

HOME ADAPTATIONS: THE CARE ACT 2014 AND RELATED PROVISION ACROSS THE UNITED KINGDOM

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The Care Act 2014 came into effect in April 2015 creating a single modern piece of law for adult care and support in England. It replaces complex legislation including the *National Assistance Act 1948* and the *Chronically Sick and Disabled Persons Act 1970* (as far as it applies to adults). The *Care Act 2014* directly affects more than 2,500 occupational therapists working in social care and housing in England as well as our NHS colleagues. It raises questions about home adaptations and as to how the *Care Act* relates to the *Housing Grants, Construction and Regeneration Act 1996* and other housing legislation.

The College of Occupational Therapists Specialist Section – Housing has commissioned Michael Mandelstam to write this briefing on the *Care Act* in order to clarify the impact of the Act for the COTSS – Housing membership whose role focuses on housing and housing adaptation matters, and to assist occupational therapists who do not work in the housing sector but who work in sectors requiring access to housing and adaptations options to facilitate safe and timely discharge from hospital. In acknowledgement of the fact that we are a UK organisation he has also referenced comparable legislation in Wales, Scotland and Northern Ireland. I am confident that this briefing will prove to be a valuable resource for all occupational therapists with an interest in housing and social care.

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Introduction

Primarily this briefing paper is about the effect of the *Care Act 2014* on the provision of home adaptations for adults in England.

Secondarily, it also outlines broadly the comparable position, under different legislation, for adults in Wales, Scotland and Northern Ireland. Likewise for children in all four countries of the United Kingdom.

Overall the briefing sets out the legal framework and provides legal pointers, but it is not a substitute for seeking legal advice in individual cases. As ever, with legislation old and new, some legal points are more amenable to simple explanation than others. The time of writing is October 2015.

College of
Occupational
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Specialist Section
Housing



SUMMARY

THIS BRIEFING COVERS THE FOLLOWING, IN FIVE SEPARATE PARTS:

1. Explains in detail the effect of the *Care Act 2014* in England and the duty of a local social services authority to help adults with home adaptations.

2. Summarises legal provisions for adult social care, in relation to home adaptations, for the rest of the United Kingdom:

- a) *Social Services and Well-being (Wales) Act 2014*;
- b) *Social Work (Scotland) Act 1968*, and the *Chronically Sick and Disabled Persons (Scotland) Act 1972*;
- c) *Health and Personal Social Services (Northern Ireland) Order 1972* and the *Chronically Sick and Disabled Persons (Northern Ireland) Act 1978*.

3. Summarises the interface between this adult social care legislation and housing legislation covering major adaptations. Including the:

- a) *Housing Grants Construction and Regeneration Act 1996*, which extends to England and Wales;
- b) *Housing (Scotland) Act 1986*;
- c) *Housing (Northern Ireland) Order 2003*.

4. Summarises the interface between adult social care legislation and NHS legislation, in relation to home adaptations:

- a) *National Health Service Act 2006*;
- b) *National Health Service (Wales) Act 2006*;
- c) *National Health Service (Scotland) Act 1978*;
- d) *Health and Personal Social Services (Northern Ireland) Order 1972*.

5. Summarises the legal position concerning children:

- a) *Children Act 1989*, and *Chronically Sick and Disabled Persons Act 1970* – covering the position in England;
- b) *Social Services and Well-Being (Wales) Act 2014*;
- c) *Children (Scotland) Act 1995*, and *Chronically Sick and Disabled Persons (Scotland) Act 1972*;
- d) *Children (Northern Ireland) Order 1995*, and s.2 of the *Chronically Sick and Disabled Persons (Northern Ireland) Act 1978*.

1. ADULT SOCIAL CARE IN ENGLAND: HOME ADAPTATIONS

Background

Most of the *Care Act 2014* came into force in England in April 2015. It supersedes a mass of diverse adult social care legislation in England. This includes the *NHS and Community Care Act 1990* and the *Chronically Sick and Disabled Persons Act 1970* (although the 1970 Act continues to apply to children in England).

To understand the effect of the *Care Act* on home adaptations, it is obviously necessary to consider what the Act states. But also to set out the interplay between it and other legislation, such as the *Housing Grants, Construction and Regeneration Act 1996* (disabled facilities grants). Also, the *National Health Service Act 2006*. This interplay is considered in this Part, but also in Parts 3 and 4 of this paper, below.

The *Care Act 2014* applies to adult social care in England, arranged by local authorities with social services functions, as listed in the *Local Authority Social Services Act 1970*.

The 2014 Act therefore does not apply to Wales, Scotland or Northern Ireland, other than in relation to cross-border matters. Nor to children – other than transitional provisions when a child legally becomes an adult at age 18. Nor, *for the purposes of this briefing paper*, does it apply in the main to the National Health Service other than in relation to a duty of cooperation with social services.

Wellbeing: the principle running through the Care Act

Section 1 of the *Care Act* states that whatever social services does under the Act, in respect of an individual person, it has a general duty to promote the wellbeing of that individual.

Wellbeing is defined to include nine components. One is personal dignity; another is physical and mental health, together with emotional wellbeing. A third is control over day-to-day life. And a fourth is the suitability of a person's living accommodation.

Clearly, home adaptations will sometimes be highly relevant to such aspects of a person's life. The nine components, in full, are (emphasis added):

(a) personal dignity; (b) physical and mental health and emotional wellbeing; (c) protection from abuse and neglect; (d) control by the individual over day-to-day life (including over the care and support provided to the adult and the way in which it is provided); (e) participation in work, education, training or recreation; (f) social and economic wellbeing; (g) domestic, family and personal relationships; (h) suitability of living accommodation; (i) the adult's contribution to society.

Occupational therapists will need to take note also of section 1(2) of the Act, when they decide how to meet people's needs and consider the question of adaptations. This states, amongst other things, that local authorities must consider the importance of at least beginning with the assumption that the individual is best placed to judge their own wellbeing. Also, that regard must be given to the individual's views, wishes and feelings. And, further, that any restriction on the person's rights or freedom of action must be kept to the minimum necessary.

This doesn't mean that people can simply get whatever home adaptations they want. The local authority, legally, still has the last word. But when decisions are made, attention must be paid to what people are saying about their wellbeing.

Much has been made, for many years (without finding expression in legislation), of so-called 'person-centred' approaches. Wellbeing in the *Care Act* would seem to be a more concrete legal move in that direction.

Wellbeing comes into sharper focus still when decisions are taken about people's legal eligibility for help: see below.

Prevention, delay and reduction of need: section 2 of the Care Act

Section 2 of the *Care Act* places a general duty on local authorities to provide, arrange or otherwise identify services, facilities and resources to prevent, delay or reduce the needs of adults either for care and support, or the needs of informal carers for support.

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Provision does not depend on a person having eligible needs. *In terms of any particular type of provision or service for a particular individual*, section 2 is virtually discretionary, because the duty is expressed in such vague terms.

On the one hand, its great potential is that it gives local authorities great scope to arrange and provide all manner of preventative services.

On the other hand, its legal weakness is that to enforce provision of a service for any one individual would be virtually impossible. This is because the duty is not to any one person, but rather to the local population in general.

Likewise, it would almost certainly be futile to attempt legally to force a local authority to provide any particular service – such as reablement, equipment or minor adaptations – to a particular level or on any particular scale, to the local population.

In summary, one would expect to see minor adaptations feature prominently amongst the preventative services arranged by local authorities. But the extent of this provision, and help for any particular individual, would scarcely be amenable to legal enforcement.

An awareness of this legal point is essential. If, for example, occupational therapists believe that minor adaptations, equipment and reablement should feature prominently in a local prevention policy, they need to argue the case, and persuade managers and commissioners to take this course, on grounds of cost-effectiveness.

Alternatively, if occupational therapists wish to enforce provision for any particular individual, they need to go on to assess the need as an eligible need – under sections 9 (assessment) and 18 (duty to meet eligible need) of the Act.

Preventative services: examples including minor adaptations

The Act itself is silent about what preventative services might look like. The statutory guidance makes up for this, by setting out at some length the importance of such services and giving various examples. Minor adaptations and equipment feature, along with reablement. Indeed the guidance states:

Local authorities must provide or arrange services, resources or facilities that maximise independence for those already with such needs, for example, interventions such as rehabilitation/reablement services, e.g. community equipment services and adaptations.¹

The guidance is what is known as statutory. It is, by definition, not legislation but it has a special status. When it states that a local authority ‘must’ do something, then in the absence of a very good reason, the local authority must indeed do it. Or else risk losing a judicial review legal case or a finding of maladministration by the local government ombudsman.

Statutory guidance suggests that the majority of intermediate care and reablement will be provided as a preventative service (emphasis added):

Where local authorities provide intermediate care or reablement to those who require it, this must be provided free of charge for a period of up to six weeks. This is for all adults, irrespective of whether they have eligible needs for ongoing care and support. Although such types of support will usually be provided as a preventative measure under section 2 of the Act, they may also be provided as part of a package of care and support to meet eligible needs.²

In some circumstances, the provision of equipment and minor adaptations will of course be necessary to support that reablement, as illustrated in case studies set out in the statutory guidance.³

However, to repeat the key legal point: In terms of individual enforceability, it would only be against assessed, eligible need that provision could be enforced for an individual. It could not generally be enforced under the preventative section 2 of the Act.

Of course, such prevention, delay or reduction in need is not only good for people – but hopefully can also save the local authority money. Spend a pound on prevention, and save ten on what would otherwise have been eligible, greater needs. So the thinking goes.

¹ Department of Health (2014) *Care and Support statutory guidance: issued under the Care Act 2014*. London: DH, para 2.9.

² Ibid, para 2.60.

³ Ibid, paras 2.31, 2.62.

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Pausing an assessment and providing minor adaptations

The legal threshold for an assessment, under section 9 of the *Care Act*, is low.

The duty is triggered if it appears to a local authority that an adult may have needs for care and support. Furthermore, the duty applies irrespective of the level of the adult's needs or of his or her finances.

Statutory guidance suggests that in some circumstances, the local authority could pause the assessment to allow for minor adaptations to be provided before the assessment is concluded and an eligibility decision made (emphasis added):

Local authorities should not, however, remove people from the process too early. Early or targeted interventions such as universal services, a period of reablement and providing equipment or minor household adaptations can delay an adult's needs from progressing. The first contact with the authority, which triggers the requirement to assess, may lead to a pause in the assessment process to allow such interventions to take place and for any benefit to the adult to be determined.⁴

Who should be assessing needs?

Regulations made under the Act state that the local authority must ensure that assessors – assessing under, for example, section 9 of the Act (adults) or section 10 (carers) - are *skilled, knowledgeable, competent and appropriately trained*. And that assessments should be appropriate and proportionate.⁵

The question arises as to what this actually means in practice for the assessment of people's needs for care and support – which in some circumstances may need to be met by adaptations.

What the regulations clearly don't mean is that a qualified professional – for instance, social worker or occupational therapist – must carry out every assessment. The statutory guidance expands on the regulations, and carries a number of references to occupational therapists being involved in assessment in some circumstances.

Nonetheless, the regulations and guidance are drafted in such a way as to mean that local authorities have a degree of flexibility in striking a balance between professionally qualified staff and non-qualified staff. What the local authority has to do is take a view on – and provide a rationale for – what sort of assessments require what sort of staff.

Assessment and occupational therapists

Accordingly the statutory guidance suggests that in order to comply with the regulations, social workers and occupational therapists may be involved in at least more complex assessments:

Registered social workers and occupational therapists can provide important support and may be involved in complex assessments which indicate a wide range of needs, risks and strengths that may require a coordinated response from a variety of statutory and community services.⁶

Likewise, in terms of staff involved in first contact with people, the guidance refers to the importance of support by professionals, such as occupational therapists:

Staff who are involved in this first contact must have the appropriate training and should have the benefit of access to professional support from social workers, occupational therapists and other relevant experts as appropriate.⁷

Similarly, the guidance underlines the general importance of professionals including occupational therapists:

Registered social workers and occupational therapists are considered to be two of the key professions in adult care and support. Local authorities should consider how adults who need care, carers, and assessors have access to registered social care practitioners, such as social workers or occupational therapists.⁸

Lastly, the guidance more specifically refers to the question of people who lack capacity and the issue of restrictions or restraints in a care and support plan, noting that there should be professional involvement:

⁴ Department of Health (2014) *Care and Support Statutory Guidance: issued under the Care Act 2014*. London: DH, para 6.25.

⁵ Great Britain.Parliament (2014) *Care and Support (Assessment) Regulations 2014. (SI 2014/2827)*. London: The Stationery Office.

⁶ Department of Health (2014) *Care and Support Statutory Guidance: issued under the Care Act 2014*. London: DH, para 6.7.

⁷ *Ibid*, para 6.27.

⁸ *Ibid*, para 6.84.

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*The local authority should have policies to address how these are recognised and responded to, and the social worker, occupational therapist or other relevant social care qualified professional or Mental Capacity lead should be involved, as well as an advocate.*⁹

Prevention, minor adaptations and financial charging

Regulations state that – when provided by a local authority as preventative services – a minor adaptation costing £1000 or less, equipment, and reablement (for at least six weeks) must be free of charge. Implying clearly just how important the Department of Health believes these forms of help to be. By making these services free of charge, a potential disincentive to take-up is removed.

Clarifying the rule about charging for equipment or minor adaptations

Sometimes there is misunderstanding about the charging rules.

The two main areas of misunderstanding are as follows. First, whether the £1000 limit about charging applies to equipment provided by a local authority, as well as to minor adaptations. *It does not.* The second is whether the £1000 limit applies to each minor adaptation provided, or to the total cost if more than one is provided for a person (it applies to each minor adaptation).

One of the Department of Health's statements in its own statutory guidance could be read ambiguously:

*The regulations require that intermediate care and reablement provided up to six weeks, and minor aids and adaptations up to the value of £1,000 must always be provided free of charge.*¹⁰

However, the regulations, which are law (unlike the guidance) are clear: the £1000 rule applies only to a minor adaptation (not to equipment), and it applies to each minor adaptation (emphasis added):

A local authority must not make a charge under regulation 3(1) where the provision made under section 2(1) of the Act is—

- a) a service which consists of the provision of community equipment (aids and minor adaptations);
- b) intermediate care and reablement support services for the first 6 weeks of the specified period or, if the specified period is less than 6 weeks, for that period.

*'community equipment (aids and minor adaptations)' means an aid, or a minor adaptation to property, for the purpose of assisting with nursing at home or aiding daily living and, for the purposes of these Regulations, an adaptation is minor if the cost of making the adaptation is £1,000 or less.*¹¹

Eligibility, charging and minor adaptations

A second set of regulations contains the same rules about charging for intermediate care and reablement, equipment – or any minor adaptation costing £1000 or less.¹²

These regulations, however, refer to charging people once they have been assessed as having eligible needs under the Act.

So, in other words, whether arranged by the local authority as a preventative service, or in order to meet eligible need, any minor adaptation costing £1000 or less cannot be charged for.

Wellbeing, legal eligibility and adaptations

The *Care Act* replaces the scheme of eligibility in England known as Fair Access to Care Services (FACS) with new rules, set out in regulations made under the Act. To be eligible under the Act, three key questions have to be answered:

First, does the adult have care and support needs arising from, or related to, a physical or mental impairment?

Second, is the adult unable to achieve at least two outcomes (which are listed in the regulations)?

Third, as a consequence, is there, or is there likely to be, a significant impact on the adult's wellbeing? (This question takes one back to section 1 of the *Care Act*, and the definition of wellbeing, considered above).¹³

⁹ Ibid, para 13.29.

¹⁰ Ibid, para 2.59.

¹¹ Great Britain. Parliament (2014) *Care and support (preventing needs for care and support) regulations 2014*. London: The Stationery Office.

¹² Great Britain. Parliament (2014) *Care and support (charging and assessment of resources) regulations 2014*. London: The Stationery Office.

¹³ Great Britain. Parliament (2015) *Care and support (eligibility) regulations 2015*. London: The Stationery Office.

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There is no requirement that the impairment be substantial and permanent (as was previously required under s.2 of the *Chronically Sick and Disabled Persons Act 1970*, through the operation of a definition set out in s.29 of the *National Assistance Act 1948*).

If all three questions are answered in the affirmative, the adult will have eligible needs.¹⁴ And the local authority will have a duty to meet those needs by way of care and support – unless there is an informal carer able and willing to meet them.¹⁵ Assuming also that the adult is ordinarily resident within the area of the local authority or, alternatively, of no settled residence.¹⁶

It is also notable that even if an adult has financial resources over a certain level, he or she can still ask the local authority to meet the need. And the authority will have a duty to do so, but can conduct a means-test with a view to financial charging.¹⁷ However, because equipment and any minor adaptation under £1000 cannot be charged for, this would mean that provision would in any case have to be made free of charge, notwithstanding the financial resources of the adult.

Eligibility, outcomes and adaptations

The outcomes are as follows and a significant number of them could relate to home adaptations (emphasis added):

a) managing and maintaining nutrition; (b) maintaining personal hygiene; (c) managing toilet needs; (d) being appropriately clothed; (e) being able to make use of the adult's home safely; (f) maintaining a habitable home environment; (g) developing and maintaining family or other personal relationships; (h) accessing and engaging in work, training, education or volunteering; (i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and (j) carrying out any caring responsibilities the adult has for a child.

There must be at least two outcomes not being achieved for a person to be eligible. However, the regulations explain further what it means to be unable to achieve an outcome.

This is a) if the person is unable to achieve it alone, b) can do so but only at the cost of significant pain, distress or anxiety, c) can do so but only with health and safety risks to themselves or others, or d) can do so but it takes significantly longer than normal. *Only one of these, a) to d), is required.*

For example, an adult might be managing to achieve, *apparently*, the personal hygiene and toileting outcomes. However, *legally*, they might not be, and so be eligible for assistance:

Example: *An elderly woman is just about managing her hygiene and toileting needs. But in order to do so, she is crawling up the stairs to the bathroom. This takes 45 minutes (d), she is at frequent risk of slipping back down (c), and the state of her arthritic joints makes it very painful (b).*

Assuming, further, that all this was having a significant impact on her wellbeing, the resulting eligibility could point to a need for a stairlift – if this was judged to be a cost-effective way of meeting her identified, eligible needs.

Meeting eligible needs

As already noted, if an informal carer is able and willing to meet the need, then although there is still legally an eligible need, there is no requirement that the local authority meet the need by providing care and support.¹⁸

Likewise if there is another statutory route whereby a potentially eligible need could be met. For example, if a disabled facilities grant were available. Or if a person had NHS continuing health care status, and the NHS undertook to carry out the adaptation.

Even then, the duty of the local authority to meet a need would be subject to the general principle that it is required to offer only the most cost-effective option for meeting the need – consistent with human rights and the *Care Act* itself.

This longstanding principle, of discharging a duty in a cost-effective manner, was most recently considered and confirmed in a case involving a former ballerina's legal fight to have a night-time carer rather than incontinence pads, even though she was deemed not to be clinically incontinent. Her argument, based

¹⁴ Great Britain. Parliament (2014) *Care Act 2014*. London: The Stationery Office, s.18(1).

¹⁵ *Ibid*, s.18(7).

¹⁶ *Ibid*, s.18(1).

¹⁷ *Ibid*, s.18(3).

¹⁸ *Ibid*, s.18(7).

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on her view of her personal dignity, failed in the High Court, the Court of Appeal, the Supreme Court and finally the European Court of Human Rights.¹⁹

Although this case was decided under the now superseded community care legislation, the general principle of cost-effectiveness will remain – although applied now in the context of the *Care Act 2014*.

Provision of adaptations, minor and major, under the *Care Act*

The *Care Act* itself says little about how a person's care and support needs might be met.

Section 8 of the Act, about meeting eligible care and support needs, gives no definition, precise or otherwise, of what care and support is. But it does list a few examples, including 'goods and facilities' which are probably the closest we get to adaptations. But of course this list is not exhaustive, it is mere illustration:

The following are examples of what may be provided to meet needs under sections 18 to 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.

However, as already noted above, the regulations about charging for meeting people's eligible needs refer specifically to minor adaptations. And the statutory guidance, too, refers to minor adaptations both in relation to preventative services and eligible-need services.

In short, the omission of any reference to adaptations in section 8 is not to be regarded as undermining the provision of adaptations – far from it. Occupational therapists, if making the case to their local authority for the provision of adaptations, can simply point to the regulations and guidance. And to the non-exhaustive nature of the list in section 8.

Assistance with major adaptations under the *Care Act* and interface with housing legislation

What then, of major adaptations? Are they potentially covered by the *Care Act*? For example, in terms of funding a major adaptation in its own right, or of adding to, or topping up, a disabled facilities grant provided under housing legislation? The answer would seem to be yes.

First, we have already seen that a minor adaptation is defined as costing £1000 or less. And must be free of charge, whether supplied preventatively or against eligible need.

The most natural way of interpreting the wider implications of this rule would be that local authorities can provide or arrange adaptations costing over £1000 – but could charge for them, if they so choose. There would be no statutory duty to charge, because charging under the *Care Act* for all services is discretionary only. So it would depend on local policy.

Second, it should be noted that (a) eligibility for help is shaped by broad and thus flexible notions of outcomes and wellbeing, and (b) there is no restrictive definition of care and support, with merely illustrative examples being given – as we have already seen above.

Third, section 23 of the *Care Act* states that social services is not allowed to do anything that is legally required to be done under the *Housing Act 1996*. But this prohibition does not extend to the *Housing Grants, Construction and Regeneration Act 1996*, which covers major adaptations in the form of disabled facilities grants. The statutory guidance points out that social services are therefore not precluded from providing housing adaptations (emphasis added):

*The purpose of this [prohibition] is to clarify the boundary in law between a local authority's care and support function and its housing function. It does not prevent joint working, and it does not prevent local authorities in the care and support role from providing more specific services such as housing adaptations, or from working jointly with housing authorities.*²⁰

Fourth, in an older case, the Court of Appeal held that the general duty to safeguard and promote the welfare of children

¹⁹ *R (McDonald) v Kensington and Chelsea Royal LBC* [2011] UKSC 33, [2011] 4 All ER. Also European Court of Human Rights: *McDonald v UK* [2014] ECHR 492.

²⁰ Department of Health (2014) *Care and support statutory guidance: issued under the Care Act 2014*. London: DH para 15.52.

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in need – under section 17 of the *Children Act 1989* - was broad enough to encompass major adaptations.²¹ This general duty in section 17 of the *Children Act* is arguably akin to the general duty in section 1 of the *Care Act* to promote an adult's wellbeing. Suggesting that the *Care Act*, too, is capable of extending to assistance with major adaptations.

Fifth, government guidance previously stated that if a person's needs for a major adaptation could not be met through a disabled facilities grant partly or at all, then a significant duty remained under section 2 of the *Chronically Sick and Disabled Persons Act 1970* (emphasis added):

*Social Service authorities may discharge their duties by the direct provision of equipment or adaptations, by providing loan finance to a disabled person to enable them to purchase these facilities, or by providing a grant to cover or contribute to the costs of provision. They may make charges for their services, where appropriate They have a duty to ensure that the assistance required by disabled people is secured. This includes those cases where the help needed goes beyond what is available through DFG, or where a DFG is not available for any reason, or where a disabled person cannot raise their assessed contribution.*²²

This was despite the fact that the 1970 Act's reference to adaptations was (and still is for children in England) somewhat roundabout: 'make arrangements for....the provision of assistance ... in arranging for ... the carrying out of any works of adaptation in his home'.

The 1970 Act no longer applies to adults. However, it is arguable that the broad brush language of the *Care Act* would, if anything, make this duty – on social services to assist in some circumstances with major adaptations – potentially stronger than previously (always supposing a person's eligibility, and the major adaptation being a cost-effective way of meeting need).

The government's explanatory notes to the Act would seem to support this inclusive approach. It notes that section 8 of the Act (emphasis added):

lists some general examples of the types of care and support that could be arranged or provided to meet the needs of both

*adults needing care and carers. This is not intended to be a definition of care and support or an exhaustive list, but to give a partial description for clarity. Local authorities may arrange or provide for any combination or type of service to meet needs, other than those services which they are prohibited from providing because they fall outside their care and support functions (see sections 22 and 23).*²³

It should be noted, however, that assistance additional to a disabled facilities grant may in any case be available from elsewhere. Possibly under the *Regulatory Reform (Housing Assistance) (England and Wales) Order 2002*. And on occasion from the National Health Service. Both these possibilities are covered below.

Prisons: adaptations

The *Care Act 2014* applies, in the main, to prisons (and to bail and probation hostels) – including the duties of prevention, assessment and the meeting of eligible needs.²⁴ This may involve assessment for, and provision of, adaptations.

Care Act guidance states that equipment would fall to the local authority, whilst adaptations would normally be for the prison to provide (emphasis added):

For those assessed as being in need of equipment or adaptations to their living accommodation to meet their needs, local authorities should discuss with their partners in prisons, approved premises and health care services where responsibility lies. Where this relates to fixtures and fittings (for instance a grab rail or a ramp), it will usually be for the prison to deliver this. But for specialised and moveable items such as beds and hoists, then it may be the local authority that is responsible.

*Aids for individuals, as defined in the Care and Support (Preventing Needs for Care and Support) Regulations 2014, are the responsibility of the local authority, whilst more significant adaptations would be the responsibility of the custodial establishment. Further guidance on responsibility of custodial services for equipment aids and adaptations will be issued by NOMS. Custody services, healthcare providers and local authorities should agree local responsibilities.*²⁵

²¹ *R (Spink) v Wandsworth London BC* [2005] EWCA Civ 302, [2005] 1 W.L.R. 2884.

²² Department of Communities and Local Government (June 2006) *Delivering housing adaptations for disabled people: a good practice guide*. London: DCLG, para 2.8.

²³ Great Britain. Parliament (2014) *Care Act 2014: explanatory notes*. London: The Stationery Office, para 88.

²⁴ Great Britain. Parliament (2014) *Care Act 2014*. London: The Stationery Office, 76.

²⁵ Department of Health (2014) *Care and support statutory guidance: issued under the Care Act 2014*. London: DH, para 17.42.

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The National Offender Management Service (NOMS) guidance repeats the gist of the Department of Health guidance, in relation to adaptations (emphasis added):

In general the responsibility for minor adaptations and fixings rests with the prisons. In cases of very severe needs it may be necessary to undertake larger scale building work, or to relocate prisoners to adapted or specialist cells. Where significant scale or high cost work is indicated, prisons should liaise with MoJ [Ministry of Justice] Estates Directorate for specialist advice. Costs of works may be met from NOMS or prison budgets, or by MoJ Estates in line with current arrangements.²⁶

Note: Unfortunately, the NOMS guidance mistakenly states that: 'local authorities are required by regulations supported by guidance to provide at their cost equipment (e.g. hoists) and personal aids (e.g. to assist mobility) up to the value of £1,000. As already detailed above in this briefing paper, the £1000 limit applies only to minor adaptations and is not about what can be provided, but about what can be charged for. And does not apply in any case to equipment).²⁷

Informal carers: adaptations

The *Care Act 2014* represents a significant change of approach to informal carers.

First, they enjoy an extended right to assessment of possible need for support. The right to an assessment, under section 10 of the *Care Act*, is no longer dependent on the carer providing substantial care on a regular basis, as required previously under the *Carers and Disabled Act 2000*.

Second, the duty under section 2 to provide or arrange preventative services applies to informal carers as well as to adults in need.

Third, for the first time, informal carers will be assessed against eligibility criteria.²⁸ If a carer meets the criteria, the local authority has a duty to meet that carer's need for support.

Fourth, a carer's needs can be met under the *Care Act*, either by arranging provision for the carer or by arranging provision for the adult.²⁹

Fifth, whether as a preventative service or as an eligible-need service, adaptations might meet the need of a carer for support.

²⁶ National Offender Management Service (2014) *Adult social care*. (PSI 15/2015). London: NOMS, para 12.4.

²⁷ Ibid, para 12.3.

²⁸ Great Britain. Parliament (2014) *Care and Support (Eligibility) Regulations 2015*. London: The Stationery Office.

²⁹ Great Britain. Parliament (2014) *Care Act 2014*. London: The Stationery Office, s.20.

2. ADULT SOCIAL CARE LEGISLATION IN WALES, SCOTLAND AND NORTHERN IRELAND: HOME ADAPTATIONS

The *Care Act 2014* applies to adult social care in England. Different legislation underpins such care in Wales, Scotland and Northern Ireland.

Wales

From April 2016, adult social care in Wales will come under the *Social Services and Well-being (Wales) Act 2014*.³⁰ This will supersede existing legislation, including section 47 of the *NHS and Community Care Act 1990*, and section 2 of the *Chronically Sick and Disabled Persons Act 1970*.

The Welsh Act contains similar principles to the *Care Act 2014*, although is by no means a mirror image. For instance, unlike the English Act, it contains provisions relating directly to children, as well as to adults.

It also differs from the *Care Act* in a number of other significant ways including aspects of rules about eligibility, and also about adult safeguarding. But, like the *Care Act*, section 15 of the *Social Services and Well-being (Wales) Act* imposes a general duty to arrange preventative services.

Home adaptations

Just as under the *Care Act*, provision of adaptations is envisaged under the *Social Services and Well-being (Wales) Act*.

In fact, section 34 of the Welsh Act refers specifically to services, goods and facilities, aids and adaptations. Whereas the *Care Act* itself fails to mention aids and adaptations explicitly – although they are referred to in regulations and in statutory guidance made under the Act.

Section 34 of the Welsh Act refers also to occupational therapy as an example of a way of meeting a person's needs. The *Care Act* omits such reference, although occupational therapists are mentioned several times in the statutory guidance, issued under the Act, as key professionals in terms of assessment. However, there is no mention in either the English Act or guidance of 'occupational therapy' as a service.

Thus, the legal position in Wales is likely to be the same as in England. That is, the provision of minor adaptations taking place under the *Social Services and Well-being (Wales) Act*, as well as assistance with major adaptations in some circumstances.

At the time of writing (October 2015), however, Welsh regulations have not been passed so as to make equipment, and any minor adaptation costing £1000 or less, free of charge (compare with England, above).

Scotland

In Scotland, adult social care provision comes under the *Social Work (Scotland) Act 1968*, and the *Chronically Sick and Disabled Persons (Scotland) Act 1972*.

Note: *The 1972 Act is in fact very short, and simply applies the provisions of the Chronically Sick and Disabled Persons Act 1970 to Scotland. So the actual duty to meet people's needs, including for adaptations, lies in section 2 of the 1970 Act. The detail, as to how the 1970 Act is applied to Scotland, is explained in section 29 of the 1970 Act. (For example, 'substantial and permanent handicap', a definition governing the 1970 Act in the past in England, has not applied in Scotland – instead, the term 'chronically sick and disabled persons' applies).*

Section 12 of the 1968 Act sets out a general duty to promote social welfare by making available advice, guidance, assistance and facilities. Section 2 of the 1970 Act sharpens this up with a specific duty, where assessed necessary, to assist people with adaptations.

Scottish government guidance interprets this to cover not just minor adaptations but also, in some circumstances, assistance with major adaptations (emphasis added):

It is important for duties under housing legislation to be seen in the context of wider local authority duties under welfare legislation, such as the Chronically Sick and Disabled Persons Act 1970. Local authorities have an overall duty to meet eligible assessed needs. These needs will be met according to locally agreed priorities and eligibility criteria. Any lack of funding from parties involved on the housing side does not negate this duty for social work. However, a local authority may decide to review the best way to meet the need, e.g. increased home based support commensurate with level of risk documented until funding becomes available for adaptations.³¹

³⁰ At the time of writing, legislation listing legal repeals has not yet been published. But it must be assumed that in Wales the *Chronically Sick and Disabled Persons Act 1970* will cease, as in England, to apply to adults from April 2016.

³¹ Scottish Government (December 2009) *Guidance on the provision of equipment and adaptations*. (CCD 5/2009). Edinburgh: SG, page 52.

2. ADULT SOCIAL CARE LEGISLATION IN WALES, SCOTLAND AND NORTHERN IRELAND: HOME ADAPTATIONS

Similarly (emphasis added):

*Finally, it is important to be aware that the local authority has a duty to meet the needs of a disabled person where these needs have been assessed as being above the local eligibility threshold. This means that if other funding is not available, the local authority is still required to meet the individual's needs, whether through an adaptation or some other solution.... The local authority must assist with meeting the need under welfare legislation such as section 2 of the Chronically Sick and Disabled Persons Act 1970.*³²

Northern Ireland

In Northern Ireland, adult social care provision comes generally under articles 4 and 15 of the *Health and Personal Social Services (Northern Ireland) Order 1972*. Article 15 of the Order sets out a general duty to make available advice, guidance, assistance and facilities, by way of providing social services.

A more specific duty arises under section 2 of the *Chronically Sick and Disabled Persons (Northern Ireland) Act 1978*. That is to assist with adaptations, where the local authority judges that this is necessary.

The courts in Northern Ireland have confirmed that this social care legislation provides a backstop to meet needs for home adaptations, including major adaptations, over and above any housing grants provided under the *Housing (Northern Ireland) Order 2003*.³³

³² Scottish Government (August 2010) *Guide to funding a major adaptation*. Edinburgh: SG, page 6.

³³ *Re Bailey's Application* [2006] NIQB 47. See also: *Re Withnell's Application* (NIQB, 18 February 2004) as considered by Weatherup J in deciding Bailey.

3. INTERPLAY BETWEEN SOCIAL CARE AND HOUSING LEGISLATION: HOME ADAPTATIONS

As already outlined in Parts 1 and 2 above, adult social care legislation for adults across the United Kingdom clearly envisages that local social services authorities will be assisting adults with home adaptations, both minor and sometimes major. However, a question arises as to how provision of home adaptations under this social care legislation dovetails with provision of adaptations under other legislation. In particular, with housing grants legislation.

In short, the position across the United Kingdom is that major adaptations come under housing legislation, through a system of grants.

However, it has already been noted in Parts 1 and 2 of this paper, that adult social care legislation can be regarded as a backstop for assistance with major adaptations. Always assuming eligibility for assistance and the cost-effectiveness of the major adaptation as an option for meeting need under that social care legislation.

Note: *The discussion below assumes two general points.*

Tenure: housing grants. *First, that in principle housing grants for major adaptations across the United Kingdom are available to disabled occupants in different tenures. In particular, the private sector, local authority housing or housing association properties.*

In England and Wales, local authorities sometimes tend to avoid awarding disabled facilities grants for local authority or housing association property. And policies in Scotland and Northern Ireland seem to be along the same lines. In these circumstances, it is expected that local authorities (or, in Northern Ireland, the Northern Ireland Housing Executive) or housing associations will fund home adaptations through alternative funding mechanisms.

However, the legal position would appear to be that if people's needs are not met through such alternatives, then they can still apply for a housing grant. And, as English guidance points out: 'It is not lawful for persons in any tenure to be obstructed in making an application for assistance through a DFG'.³⁴

It seems that, notwithstanding some local policies to the contrary, this legal principle probably applies generally across the United Kingdom. Indeed, Scottish guidance states that if, for example, housing association funding is not available, a tenant could apply for a housing grant.³⁵

Tenure: social care. *Second, that any responsibilities for adaptations imposed by social care legislation and discussed previously in this briefing apply, likewise, irrespective of tenure.*

England: housing grants for adaptations

The Housing Grants, Construction and Regeneration Act 1996 – containing the provisions for disabled facilities grants (DFGs) – is unaffected by the Care Act 2014. So, for major adaptations, the first legal port of call would be the 1996 Act. The 1996 Act sets out rules for when a disabled facilities grant is mandatory – up to a maximum of £30,000 and subject to a means test.

The key questions determining eligibility are whether a) there is a disabled occupant, b) the proposed adaptations fall within the prescribed list of purposes, c) the works are necessary and appropriate, and d) whether they are reasonable and practicable.³⁶

Note: *The recommendation as to whether the works are necessary and appropriate are often made by occupational therapists working in social services. This is because the Act states that, in the process of deciding whether the works are necessary and appropriate, the housing authority must consult the social services authority (if they are not one and the same authority).*

It is therefore important to note that, first, the final decision is made by the housing authority.

Second, the recommendation made, and the decision taken, relate to the Housing Grants, Construction and Regeneration Act 1996 – and not to the Care Act 2014. This, in turn, means that for an occupational therapist to apply directly the Care Act eligibility criteria, in making the recommendation about necessity and appropriateness, would be legally misconceived.

³⁴ Department of Communities and Local Government (June 2006 edition) *Delivering housing adaptations for disabled people: a good practice guide*. London: DCLG, para 3.26.

³⁵ Scottish Government (August 2010) *Guide to funding a major adaptation*. Edinburgh: SG, page 20.

³⁶ Great Britain. Parliament (1996) *Housing Grants, Construction and Regeneration Act 1996*. London: The Stationery Office, ss.23 and 24.

3. INTERPLAY BETWEEN SOCIAL CARE AND HOUSING LEGISLATION: HOME ADAPTATIONS

This divide between adult social care rules, now under the Care Act, and the DFG rules under the 1996 Act, has been recognised in previous case law. It is to the effect that adult social care legislation can be applied, quite properly, with resources in mind (through eligibility criteria etc.) But that the decision, about necessity and appropriateness under the 1996 Act, is a 'technical question'. And cannot take resources into account.³⁷

In addition to the 1996 Act is a further piece of housing legislation, the *Regulatory Reform (Housing Assistance) (England and Wales) Order 2002*. This gives local authorities a wide discretion to assist with housing locally, including with home adaptations. For instance, providing extra funding on top of the £30,000 maximum awarded for a DFG – or even an adaptation not falling within the DFG scheme at all.

This means that if needs are not met in full or at all under the 1996 Act, the 2002 Order could be used. In which case, social services would not need to consider stepping in under the *Care Act*. However, the 2002 Order is discretionary, and in times of financial constraint is likely to prove a diminishing source of help.

Even so, housing authorities need to be aware of government guidance about the 2002 Order warning against blanket policies not to provide assistance – in order to avoid an unlawful fettering of discretion.³⁸

Adaptations and the cut-off point between the Care Act – and the Housing Grants, Construction and Regeneration Act 1996 (HGCRA)

We have already noted that regulations made under the *Care Act* stipulate that any minor adaptation provided, costing £1000 or less, must be arranged free of charge.

However, the *Care Act* does not state that any adaptation costing £1000 or less must be provided through the *Care Act* – and that any adaptation over that must be provided under the HGCRA.

Nor, conversely, does the HGCRA state that DFGs are only available for adaptations costing in excess of £1000.

There is a sound legal reason as to why there should not be a rigid financial cut-off point for provision.

For instance, a person may need an adaptation costing £1000 or less but not be eligible under the *Care Act*. Yet, because the rules are different under the HGCRA, the person could nevertheless be eligible for a DFG. To this effect, English government guidance has long since pointed out that a person could be eligible for a DFG but not for adult social care provision.³⁹

Conversely, the need might be for an adaptation over £1000, but not be met, fully or at all, under the HGCRA and the DFG rules. For instance, the adaptation required may not come under the statutory list of purposes for which a DFG must be approved.

Alternatively, the cost of the works may exceed the mandatory maximum value of a DFG, £30,000.

Or the adult may be means-tested under the HGCRA and assessed to make a contribution which he or she really cannot afford.

In all these cases, the meeting of the need might need to be considered at least, under the *Care Act*, notwithstanding that the cost exceeds £1000.

Setting a rough boundary

Nonetheless, previous government guidance has suggested that a general £1000 dividing line might be sensible. With adaptations of £1000 or less normally provided either by social services authorities or by housing authorities under the *Regulatory Reform (Housing Assistance) (England and Wales) Order 2002*.⁴⁰

Yet, arguably the cut-off point could be anywhere. For example, in a 2014 case, the local government ombudsman accepted that it was in the local social service authority's discretion to set a cut-off point of £250, and to refer people for DFG for adaptations exceeding that level of cost.⁴¹

But, in any event, and for the reasons outlined immediately above, the cut-off point should not be rigid.

³⁷ *R v Birmingham City Council, ex p Mohammed* [1998] 3 All ER 788 (QB).

³⁸ Office of the Deputy Prime Minister (2003) *Housing renewal*. (5/2003) London: ODPM, para 4.5.

³⁹ Department of Communities and Local Government (June 2006 Edition) *Delivering housing adaptations for disabled people: a good practice guide*. London: DCLG, paras 2.13, 4.7.

⁴⁰ *Ibid.*, para 6.21.

⁴¹ Local Government Ombudsman (2014) *Investigation into Northumberland County Council*. (13 018 218). London: LGO.

3. INTERPLAY BETWEEN SOCIAL CARE AND HOUSING LEGISLATION: HOME ADAPTATIONS

Wales, Scotland, Northern Ireland: grants for home adaptations

The position in Wales, Scotland and Northern Ireland is broadly similar to that in England – that is, major adaptations being primarily associated with provision of home adaptations under housing legislation, through a system of housing grants.

With, however, adult social care legislation remaining as a backstop for assistance with major adaptations: assuming eligibility for assistance and the cost-effectiveness of the major adaptation as an option for meeting need.

Wales

Wales is governed by the *Housing Grants, Construction and Regeneration Act 1996* – and so is subject to the same disabled facilities grants rules as in England (with the odd difference, such as the maximum DFG being up to £36,000 in Wales, as opposed to £30,000 in England). And also to the *Regulatory Reform (Housing Assistance) (England and Wales) Order 2002*, which allows for discretionary assistance, over and above disabled facilities grants.

As explained above in Part 2 of this paper, Welsh adult social care legislation explicitly refers to adaptations. Suggesting strongly that, under the *Social Services and Well-Being (Wales) Act 2014*, social services would be providing minor adaptations and remain a backstop for assisting with major adaptations, over and above the disabled facilities grants system.

In working out divisions of responsibility between housing and social services for minor and major adaptations, Welsh guidance has in the past stated that local arrangements should aim to minimise delay and bureaucracy (emphasis added):

The priorities and demands being made on both grants departments and social services departments (particularly for OT assessments) may cause delays and result in the adaptation needs of disabled people not being met in a sufficiently timely manner. Authorities should agree policies and procedures for delivering help through DFGs which ensure that the service provided is efficient and effective.

Appropriate procedures and standards for dealing with routine minor adaptations, will enable authorities to respond to simple needs without a prolonged assessment process. Such approaches will be consistent with guidance given under community care arrangements to develop assessment procedures which are flexible and appropriate to levels of need.⁴²

Scotland

In Scotland, the housing grants system falls under the *Housing (Scotland) Act 2006*.

Section 73 provides for mandatory grants to cover essential standard amenities. Section 71 refers to a discretion to assist with other adaptations relating to the accommodation, welfare or employment of the disabled person.

As explained above in Part 2 of this paper, the *Social Work (Scotland) Act 1968*, section 12 (generally) – and section 2 of the *Chronically Sick and Disabled Persons (Scotland) Act 1972* (in particular) – can be seen as the backstop for major adaptations. Over and above the provision of grants under the *Housing (Scotland) Act 2006*. Scottish guidance, quoted above in Part 2 of this paper, makes clear that social work legislation may come into play to provide assistance with major adaptations.⁴³

As far as minor adaptations are concerned, Scottish guidance states that they should be provided with a minimum of bureaucracy and that the model of provision should be clear, through inter-agency agreement:

Local authorities should identify all of their spending on equipment and minor adaptations across services including social work, education and housing services with the aim of integrating provision of 'standard' equipment (including minor adaptations) with their health colleagues. Health services should carry out a similar review. This could involve the use of pooled, or aligned budgets and establishment of joint stores for the provision of 'standard' equipment and minor adaptations.⁴⁴

⁴² Welsh Assembly (2002) *Housing renewal guidance*. (NAFWC 20/02). Cardiff: The Stationery Office, para 29.

⁴³ Scottish Government (2009) *Implementing the Housing (Scotland) Act 2006, Parts 1 and 2: statutory guidance for local authorities: volume 6: work to meet the needs of disabled people*. Edinburgh: SG, paras 14-16.

⁴⁴ Scottish Government (December 2009) *Guidance on the provision of equipment and adaptations*. (CCD 5/2009). Edinburgh: SG, page 37.

3. INTERPLAY BETWEEN SOCIAL CARE AND HOUSING LEGISLATION: HOME ADAPTATIONS

Northern Ireland

In Northern Ireland, housing grants are in the form of disabled facilities grants under the *Housing (Northern Ireland) Order 2003*. The mandatory purposes are listed in article 54 of the Order (as for England and Wales, under the *Housing Grants, Construction and Regeneration Act 1996*).⁴⁵

The maximum amount available is £25,000, differing therefore from both England and Wales.

Unlike in England, discretionary disabled facilities grants survive in Northern Ireland under the 2003 Order, for the purposes of the welfare, accommodation or employment of the disabled occupant.⁴⁶ And, a discretionary scheme of home repair assistance, for minor works, comes under article 106 of the 2003 Order.

As already noted in Part 2 of this paper, the law courts in Northern Ireland have confirmed the importance of the legal backstop, for major adaptations, of section 2 of the *Chronically Sick and Disabled Persons (Northern Ireland) Act 1978*, underpinned by articles 4 and 15 of the *Health and Personal Social Services (Northern Ireland) Order 1972*.⁴⁷

⁴⁵ However, also under article 54 of the 2003 Order, discretionary disabled facilities grants are in principle still available in Northern Ireland to make the accommodation suitable for the welfare, accommodation or employment of the disabled occupant.

⁴⁶ Northern Ireland Executive (2003) *Housing (Northern Ireland) Order 2003*. Belfast: The Stationery Office, a.54.

⁴⁷ *Re Bailey's Application* [2006] NIQB 47. See also: *Re Withnell's Application* (NIQB, 18 February 2004) as considered by Weatherup J in deciding Bailey.

4. NHS RESPONSIBILITIES FOR HOME ADAPTATIONS FOR ADULTS

Home adaptations tend not to be associated with the provision of health services. However, there are at least two ways in which they might be.

First, if the NHS decides to provide an adaptation of some sort anyway, in relation to a health condition. Second, if a person has what is referred to as NHS continuing healthcare (CHC) status. Third, if through joint working, the NHS decides to provide funding to assist local authorities to carry out their functions.

NHS and home adaptations: England

Under section 3 of the *National Health Service Act 2006*, the provision of services, commissioned by NHS clinical commissioning groups (CCGs), is defined broadly. The duty is somewhat intangible, being only 'required to such extent as it considers necessary to meet the reasonable requirements':

- a) hospital accommodation
- b) other accommodation for the purpose of any service provided under this Act,
- c) medical, dental, ophthalmic, nursing and ambulance services,
- d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as the group considers are appropriate as part of the health service,
- e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the group considers are appropriate as part of the health service,
- f) such other services or facilities as are required for the diagnosis and treatment of illness

This legislation is drafted widely enough, so as at least not to exclude the provision of adaptations which, for example, could be covered by the word 'facilities' in paragraphs (e) and (f). This is the strength of such a broad duty.

For instance, longstanding guidance from the Department of Health made clear that home adaptations, required for renal dialysis in a person's home, would be an NHS responsibility.⁴⁸

But, equally, the very breadth and generality of the duty means that the section 3 duty, in respect of a particular service (such as an adaptation) and of a particular person, is very difficult to enforce.⁴⁹

NHS continuing healthcare and home adaptations

Regulations and guidance about NHS continuing healthcare are more specific.

Regulations state that if a person's needs amount to a 'primary health need', and thus constitute a continuing healthcare need, the person's package of care must be arranged and funded solely by the NHS.⁵⁰ Furthermore, to emphasise this point, section 22 of the *Care Act 2014* legally prohibits social services from doing anything which the NHS is required to do.

So what does this mean in terms of adaptations for a person with NHS continuing healthcare status? Department of Health guidance spells out that if a person is in his or her own home, adaptations which would normally fall to social services to provide, would be an NHS responsibility (emphasis added):

Social care needs are directly related to the type of welfare services that LAs have a duty or power to provide. These include, but are not limited to: social work services; advice; support; practical assistance in the home; assistance with equipment and home adaptations; visiting and sitting services; provision of meals; facilities for occupational, social, cultural and recreational activities outside the home; assistance to take advantage of educational facilities; and assistance in finding accommodation (e.g. a care home), etc.

*CCGs should be mindful that where a person is eligible for NHS continuing healthcare the NHS is responsible for meeting their assessed health and social care needs.*⁵¹

For larger adaptations, the guidance points to disabled facilities grants under housing legislation as the first port of call. But, that for additional needs in relation to adaptations, NHS CCGs should be aware of their responsibilities and powers to meet housing related needs of those with NHS continuing healthcare needs (emphasis added):

⁴⁸ Department of Health and Social Security (1974) *Services for chronic renal failure*. (HSC(IS)11). London: DHSS. And: Department of Health (1993) *Home haemodialysis patients*. (HSG (93)48). London: DH.

⁴⁹ *R v Cambridge HA, ex p B* [1995] 2 All ER 129 (CA).

⁵⁰ Great Britain. Parliament (2012) *National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012*. London: The Stationery Office, r 20.

⁵¹ Department of Health (November 2012, Revised) *National framework for NHS continuing healthcare and NHS-funded nursing care*. London: DH, para 2.3, page 50.

4. NHS RESPONSIBILITIES FOR HOME ADAPTATIONS FOR ADULTS

For larger adaptations, Disabled Facilities Grants (DFGs) may be available from local housing authorities towards the cost of housing adaptations that are necessary to enable a person to remain living in their home (or to make a new home appropriately accessible). DFGs are means-tested.

*However, housing authorities, CCGs and LA social services authorities all have discretionary powers to provide additional support where appropriate. Further details can be found in the guidance *Delivering housing adaptations for disabled people: a good practice guide*. This guidance encourages the above bodies, together with home improvement agencies and registered social landlords, to work together locally on integrated adaptations services.*

Whether or not such integrated services are in place, CCGs should consider having clear arrangements with partners setting out how the adaptation needs of those entitled to NHS continuing healthcare should be met, including referral processes and funding responsibilities.

*CCGs should be aware of their responsibilities and powers to meet housing-related needs for those entitled to NHS continuing healthcare.....*⁵²

Statutory guidance on the *Care Act* also refers to NHS CCG involvement in the provision of home adaptations:

*Integrated management or provision of services. This could, for example, include jointly funding home adaptations to ensure people with changing care needs are able to maximise their independence and live well at home for longer.*⁵³

Prohibiting social services from meeting healthcare needs

As already noted above, section 22 of the *Care Act 2014* makes clear that social services is legally prohibited from providing anything that the NHS is required to provide. This means that when NHS continuing healthcare status is established, and equipment or adaptations are required, it is arguable that social services is prohibited from providing them under the *Care Act*.

There would be nothing to stop social services providing on behalf of the NHS – but, in that case, provision would be under the *NHS Act 2006* not the *Care Act 2014*.

Joint working and home adaptations

Under section 75 of the *NHS Act 2006*, NHS bodies can, amongst other things, make payments to local authorities for the carrying out of their (local authorities') health-related functions. Conversely, the payments could be from the NHS to the local authority, for the carrying out by the local authority of NHS functions.

Under section 256 of the *NHS Act 2006*, clinical commissioning groups can make payment to local authorities for the carrying out of their social services functions.

In either case, if money is paid to the local authority in respect of home adaptations, the actual home adaptations would be provided under local authority legislation, not NHS legislation.

NHS and home adaptations: Wales, Scotland, Northern Ireland

One might have thought that the position as described above should, in principle at least, hold good for Wales, Scotland and Northern Ireland. But it is not quite that straightforward.

Wales

For Wales, NHS provision generally is made under section 3 of the *NHS (Wales) Act 2006*. As in England, this duty is probably broad enough to encompass adaptations, though does not explicitly refer to them.

More specifically, Welsh guidance on NHS continuing healthcare does not refer to home adaptations but seems to do so by implication. Namely, that adaptations, which would normally fall to social services, would be an NHS responsibility in the case of a person with NHS CHC status (emphasis added):

When an individual has been assessed as having a primary health need, and is therefore eligible for CHC, the NHS has responsibility for funding the full package of health and social

⁵² Ibid, pages 102–103.

⁵³ Department of Health (2014) *Care and support statutory guidance: issued under the Care Act 2014*. London: DH, para 15.12.

4. NHS RESPONSIBILITIES FOR HOME ADAPTATIONS FOR ADULTS

*care. Where the individual is living at home, this does not include the cost of accommodation, food or general household support.*⁵⁴

In terms of the NHS making payments to local authorities to help the latter with their social services functions (including, potentially, adaptations), section 194 of the *NHS (Wales) Act 2006* applies. And the making of payments by NHS bodies to local authorities, to help the latter with their health-related social services functions, would come under section 33 of the *NHS (Wales) Act 2006*.

The prohibition on social services doing what the NHS is required to do is contained in section 47 of the *Social Services and Well-being (Wales) Act 2014*.

Scotland

NHS provision generally is made under sections 36 and 37 of the *NHS (Scotland) Act 1978*. As in England, this duty is probably broad enough to encompass adaptations in principle, though does not refer to them.

More specifically though, the position in relation to NHS continuing healthcare in Scotland now differs significantly to that in England. At least according to recent Scottish government guidance, which states that NHS continuing healthcare status applies to hospital stays only.⁵⁵

The previous guidance issued in 2008 stated that ‘when someone can be treated in their own home then the NHS retains responsibility to meet the health elements of that care’.⁵⁶ Even this older guidance did not follow the English and Welsh guidance: it did not refer to social care also as being the responsibility of the NHS in continuing healthcare cases, when people were in their own home.

In short, to argue any NHS responsibility for home adaptations in Scotland – on the basis of NHS continuing healthcare status – would appear, in the light of both the 2008 and 2015 guidance, to be difficult. Of course this could be subject to any future legal cases challenging the legal validity of this guidance.

More generally, however, the NHS still has the legal power to arrange home adaptations in people’s own homes for the meeting of healthcare needs – irrespective of whether a person is deemed to have NHS continuing healthcare status. But to enforce any such provision for an individual person would be difficult.

In terms of the NHS making payments to local authorities, to help the latter with their social services functions (including, for instance, adaptations), section 16A of the *NHS (Scotland) Act 1978* applies.

Northern Ireland

In Northern Ireland, health provision generally is made under article 5 of the *Health and Personal Social Services (Northern Ireland) Order 1972*. As in England, Wales and Scotland, this duty is probably broad enough to encompass adaptations in principle, though does not mention them by name.

As to NHS continuing healthcare, there appears to be no specific guidance in Northern Ireland. There is a brief reference in 2010 guidance to Health and Social Services Trusts’ fully funding care home placements if a person has continuing healthcare status.⁵⁷

⁵⁴ NHS Wales (June 2014) *Continuing NHS healthcare: the national framework for implementation in Wales*, Cardiff: NHS Wales, para 2.10.

⁵⁵ Scottish Government (May 2015) *Hospital based complex clinical care*. (DL (2015) 11). Edinburgh: SG.

⁵⁶ Scottish Government (February 2008) *NHS continuing healthcare*. (CEL 6 (2008)). Edinburgh: SG, para 107.

⁵⁷ Department of Health, Social Services and Public Safety, Northern Ireland (March 2010) *Care management, provision of services and charging guidance*. (Circular HSC (ECCU) 1/2010), para 88.

5. HOME ADAPTATIONS FOR CHILDREN

The final Part of this briefing paper outlines the position of children, in relation to home adaptations, across the United Kingdom.

Broadly, the legislative provisions for children are distinct from adult provisions in social care legislation, but the same in housing and NHS legislation.

Social care legislation: children – England

The *Care Act 2014* is about adult social care. It does contain provisions about transition from childhood to adulthood, at age 18. But its rules do not otherwise apply to children.

This means that section 2 of the *Chronically Sick and Disabled Persons Act 1970* (CSDPA) continues to apply to children, despite no longer applying to adults.

As already noted in Part 1 of this paper, previous government guidance has stated that, in its view, the 1970 Act places a strong duty on social services in relation to adaptations. Particularly where, for one reason or another, a person's needs are not met through a DFG.⁵⁸

The courts have pointed out that section 2 of the CSDPA is in effect a legal extension of Part 3 of the *Children Act 1989*. And that the wording of section 17 of the 1989 Act – the general duty to safeguard and promote the welfare of children in need – is capable of covering the provision of major adaptations.⁵⁹

Children and Families Act 2014

Recent legislation has overhauled the law relating to special education in England. When a child has special educational needs, over and above those the school is able to meet from its own resources, he or she will have an Education, Health and Care (EHC) plan under the *Children and Families Act 2014*.

As its name suggests, the EHC plan will contain assessed needs and planned provision for education, health and social care.

One specific rule, under section 37 of the *Children and Families Act 2014*, states that anything provided for the child, under s.2 of the *Chronically Sick and Disabled Persons Act 1970*, must be contained within the EHC plan. Including, presumably, any adaptations provided under the 1970 Act.

Social care legislation: children – Wales, Scotland, Northern Ireland

In Wales, from April 2016, local authorities have a duty to meet the needs of children under section 37 of the *Social Services and Well-being (Wales) Act 2014*.⁶⁰ And care and support for children can include home adaptations, as is made explicitly clear in section 34 of the Act.

In Scotland, provision for children comes under section 22 of the *Children (Scotland) Act 1995* and section 2 of the *Chronically Sick and Disabled Persons (Scotland) Act 1972*.⁶¹ This legislation could in principle – for both children and adults – cover both minor adaptations but also assistance with major adaptations, over and above the housing grants system under the *Housing (Scotland) Act 2006*. (As discussed in Part 2 of this briefing, above).

In Northern Ireland, provision for children comes under article 18 of the *Children (Northern Ireland) Order 1995*, and section 2 of the *Chronically Sick and Disabled Persons (Northern Ireland) Act 1978*. This legislation could in principle – for both children and adults – cover both minor adaptations but also assistance with major adaptations, over and above the housing grants system under the *Housing (Northern Ireland) Order 2003* (As discussed in Part 2 of this briefing, above).⁶²

Housing legislation: England, Wales, Scotland, Northern Ireland

The system of housing grants in the United Kingdom, as outlined for adults in this briefing, applies also to children.

NHS legislation: England, Wales, Scotland, Northern Ireland

In principle, in relation to home adaptations, NHS legislation as described above in Part 4 of this briefing for adults, applies also to children.

England: NHS continuing care for children

The position for children is less clear than for adults, when it comes to continuing care. (And even for adults, the question of NHS continuing healthcare gives rise in practice to considerable uncertainties).

⁵⁸ Department of Communities and Local Government (June 2006 edition) *Delivering housing adaptations for disabled people: a good practice guide*. London: DCLG, para 2.8.

⁵⁹ *R (Spink) v Wandsworth London BC* [2005] EWCA Civ 302, [2005] 1 W.L.R. 2884.

⁶⁰ At the time of writing, August 2015, legislation has not yet been passed listing repeals in Wales. But it is assumed that the *Chronically Sick and Disabled Persons Act 1970* will no longer apply to children in Wales, from April 2016.

⁶¹ Which applies s.2 of the *Chronically Sick and Disabled Persons Act 1970* to Scotland.

⁶² *Re Bailey's Application* [2006] NIQB 47. See also: *Re Withnell's Application* (NIQB, 18 February 2004) as considered by Weatherup J in deciding Bailey.

5. HOME ADAPTATIONS FOR CHILDREN

In principle, the *NHS Act 2006* applies to adults and children equally. And it could have been expected that the same legal approach would apply. This seemed to be the implication of the *Haringey* legal case, involving assistance with tracheostomy care.⁶³

However, the relevant regulations, issued since that legal case, do not define continuing care for children the same as they do for adults. For the latter, NHS CHC is defined as a package of care arranged and funded solely by the NHS (see above). Whereas for children, the regulations refer neither to sole responsibility nor to 'continuing healthcare' but only to 'continuing care' and state that:

*'Continuing Care for Children' means that part of a package of care which is arranged and funded by a relevant body for a person aged 17 or under to meet needs which have arisen as a result of disability, accident or illness'*⁶⁴

Guidance about continuing care for children does not mention adaptations. It does contain a 'decision support tool', to be used to identify the NHS element of a child's continuing care needs. And it emphasises the link with education, health and care plans (*Children and Families Act 2014*) – with continuing care arranged by the NHS equating to the health part of the plan.⁶⁵

In short, the NHS would certainly have the power to arrange adaptations for a child. But this guidance and the regulations are likely to lead to some legal uncertainty as to the circumstances in which the NHS is likely to do this.

Generally speaking, the more closely related the adaptation is to the treatment of a complex health condition or essential medical need, the stronger the argument may become that the NHS should arrange or at least assist with an adaptation.

⁶³ *R (D) v Haringey LBC* [2005] EWHC 2235 (Admin), (2006) 9 CCLR 58.

⁶⁴ Great Britain. Parliament (2012) *National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012*. London: The Stationery Office, r.32A.

⁶⁵ Department of Health (2016) *National framework for children and young people's continuing care*, London: DH, pages 8, 31.

REFERENCES: ACTS OF PARLIAMENT, ORDERS AND STATUTORY INSTRUMENTS

- Great Britain. Parliament (2015) *Care and Support (Eligibility) Regulations 2015*. London: The Stationery Office.
- Great Britain. Parliament (2014) *Children and Families Act 2014*. London: The Stationery Office.
- Great Britain. Parliament (2014) *Care and Support (Assessment) Regulations 2014*. (SI 2014/2827). London: The Stationery Office.
- Great Britain. Parliament (2014) *Care and Support (Preventing Needs for Care and Support) Regulations 2014*. London: The Stationery Office.
- Great Britain. Parliament (2014) *Care and Support (Charging and Assessment of Resources) Regulations 2014*. London: The Stationery Office.
- Great Britain. Parliament (2014) *Care Act 2014*. London: The Stationery Office.
- Great Britain. Parliament (2006) *National Health Service Act 2006*. London: The Stationery Office.
- Great Britain. Parliament (2002) *Regulatory Reform (Housing Assistance) (England and Wales) Order 2002*. London: The Stationery Office.
- Great Britain. Parliament (2000) *Carers and Disabled Act 2000*. London: HMSO.
- Great Britain. Parliament (1996) *Housing Act 1996*. London: HMSO.
- Great Britain. Parliament (1996) *Housing Grants Construction and Regeneration Act 1996*. London: HMSO.
- Great Britain. Parliament (1990) *NHS and Community Care Act 1990*. London: HMSO.
- Great Britain. Parliament (1989) *Children Act 1989*. London: HMSO.
- Great Britain. Parliament (1970) *Chronically Sick and Disabled Persons Act 1970*. London: HMSO.
- Great Britain. Parliament (1970) *Local Authority Social Services Act 1970*. London: HMSO.
- Great Britain. Parliament (1948) *National Assistance Act 1948*. London: HMSO.
- Northern Ireland Executive (2003) *Housing (Northern Ireland) Order 2003*. Belfast: The Stationery Office.
- Northern Ireland. Northern Ireland Assembly (1995) *Children (Northern Ireland) Order 1995*. Belfast: HMSO.
- Northern Ireland. Northern Ireland Assembly (1990) *NHS and Community Care Act 1990*. London: HMSO.
- Northern Ireland. Northern Ireland Assembly (1978) *Chronically Sick and Disabled Persons (Northern Ireland) Act 1978*. Belfast: HMSO.
- Northern Ireland. Northern Ireland Assembly (1972) *Health and Personal Social Services (Northern Ireland) Order 1972*. Belfast: HMSO.
- Scotland. Scottish Executive (2006) *Housing (Scotland) Act 2006*. Edinburgh: The Stationery Office.
- Scotland. Scottish Executive (2003) *Housing (Scotland) Act 2003*. Edinburgh: The Stationery Office.
- Scotland. Scottish Executive (1995) *Children (Scotland) Act 1995*. Edinburgh: HMSO.
- Scotland. Scottish Executive (1986) *Housing (Scotland) Act 1986*. Edinburgh: HMSO.
- Scotland. Scottish Executive (1978) *National Health Service (Scotland) Act 1978*. Edinburgh: HMSO.

REFERENCES: ACTS OF PARLIAMENT, ORDERS AND STATUTORY INSTRUMENTS

Scotland. Scottish Executive (1972) *Chronically Sick and Disabled Person (Scotland) Act 1972*. Edinburgh: HMSO.

Scotland. Scottish Executive (1968) *Social Work (Scotland) Act 1968*. Edinburgh: HMSO.

Wales. Welsh Assembly Government (2014) *Social Services and Well-Being (Wales) Act 2014*. Cardiff: The Stationery Office.

Wales. Welsh Assembly Government (2006) *National Health Service (Wales) Act 2006*. Cardiff: The Stationery Office.

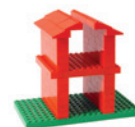
HOME ADAPTATIONS: THE CARE ACT 2014 AND RELATED PROVISION ACROSS THE UNITED KINGDOM

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