the Supporting People programme from April 2003 and will be subject to Supporting People performance review mechanisms.

Changes to Registered Care Homes

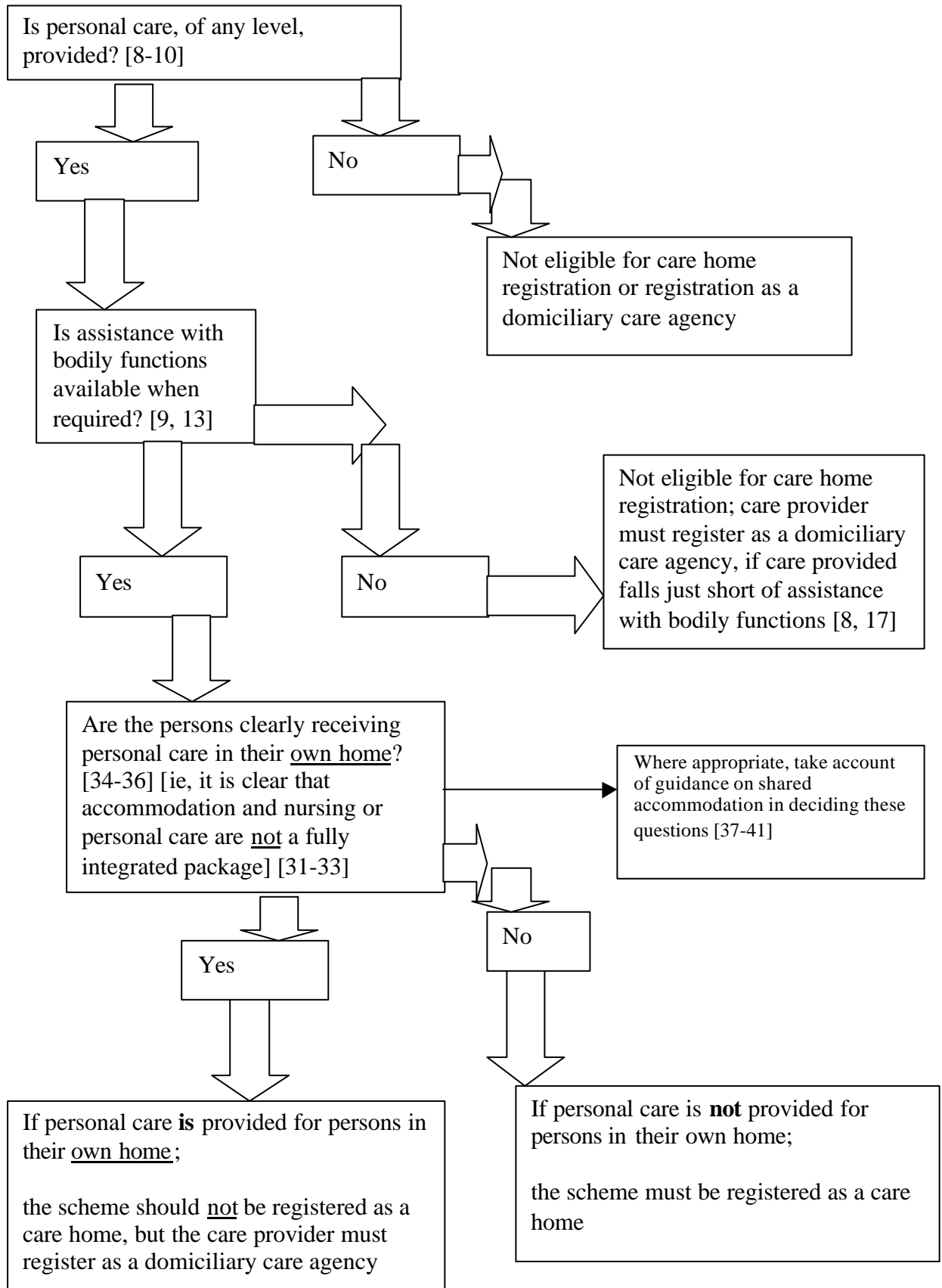
56. There are positive reasons why organisations might seek to change a care home and cease registration as a care home. This might be appropriate in circumstances where the assessments/care plans of the individuals in the scheme lead to changes that might promote greater independence. In some cases, the greater consistency of regulation applied by the National Care Standards Commission after April 2002 may lead to re-designation of care homes, which have previously been registered. Such changes should only occur where there has been a service review involving residents/tenants and it is clear that the requirements for registration no longer apply.
57. In the run up to Supporting People, due for implementation in April 2003, we are aware that some organisations have been advised to change their care homes. This has involved persuading their tenants/residents to claim Transitional Housing Benefit (THB) for housing related support costs, on the basis that the services provided in the home is no longer a care home. Once a claim is made and approved, the housing related support costs, determined through THB, will be

added to the Supporting People (SP) 'pot'. This 'pot' is being calculated from THB claims (along with other funding sources) in the run up to April 2003 and will be transferred to local authorities, subject to schemes complying with Supporting People Grant conditions after April 2003. Local authorities will then take on the funding and administration of housing related support through a Supporting People Grant.

58. Government policy would not support inappropriate changes to care homes which do not genuinely promote the independence of users, but seek primarily to secure funding through Transitional Housing Benefit and *Supporting People*. Such changes risk removing necessary protection from vulnerable people and may be unlawful.
59. If there is any argument about whether an establishment is a care home or not, then the National Care Standards Commission will need to take a view. And, of course, the Commission's decision will be subject to appeal and may be tested in a Tribunal and ultimately a court of law.
60. The Office of the Deputy Prime Minister issued a pre-consultation draft of Directions and Grant conditions for Supporting People on 10 June 2002, and will issue further elements of those directions and grant conditions at the same time as this guidance. These do not allow for funding of registered care homes from Supporting People funds, other than transitionally for care homes previously funded (in part) by Social Housing Management Grant. Any schemes found to be properly registrable as care homes will forfeit funding from Transitional Housing Benefit (up to March 2003) or from Supporting People Grant (from April 2003). Under section 11 of the Care Standards Act, the scheme provider will be committing an offence of carrying on or managing an establishment without being registered. We strongly recommend that providers take advice from the National Care Standards Commission, before changing the registration of any scheme under the Care Standards Act 2000.
61. The Care Standards Act 2000 and associated regulations recognise that in some circumstances an existing registered care home provider will wish to relinquish their registered status to seek to provide alternative forms of care or simply to cease trading. Regulation 15 of the NCSC (Registration) Regulations 2001 allows registered providers to apply for 'Voluntary Cancellation' of their registration. Such an application must be made at least 3 months before the proposed date when the registration as a care home will cease. Certain information must be supplied to the NCSC to satisfy the Commission that all necessary arrangements have been made to secure the appropriate relocation of service users. For further advice on the process to be applied advice must be sought from the NCSC.

Summary: To register as a care home or as a domiciliary care agency?

[This chart is for illustrative purposes only and should be read in conjunction with the detailed guidance. References are to paragraph numbers in the guidance.]



Assured Tenancies and Security of Tenure

(based on the Housing Corporation's Code of Practice on Tenure, October 1999)

Introduction

1. The Housing Corporation requires registered social landlords (housing associations) to give residents in supported housing the most secure form of tenancy compatible with the purpose of the housing. Implementation of the Code of Practice on Tenure is assessed as part of compliance with the performance standards for supported housing.
2. Supported housing includes: -
 - Direct access hostels
 - Group homes
 - Purpose built self contained housing
 - Foyers
3. Supported housing can be provided in self contained or shared housing. It excludes general housing in which residents only receive care services from another agency (e.g. social services) and the housing association is not itself providing, or contracting to provide, further services.

Assured tenancies

4. Assured tenants have security of tenure and can only be asked to leave under certain conditions, which are specified in law. (Section 2 of the Housing Act 1988) These will relate to issues such as non-payment of rent, nuisance, use of premises, damage, racial and other harassment etc.
5. A tenancy is a grant of interest in the land and a licence is merely permission to stay. According to the Housing Corporation's code the *conditions for a tenancy* as opposed to a licence are that: -
 - There must be identifiable parties
 - An area of occupation must be defined
 - The arrangement must relate to a particular period or cycle of time, for example for 6 months, monthly or for life
 - The occupier must have *exclusive possession* of at least a part of the premises and will usually pay a charge for occupancy (the rent)
6. *Exclusive occupation or use/Possession* is the right of an occupier to exclude others from the property, subject to certain restricted rights, which the landlord may reserve, for example, to enter to repair or review the condition of the property or to clean the premises.
7. It is legally possible to have an assured joint tenancy in shared housing. This may be joint tenancy as a group for the whole of the property. Alternatively, there will

be individual tenancy of part of the dwelling, such as a bedroom, which amounts to exclusive occupation (reference to Street vs. Mountford case) with access to common areas. Each of these may be assured tenancies. A third possibility for shared houses is for a landlord to contract with each individual occupier for a right to live in the property, but without specifying which part of it. Because each occupier has neither identifiable premises nor a jointness with other occupiers to make the arrangement a tenancy of the whole property, there is not sufficient exclusivity for the arrangement to be a tenancy, it is a licence to occupy.

8. This has been a contentious area of law, which ultimately only a court can decide. In the past, landlords would set up what they called “licence arrangements” with occupiers to get round some of the protections (security of tenure, and particularly rent) that tenants (not licensees) had. Sometimes this consisted only of putting the heading on the agreement, with the terms of occupation being exactly as for a tenancy. Many cases were brought, and the courts have become increasingly stringent in what they will accept as a licence: the default assumption is usually that an arrangement is a tenancy, and it is only where the reality of how it works points to it being ‘less’ that would make it a licence.
9. Assured tenancies are fixed or periodic. Since the introduction of the Housing Act 1996 an assured shorthold tenancy can be fixed or periodic. In shorthold tenancies there will be a time limit on the tenancy and this might be appropriate in cases where there is short stay or temporary accommodation being offered. The Housing Corporation *recommends assured tenancies in cases where there is a home for life, permanent or long term accommodation and the conditions for a tenancy are met*. This applies to self contained and shared housing.

Secure tenancies

10. Under Part IV of the Housing Act 1985, local authorities (and historically, until the commencement of the Housing Act 1988, housing associations) are empowered to grant secure tenancies. Secure tenants have security of tenure and can only be asked to leave under certain conditions, which are specified in law, and enjoy the right to the quiet enjoyment of their home. These rights are closely analogous to those applying for assured tenancies. Secure tenancies and assured tenancies should be treated as interchangeable for the purposes of this guidance.

Licences

11. The conditions for the issuing of a licence as opposed to a tenancy are where the occupant does not have exclusive possession of any part of the premises. This could include: -
 - Two or more unrelated people, each with their own occupancy agreement are required to share a bedroom
 - *The Landlord or agent requires and actually does gain access to the resident's rooms for the purposes of administering care or protecting a resident's welfare*
 - The Landlord or agent requires to and actually does move residents between rooms for the purposes of managing the accommodation efficiently

12. Registration as a care home does not in itself confer the status of a licence. It is the issue of having unrestricted access to a person's room, which does. For example registration inspections of resident's rooms should be made with the consent of residents and would not constitute a genuine requirement for unrestricted access. In the case of assured tenancies, there will not be unrestricted access.

National Housing Federation guidance issued in October 1997 on tenancies

13. The National Housing Federation provides model assured tenancy agreements, which set down the requirements for a range of types of tenure in the light of the Housing Act 1996. In summary, the models set out the landlord's and the tenant's obligations. There are model agreements for self contained and shared supported housing. In the case of very sheltered housing the self contained assured tenancy model will be appropriate. In the case of group living the assured tenancy model for shared supported housing will be appropriate.
14. Tenants have the right to occupy the premises without interruption or interference from the association for the duration of the tenancy (except for the obligation contained in the agreement to give access to the associations' employees or contractors. This is in relation to inspections to carry out repairs or other works to the premises.) This right to occupy is so long as the tenant complies with the terms of the agreement and has proper respect for the rights of other tenants and other persons in the neighbourhood.

Capacity and Housing Tenancies

A summary of the position is:

- i. Generally there is a legal presumption that a person is capable until proved otherwise.
- ii. The test of capacity should be functional, ie, take account of the particular activity and the complexity of the elements of the contract, not a blanket test that a person is incapable of understanding; buying a bus ticket or a house is not the same. This would look at the information available and its form. Normally if you have exclusive possession, pay rent, for a term (e.g. a week or month) the Courts will recognise a tenancy exists regardless of documents and the person's understanding of them.
- iii. A contract will also still be binding if the landlord believed the tenant was capable of making it.
- iv. The penalty, if there is one, for having a void contract falls entirely on the party (ie, landlord) to the contract that has capacity not on the vulnerable person who lacks capacity.
- v. Common law also provides that, for goods and services which are 'necessaries', the supplier can recover the price even if the contract is technically unenforceable. This allows the grant of a tenancy with the safeguard that rent is recoverable.
- vi. Furthermore, the Official Solicitor has confirmed in advice to a local authority that the grant of a tenancy would be proper even though capacity may be limited. The landlord would be bound by the Agreement and a claim could be pursued by a 'next friend' even though its provisions might be unenforceable against the tenant.