

Housing LIN INFORMATION SHEET: MCA – no. 4

The Mental Capacity Act 2005: Statutory Duties to Accommodate

This information sheet is one of four that accompanies the Housing LIN factsheet Housing Provision and the Mental Capacity Act 2005

Numerous statutes authorise various public bodies to provide accommodation where the individual meets the eligibility criteria.

Which body has the principal duty will depend on the type and level of assessed need, which statute takes precedence, and may also depend on whether the duty imposed by statute is a power, a ‘target’ duty or one that can be enforced by an individual against the public body.

This fact sheet will detail the different public bodies responsible for providing accommodation, the matters they will be required to take into consideration when assessing eligibility, and specific considerations for those who lack, or may lack, capacity.

The Health Service

There are two main statutory provisions which empower a health body (PCT or other Trust) to provide accommodation. The first of these provisions is set out in s117 of the Mental Health Act 1983. This section imposes a duty on the health service (as well as the relevant local authority’s social services department) to arrange appropriate accommodation as part of a package of aftercare support for anyone who is discharged from hospital, or released on temporary leave of absence, following a period of detention under the Mental Health Act 1983. The duty under s.117 of the MHA is not discretionary and it is unlikely that either public body could successfully defend any non-provision purely on the basis of their lack of financial resources. However, an authority may have lawful justification for not providing accommodation where they are able to establish that, despite using all reasonable endeavours, they are unable to identify or procure “appropriate” accommodation.

Section 3(1) National Health Service Act 2006 entitles health bodies to provide hospital accommodation or any other accommodation for the purpose of any service normally associated with the treatment or prevention of illness. This is a target duty which means that it is a duty owed to the community at large and that no single individual can compel the health authorities to provide accommodation under this.

It is central government's policy that those people with a 'primary health need', as explained in government guidance, should be entitled to such accommodation and all services, funded by the health service, and this is known as 'continuing NHS health care'. There is no right to choose accommodation provided under this eligibility status, but the NHS must make reasonably appropriate selections for the client's needs, and is equally subject to the Human Rights Act when so doing, as a local authority would be.

An individual who lacks capacity to decide where to live or capacity to undertake the responsibilities of a tenancy may also have physical or mental health difficulties and could qualify under these statutes. Consideration should therefore be given to the health authority's duties or powers to provide assistance. Any provision under these statutes is not reliant on an assessment that the individual has capacity to accept the offer or any terms attached to the offer of accommodation, because the arrangement made with the provider is a contract between the public body and the provider. Also, if the health body does arrange accommodation, this must be provided free of charge to the individual.

Local Authority Housing Departments

Under the Housing Act 1996 a local authority housing department will owe a duty to provide suitable accommodation to a homeless person, and anyone reasonably expected to live with them, provided that the person is able to establish that they are eligible, homeless or threatened with homelessness, in priority need and the local authority can not establish that they are intentionally homeless or have a stronger local connection elsewhere.

Eligibility:

The Housing Act 1996 excludes certain persons from abroad from eligibility for support. Therefore in order to qualify an individual would need to show that he is not within any of the categories of persons so restricted. A British citizen or citizen of an EEA state would qualify, as would most persons from abroad with leave to remain in the UK provided this wasn't granted on the basis that someone else gave an undertaking to maintain the individual, or the leave prohibits recourse to public funds. Someone else, who would normally expect to reside with the ineligible person, can make the application in their own right but they would then need to show that they are in priority need and homeless or threatened with homelessness.

Homeless / threatened with homelessness:

Emergency accommodation should be made available to those eligible and in priority need where they can establish that they are actually homeless or are likely to become homeless within 28 days.

Priority need:

A person who is vulnerable as a result of old age, mental illness or learning difficulty, physical disability or other special reason has priority need status, this includes those who lack capacity. However, the court in *R v Tower Hamlets London Borough Council, Ex Parte Ferdous Begum* (1993) confirmed there is no duty under the Housing Acts owed to children or disabled persons who had neither the capacity to

make an application themselves or to authorise an agent to make an application on their behalf.

This case established that the LA's duty under the Housing Act 1996 is to "make an offer of permanent accommodation" for those in priority need who must then decide whether to accept or reject the offer of assistance. The Court held that whilst the Housing Act afforded disabled persons and their carers priority need status there was "*no purpose in making an offer of accommodation to a person so disabled that he is unable to comprehend or evaluate the offer. If a person is so incapacitated that he can not [accept the offer and undertake the responsibilities that are involved] he is not left destitute but protected by the National Assistance Act 1948.*"

It is unclear whether this principle would be upheld today in light of the introduction of the Human Rights Act, but no case has as yet over-ruled the binding force of this decision.

The Housing Act 2002 goes some way to amend this position in that it allows that where someone lacks capacity to make the application in their own right, someone who can **reasonably be expected to live with them** can make the application for housing relying on their incapacity as a qualifying 'special reason' for priority need status.

It is as yet unclear whether a person with a welfare and finance/property LPA will count as if they were actually the incapacitated person and thus be able to apply.

In addition, the Mental Capacity Act 2005 sets out very clear obligations on Local Authority decision makers to undertake all reasonable methods to maximise a person's ability to make a capacitated decision before determining that they are incapacitated. The local authority housing department will also need to bear in mind the obligations imposed by the Disability Discrimination Act 1995. It may be acting unlawfully by refusing to provide accommodation to someone who lacks capacity where this is due to a disability unless they can show a justifiable reason as set out within the 1995 Act, for example they were unable to understand the nature of the contract of accommodation.

Even where the individual can not be assisted to make a capacitated decision, and there is no one able to make an application on his behalf (either as an agent of the person or because they can reasonably be expected to live with the incapacitated person), the housing department will still have an obligation to work closely with other statutory and voluntary bodies within the CPA to ensure that those within mental health client groups or otherwise incapacitated are not at risk of homelessness and are adequately and appropriately housed as set out in the current Homelessness Code of Guidance for Local Authorities issued by the Department for Communities and Local Government.

Intentionality:

It is for housing authorities to satisfy themselves in each individual case whether an applicant is homeless or threatened with homelessness whether this situation has arisen due to acts or omissions carried out by the individual intentionally. Generally, it is not for applicants to "prove their case" unless the applicant is seeking to establish that, as a member of a household previously found to be homeless intentionally, he or she did not acquiesce in the behaviour that led to homelessness.

In such cases, the applicant will need to demonstrate that he or she was not involved in the acts or omissions that led to homelessness, and did not have control over them.

Therefore, because it is the local authority who have responsibility for determining a person's capacity in respect of action or omissions which lead to homelessness, and because any decision would be subject to challenge and judicial scrutiny, those responsible for assessing capacity would be wise to follow closely the guidance set out in the Code of Practice accompanying the Mental Capacity Act. They should seek to establish beyond reasonable doubt that the person had full capacity when carrying out the act/ omission, or agreeing to the actions of another, which resulted in their homelessness. In addition, anyone with responsibility for the care or treatment of a person who may have been made homeless as a result of their incapacitated actions should also give consideration to obtaining legal advice for the individual to ascertain whether the possession order could be set aside. They could also make detailed representations on the issue of capacity to the housing authority, both in terms of actions that lead to the person's homelessness and their ability to undertake a tenancy or licence.

Local Connection:

Unlike ordinary residence a person's local connection is not determined by where they choose to live; instead it is determined by the facts of any particular case. A local authority housing department can, where they believe the facts establish that an applicant has a stronger local connection elsewhere, make a referral to the other area's housing department to provide accommodation. If the other housing authority can reasonably refuse the referral then it is for the original housing department to accommodate.

Any duty under the Housing Act 1996 is discharged if, after the local authority housing department has made a *reasonable* offer, the capacitated person rejects the provision. Those who are vulnerable or lacking capacity therefore need access to advice about challenging the suitability of the offer, on appeal, in public law terms.

Similarly capacity will have to be very carefully considered when a housing provider is seeking to withdraw a service and discharge their duty as a result of the unreasonable behaviour on behalf of the service user. The local authority will need to establish that the person was acting with capacity when carrying out any purported unreasonable act. In assessing this the authority must give careful consideration of their duties as set out in the Mental Capacity Act and Code of Practice and clearly record any evidence establishing capacity. The individual should also be given the opportunity to respond to any allegation.

The local authority housing department may also have obligations under the Disability Discrimination Act 1995. Under the 1995 Act it is unlawful to discriminate without justification against disabled people, including those suffering from a mental incapacity, in the selling, letting or management of residential premises. This includes making special arrangements regarding the allocation of properties to those with disabilities, initiating possession proceedings, limiting the use of any facilities or access to benefits on the basis of their impairment. This is lawful only if justified by one of the provisions in the DDA e.g. health and safety, the restriction is necessary for other occupiers etc. It is not a justification that the discrimination was in the person's best interest. Prior to issuing possession orders against those who have a

disability the Courts have given careful consideration as to whether any purported breach of the tenant's obligation was linked to their disability and, where this is found to be the case, whether a possession order is justified under the 1995 Act.

For example, in *North Devon Homes v Brazier* [2003] the High Court refused to issue a possession order against a tenant with a psychotic disorder as the landlord had not put forward any evidence that her unreasonable behaviour (use of abusive language and gestures towards her neighbours and excessive nightly noise) put the physical health and safety of the neighbours at risk.

In another case, *Manchester County Council v Romano* [2004] a possession order was granted against a tenant despite their diagnosis of a depressive mental illness as the local authority landlord had been able to show that the unreasonable behaviour (loud hammering and music throughout the night) had endangered the health and safety of the neighbour (a driving instructor who suffered from sleep deprivation as a result of the noise.) The Court of Appeal also questioned whether the behaviour was linked to the tenant's mental illness.

The courts are very clear that a local authority's housing department can not withdraw all services from those they assess as lacking capacity. They may still owe a duty under the Housing Act 1996 to advise and assist an individual to find appropriate accommodation or may be asked to co-operate with the local authority's social services department, under s.47 of the NHA and Community Care Act 1990, to assist them to discharge their duties under community care legislation.

Local Authority Social Services Department

Section 21 of the National Assistance Act 1948 imposes a duty on local authority social services departments to provide accommodation to anyone over 18, in need of care and attention as a result of age, illness, disability or any other circumstance. These powers and duties are residual; they arise only where the person's needs for care and attention are not met by any other provision (either statutory or voluntary).

For this reason a local authority is able to take into account an individual's resources, subject to a threshold cap. Likewise the local authority social services department is required to consider the individual's capacity to arrange their own accommodation. Where the individual is assessed as lacking the required capacity to make their own arrangements and no other person or body has authority or is willing to make such arrangements, the local authority is likely to have a duty to make such arrangements, irrespective of the individual's resources.

Whilst a local authority social services' duty to arrange and/or fund accommodation in a residential or care home setting is well understood, consideration must also be given to the local authority social services department duties to provide ordinary accommodation under community care legislation. The courts are careful to stress that the Housing Act legislation remains the principal piece of legislation for establishing a duty to accommodate. However, there is clear provision within community care legislation, notably s.21 of the National Assistance Act 1948, s17 Children Act 1989 and s.2 of the Local Government Act 2000, which does empower a social services department to provide ordinary accommodation.

For example, where a community care assessment identifies 'ordinary accommodation' as an assessed need and this need will not be met within the required timeframe or at all by the housing department, then a duty to meet this need will arise and it will be for the local authority's social services department to meet this need. Under this power, local authorities actually hold the contract with the housing provider, rather than the individual service user holding it. If they were to place an individual who needs help with bodily functions into an Extra Care housing setting, the arrangement would be liable to registration as a care home under the Care Standards Act. Thus local authorities cannot do this. They must either place the individual in a registered care home, or facilitate a person who needs accommodation and care into a tenancy and then provide domiciliary care. In this scenario, the person would have the contract with the housing provider and therefore all the principles in relation to capacity and signing a tenancy come into play.

As with any provision under community care law, the social service department will need to consider as part of their assessment whether the care plan that is identified is appropriate in that it meets the eligible needs in a way that respect the individual's rights under the Human Rights Act 1998 and the local authority's statutory duties, without acting outside of their statutory powers. Where a person rejects a reasonable and appropriate offer of assistance the local authority will need to identify clear evidence that they did so with full capacity, including an understanding of the consequences, because it would be a breach of the duty to meet need, and possibly negligent, to ignore potential incapacity.

A local authority can lawfully withdraw services where a capacitated person refuses a reasonable and appropriate offer.

Where a person's carer is seeking to refuse services on another's behalf the local authority should confirm that there are no adult protection concerns before disengaging – this will involve ensuring that the 'refuser' is able and willing to make arrangements to meet the shortfall in needs him or herself.

Again, a vulnerable or incapacitated person will need access to advice about challenging the suitability of the offer, or any withdrawal of such offers, in public law terms.

National Asylum Support Service (NASS)

Certain categories of persons from abroad are excluded from support from a local authority housing or social service department, in such circumstances they are able to apply for accommodation and subsistence support to NASS, who have a statutory duty to make available appropriate accommodation for them and any dependants.

Offers of accommodation are usually made following an allocation process which involves dispersal of the individual, and their dependants, to areas not suffering from housing shortages. However it is possible to make representations to NASS against dispersal where an individual or dependant has an important link to an area, particularly if that link involves education or complicated medical treatment or therapy.

The duty to provide accommodation is not dependent on any assessment of the individual's capacity, if the individual lacks the capacity to make an application this can be made on their behalf by anyone. Similarly any offer of accommodation must be appropriate. Therefore, if the person lacks the capacity to undertake responsibilities associated with independent living then alternative arrangements must be put in place by NASS.

IMCA Rights and Changes in Accommodation

IMCA rights in the context of NHS-arranged accommodation arise only when the arrangements are made for accommodation *in* (or to another) hospital or care home.

With regard to accessing supported housing, it is clear that a proposed move from registered residential care to independent living will hardly ever trigger IMCA rights.

For those IMCA rights to arise, s39(2)(a) MCA has the effect that the local authority would have to be acting in accordance with the National Assistance Act when making the arrangements – i.e. actually contracting for a placement in the unregistered supported accommodation, directly with the landlord.

This is not common in either Extra Care or supported living accommodation settings (although it is lawfully *possible*, so long as the person has no need for personal care of the nature of assistance with bodily functions).

Logically, if a person needing supported accommodation has the mental capacity to understand and consent to a tenancy for him or herself, then no IMCA would be appropriately involved, because the right to the appointment of an IMCA depends on *lacking* capacity.

For those persons who *lack* capacity regarding the matter of the tenancy, but are seemingly likely to benefit from a move to supported accommodation, an IMCA's involvement may well strike all concerned as likely to be *helpful*.

But even if the fact that the grant of the tenancy is being *facilitated* by a social services department, constituted the 'making [of] arrangements', as the trigger to entitlement is worded, under s39(1)(b) of the MCA, and such facilitation was 'in accordance with' s29 of the National Assistance Act (arrangements for promoting welfare of disabled persons), there would still need to be a *deputy* with a Single Order, or an *attorney*, involved, in order formally to agree to the signature of the tenancy, before it could be regarded as made.

Any such person would always have a better claim to involvement in decision-making in this sort of tenure-related matter than an IMCA.

Hence the *other* essential to the triggering of an IMCA (s39(1) - that the authority was satisfied that there is no person whom it would be appropriate to consult - would not apply.

Other Information sheets in this series include:

1. The Mental Capacity Act 2005: Substitute Decision-making and Agency
2. The Mental Capacity Act 2005: Lawful restraint or unlawful deprivation of liberty?
3. The Mental Capacity Act 2005: Paying for necessities and pledging credit