

Accessing social care and health care services: the rights of adults with a learning disability

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Introduction

Accessing social care and health care services can be a complex process, and disputes can arise between local authorities and health authorities regarding which organisation is responsible for providing services. This tool kit aims to set out the duties and obligations that local authorities and health authorities have to provide social care and health care services, and to explain how those services can be accessed. As this tool kit has been prepared for use by Mencap Cymru's Regional Officers, it focuses on the law and procedure applicable in Wales, and particular consideration is given to the rights of adults with a learning disability.

The tool kit is divided into three parts:

Part 1 – The duties and obligations of local authorities - explains the duties and obligations that local authorities have to provide assessment, care and support. Local authorities may not be obliged to meet all/any of a person's needs, and Part 1 explains how a local authority determines whether a person is eligible to receive services and provides an overview of the key services that are usually available from local authorities. Consideration is also given to when local authorities can charge for the services provided, and how any charges are calculated. Information is also provided regarding carers' assessments.

Part 2 – The duties and obligations of local health boards - explains the duties and obligations that local health boards have to provide health care services, including community-based services. Consideration is also given to assessing capacity, and when people can be deprived of their liberty.

Part 3 – Challenging Decisions - explains the key ways in which decisions regarding social and health care can be challenged where there is a disagreement about the level of services to be provided.

In addition, the tool kit contains a **Future Changes** section, which highlights some of the key changes that are likely to occur when the Social Services and Well-being (Wales) Act 2014 takes effect in April 2016.

The tool kit includes hyperlinks to key online resources. Wherever a reference is underlined in the text, it indicates that it is a hyperlink, which will take you to the relevant external resource.

Part 1 – The duties and obligations of local authorities

Local government is undertaken by local authorities, and a local authority has responsibilities towards both adults and children living in its area. This Part will focus on the duties and obligations that local authorities have for assessment, care and support, which are usually referred to as ‘social care’ services. It should be noted that local authorities do not have any duties to treat, and accessing health care provision will be considered in **Part 2 – The duties and obligations of local health boards**.

Obtaining an assessment

Assessment is the gateway to social care services. A disabled person (including a person with a learning disability) is entitled to an assessment of their entitlement to services if:

- they (or someone acting on their behalf) requests an assessment (**s4 Disabled Persons (Services, Consultation and Representation) Act 1986**); or
- the local authority becomes aware of the fact that the person is disabled (**s47 National Health Service and Community Care Act 1990**).

Therefore, if you are supporting an adult with a learning disability, who is not currently receiving social care services, you should advise them that they are entitled to be assessed. Usually, the best way to request an assessment is to send a request to the local adult social care department, and you should be able to obtain the relevant contact details from the local authority’s website.

It is important to remember that as all disabled people are entitled to an assessment, the local authority cannot refuse to carry out an assessment on the basis that it appears unlikely that the person will qualify for

services. (This was confirmed by the court in ***R v Bristol City Council ex parte Penfold* [1998] 1 CCLR 315.**) Similarly, the fact that the disabled person might be able to pay for services should not prevent an assessment taking place, as any assessment of financial means should take place after the assessment of needs has taken place.



How to request an assessment.

If you are supporting someone who wants to be assessed, then you may find the following resources useful:

- The Westminster Government provides an online search engine that allows you to identify the local authority, which is responsible for the area in which a person is living, by entering a postcode.
- Irwin Mitchell Solicitors produce a series of free Template Letters to support people contacting local authorities to request a range of service provision. *[Irwin Mitchell are based in England, therefore, as the law relating to social care in England and Wales is different, care needs to be taken when using the templates to ensure that any law referred to is correct.]*

How long should an assessment take?

Although the legislation does not set timescales during which assessments should be completed, any assessment must be completed within a reasonable time. Guidance from the Ombudsman suggests that most assessments should be completed within 4 – 6 weeks, and straightforward assessments should be completed more quickly. If the local authority says that it cannot complete an assessment within a reasonable time period (e.g. because it has a waiting list), then it is

possible to make a complaint on the basis that the local authority is not providing sufficient resources to comply with its duty to provide assessments within a reasonable time.

Conducting the assessment

The assessment should be conducted in a way that allows a person with a learning disability to participate fully. The Welsh Assembly's guidance 'Creating a Unified and Fair System for Assessing and Managing Care' requires that assessments should be person-centred *“using methods which help individuals prepare for their contribution to the assessment and having the right information, support and advocacy arrangements available, will facilitate this”* (section 2.8). Therefore, you might be asked to provide support during an assessment in order to help ensure that the person being assessed understands the process and can express their wishes clearly.

The guidance also notes that *“the depth and breadth of the assessment should be proportionate to the person's needs”* (section 2.9), which means that the local authority has discretion regarding how the assessment is carried out. However, it would be good practice for all assessments to:

- Commence by consulting with the person being assessed in order to build a rounded picture of their problems and circumstances.
- Consider whether the person has any carers and, if so, agree with the person how the carers will contribute to the assessment.
- Endeavour to reach agreement about the needs and services to be provided with the person and, if appropriate, any carer.

Essentially, the assessment process should ascertain what the risks to the person being assessed would be if services were not provided. Therefore, it is essential to ensure that all relevant sources of information are included within the assessment process (e.g. family members, GP), so that

a comprehensive picture of the person's circumstances, including their care, social and cultural needs, is established.

Where it appears that the person being assessed may also require housing support or health services, the adult social care department should invite the relevant housing and/or local health board to assist in the assessment process (**s47(3) National Health Service and Community Care Act 1990**).

If a person is assessed as requiring social care, the resource implications can be considerable for the local authority. Usually, a local authority is only required to provide services where the person is ordinarily resident in the local authority area. The meaning of 'ordinary residence' has been considered by the courts, and in ***R v Barnet London Borough Council ex parte Shah* [1983] 1 All ER 226**, the House of Lords noted that ordinary residence is established if:

- there is a regular, habitual mode of life in a particular place;
- whether of short or long duration;
- which is voluntary and for a settled purpose.

What needs does a local authority have to meet?

The assessment should identify all of the disabled person's needs, and the identified needs are often referred to as **presenting needs**. However, local authorities are not under a duty to meet every need that a person has. Local authorities will have eligibility criteria, and only if those criteria are met will services be provided. Therefore, a local authority only has to provide services that meet a person's **eligible needs**. If a person has presenting needs, which do not meet the eligibility criteria, then the local authority does not have to provide support in relation to those needs. This means that some people will have **unmet needs** (i.e. needs in respect of which the local authority has no legal duty to provide services).

The Welsh Assembly's guidance 'Creating a Unified and Fair System for Assessing and Managing Care' (sections 5.8 – 5.15) requires that assessments should identify how the person's difficulties impact upon their ability to live independently. Four key factors of independence are listed:

- **Autonomy** - the control a person has over their immediate situation and the extent to which they are able to make and act on informed choices.
- **Health and safety** - health means risk to the health of the individual, including mental and physical health, and maintaining current health status and preventing deterioration. Safety has two aspects: the keeping of a person from harm, which could be caused by themselves or others; and the keeping of others, including family members, from harm caused by the person. Harm can be intentional or unintentional.
- **Managing daily routines** - this has two aspects: the ability of a person to look after their own personal care, domestic needs and other daily routines; and their ability to look after dependent family members or others close to them.
- **Involvement** - a person's involvement in work, education and learning, family life and social networks and community activities. It includes recognition of an individual's social roles and responsibilities, including parenting and caring.



Assessing a person with a learning disability.

Where the person has a learning disability, there is supplemental guidance regarding the approach which should be taken to service provision in the Statement on Policy and Practice for Adults with a Learning Disability (March 2007). This requires local authorities to ensure that their assessment and planning for people with a learning disability is person-centred and inclusive.

Having assessed the extent to which the person's difficulties impact upon their independence, the local authority will decide what the overall level of risk to the person's independence is. The 'Assessing and Managing Care' guidance sets out four levels of risk to independence, and a range of indicators of what constitutes each level of risk:

- **Critical** (e.g. there is, or could be, an inability (physical or mental) to carry out vital personal care, domestic or other routines).
- **Substantial** (e.g. there is, or could be, an inability (physical or mental) to carry out the majority of personal care, domestic or other routines).
- **Moderate** (e.g. there is, or could be, some inability (physical or mental) to carry out several domestic or other routines).
- **Low** (e.g. there is, or could be, some inability (physical or mental) to carry out one or two domestic or other routines).

The full range of indicators is much more extensive, and the guidance should be consulted for the complete list.

Usually, a need will be deemed to be an eligible need if the person is likely to suffer significant harm if services are not provided to meet the need. In practice, this means that most local authorities will provide services where the risk to independence is assessed as being either **critical** or **substantial**. It is important to remember that the indicators recognise the need for prevention, and factors which could result in a future, rather than a current, difficulty must be taken into account when assessing the level of risk.

The local authority's duty to meet an eligible need is not dependent on resource implications, which means that all eligible needs have to be met by the local authority regardless of the financial implications which providing the necessary services will have (see **R v Gloucestershire County Council [1997] UKHL 58**). However, if there is more than one option available to meet a person's eligible needs, then the local authority is able to offer only the cheapest option, provided it is sufficient to meet the relevant need.



‘Low level of service’ v ‘Low level of need’.

Sometimes the service that the person requires is at a low level (e.g. cleaning). However, that does not automatically mean that the person’s need is also low.

Example:

A person with mental health difficulties, including agoraphobia, is assessed as requiring help for one hour per week to do their shopping. That is likely to be classed as a low level of service, given that the help is only required for shopping for one hour per week. However, the level of need is likely to be assessed as critical/substantial, given the risk to the person if they are unable to buy food. Therefore, the person is likely to have an eligible need and be entitled to services, notwithstanding the fact that the level of service is low.

Some local authorities will try and argue that low level services are excluded from their eligibility criteria. This is not lawful, as it is the level of need, and not the level of service, which is relevant.

What services does a local authority have to provide?

At the end of the assessment process the local authority will produce a **care plan**, which sets out those needs that have been assessed as eligible needs and what services the local authority is going to provide in order to ensure the eligible needs identified are met.

The local authority will have discretion regarding what services it chooses to provide, and services typically include:

- residential care;
- personal care and help at home;
- aids and adaptations;
- meals;
- recreational activities;
- assistance with travel;
- direct payments.

How will the local authority deliver services?

The local authority does not have to provide the identified services itself, and may choose to commission them from external sources. In practice, the majority of services are outsourced. However, the local authority must ensure that the services provided are of an appropriate quality, and therefore has a duty to monitor both services provided directly by the local authority and services that have been contracted out.

The services delivered by local authorities fall into three main categories:

- residential care;
- non-residential/home-based services; and
- direct payments.

Residential care

Here we are looking at people who need help with their personal care on a residential basis, which does not include health (nursing) care. Provision of health care is discussed separately in **Part 2 – The duties and obligations of local health boards**.

Under **s21 National Assistance Act 1948**, local authorities must provide residential accommodation for any person living in their area who is:

- aged 18 or over;
- needs care and attention due to their age, illness or disability; and

- the care and attention required cannot be provided other than by residential accommodation.

Although ‘care and attention’ is not defined in the legislation, the courts have held that it involves an element of ‘looking after’ – so help with personal care and domestic tasks.

Residential care is usually provided via care homes, which may be run directly by the local authority or by private providers. Where the person is assessed as requiring residential care, the local authority has an absolute duty to provide it irrespective of resources (and this was confirmed by the Court of Appeal in ***R v Sefton Metropolitan Borough Council ex parte Help the Aged* [1997] 4 All ER 532**).

Where a person is assessed as needing residential care, they are entitled to choose which care home they reside in, provided:

- the care home can meet the person’s assessed needs;
- there is a vacancy;
- the care home does not charge more than the local authority would normally pay to ensure that the assessed needs are met; and
- the care home is willing to accept the local authority’s terms and conditions.

In ***R (Goldsmith) v London Borough Of Wandsworth* [2004] EWCA Civ 1170**, the Court of Appeal held that the local authority had breached the Article 8 right to private and family life of a 95 year old woman, when it decided that she should not return from hospital to the care home where she had been living previously. The Court noted that the local authority had not properly assessed the physical and psychological impact that the move would have upon the woman.

If a person wishes to reside in a care home that charges more than the local authority is prepared to pay, then the person can still opt to live in

their preferred accommodation but a **‘topping up’ arrangement** will be required. The topping up arrangement is needed to ensure that the home receives the difference between what the home charges and what the local authority is prepared to pay. The top-up funding is payable in addition to any contribution which the person has to pay towards the costs of their care (see below). Therefore, in most cases, the top-up funding has to be provided by a third party, and not by the person who is going to be resident in the care home. This means that before a topping up arrangement is agreed, a third party (usually a family member) will have to demonstrate that they are prepared to fund the additional costs of the person attending their preferred home, and that they have the means to meet the costs for as long as the arrangement lasts.

If the person is happy to reside in a care home, which charges at the applicable local authority rate, then the local authority will still conduct an assessment of the person’s means in order to decide what contribution the person should make towards the costs of their care. This is because the local authority has a legal duty to apply a resources test and recover an appropriate contribution from the person receiving care. The assessment will look at the person’s income and capital. The rules regarding how resources are assessed are complicated, but there are some basic principles that apply:

- The **capital limit** - which is currently £24,000. If the person has capital savings of more than the capital limit, they will have to pay the full costs of their residential care until their capital is reduced to below the capital limit. Savings below the capital limit are disregarded. Where the person’s capital is tied up in their house, the local authority has discretion to enter into a deferred payment arrangement, during which the local authority will take a charge over the person’s property rather than forcing sale.
- The **personal expenses allowance** - which is currently £25.50. This is the amount of money that the person requires for their personal

expenses. When calculating how much a person must contribute towards the costs of their care, the local authority cannot leave a person with a disposable income of less than £25.50 per week.

- **Joint assets** – these are assets held jointly with a partner. The value of joint assets will usually be divided equally for the purposes of the resources assessment, as the assessment can only be based on the income and capital of the person who is going to reside in the care home.

Age Cymru produces a factsheet Paying for a permanent care home placement in Wales, which explains, with examples, how a resources assessment should be carried out by a local authority. There are also complex rules that deal with the funding position of people whose care needs arise from personal injury claims, where the person has received compensation. The solicitor who advised in relation to the personal injury settlement should be able to provide guidance regarding the funding arrangements for any residential care arising from the claim.

The duty to provide residential care under **s21 National Assistance Act 1948** applies where a person is resident in the relevant local authority area. Sometimes people will want to move into residential accommodation that is in another local authority area, to be nearer their family. In such cases, the person has the right to move to the care home of their choice, even if it is outside the local authority area in which they are resident. The arrangements must be made in accordance with the Welsh Government's Guidance on the National Assistance Act 1948 (Choice of Accommodation) Directions 1993. However, the criteria are essentially the same as when choosing residential care within the local authority area, namely:

- the care home must be able to meet the person's assessed needs;
- there must be a vacancy;

- the care home cannot charge more than the local authority would normally pay to ensure that the assessed needs are met; and
- the care home must be willing to accept the local authority's terms and conditions.

Where the needs assessment identifies that a cross-border placement would best meet the person's needs, the local authority is also under a duty to make appropriate arrangements. The arrangements must be made in accordance with the Welsh Government's Guidance for local authorities on cross-border placements for adults. (Currently, the Guidance only applies to placements in England, but it will apply to placements in Scotland and Northern Ireland once the Social Services and Well-being (Wales) Act 2014 has been implemented – see **Future Changes**.)

Under the Guidance, the local authority, which undertakes the needs assessment (the first local authority), will generally retain responsibility for the person even after they move to a new local authority area (the second local authority). This means that the first local authority will enter into the agreement with the care home, and will be responsible for meeting the costs, subject to the assessment of the person's income and capital, and any topping up arrangement. The first local authority will also be responsible for ensuring that the placement is of an appropriate quality but, given that the care home is likely to be a considerable distance from the first local authority, it is likely that the first local authority will enter into an arrangement with the second local authority for it to undertake quality assurance checks on behalf of the first local authority.

A person is not entitled to stay in a care home of their choice where a decision has been taken to close the home. A number of legal challenges have been made in these circumstances, and the courts have generally held that, provided the local authority has consulted appropriately and

has taken account of all relevant issues, it is the way in which residents are transferred, rather than the principle of the move itself, which is important (see ***R v Wandsworth London Borough Council ex parte Beckwith* [1996] 1 W.L.R 60**). The same principle applies where the local authority is considering closure of a non-residential service, such as a day centre (see ***R (Bishop) v Bromley London Borough Council* [2006] EWHC 248 (Admin)**).

Non-residential/home-based services

Non-residential and home-based services can cover a wide range of assistance from basic aids and adaptations, which make personal care and home life easier (e.g. a raised toilet seat, grab rails or a perching stool), through to supporting people to take advantage of educational and recreational facilities. However, local authorities also have some specific duties towards disabled people under:

- **s29 National Assistance Act 1948**; and
- **s2 Chronically Sick and Disabled Persons Act 1970**.

The definition of disability under both of these Acts includes “having a mental disorder of any description”, which brings learning disability within the definition.

Under **s29 National Assistance Act 1948**, each local authority must:

- have a register of disabled people living in its area;
- provide social work advice and support for disabled people;
- provide facilities for social rehabilitation and adjustment to disability;
- provide facilities for disabled people to undertake occupational, social, cultural and recreational activities.

In addition, **s2 Chronically Sick and Disabled Persons Act 1970** requires local authorities to provide additional non-residential/home-based

services where they are necessary in order to meet the needs of disabled people living in the area, namely:

- practical assistance in the home;
- wireless, television, library or similar recreational facilities;
- lectures, games, outings or other recreational facilities, and educational facilities;
- assistance in travelling to/from community-based care services;
- home adaptations;
- holidays;
- meals (at home or elsewhere);
- a telephone (and any special equipment necessary to be able to use it).

Unlike residential care services, for which the local authority must charge, there is no obligation to charge for non-residential/home-based services. However, most local authorities will levy a charge, and the Welsh Government has produced guidance regarding Charging for non-residential Social Services. (It is likely that the guidance will be replaced by new provisions once the Social Services and Well-being (Wales) Act 2014 has been implemented – see **Future Changes**.)

Under the Welsh Government's guidance, a local authority must set any charge at a 'reasonable level', and cannot charge more than the cost of actually providing the service. The current maximum charge is £60 per week, and this applies whether the person is receiving a single service or a combination of services. The only exception to this is where the person also receives a 'low level, low cost' service that substitutes for an ordinary living cost that the person would otherwise incur (such as the provision of meals or a laundry service). In these circumstances, the guidance allows the local authority to levy an additional flat rate fee for each 'low level, low cost' service provided, which may mean that the person is required to pay more than the usual maximum weekly charge.

In assessing whether the person should be charged for the services provided, the local authority will carry out a means assessment. The assessment will take into account the person's income and may take into account their capital. However, if capital is taken into account, the Welsh Government's guidance requires that capital allowances at least as generous as those applicable to residential care should be applied. Where the person has a partner, the assessment should take into account only the person's means. If there is a dispute about the amount that the person is required to pay, then a review can be requested and ultimately a formal complaint could be lodged (see **Complaints Procedures**). Age Cymru produces a factsheet [Paying for care and support in your own home](#), which explains the approach that local authorities should take when setting charges for non-residential/home-based services.

Direct payments

As the name suggests, a direct payment is a sum of money that the local authority pays directly to the person. The person then uses the money to purchase the services and support that they need. Direct payments were introduced in 1996, and the idea behind them was to allow the person to have greater control over the services and support that they receive in order to promote independence. Generally, direct payments are available for non-residential/home-based services, although they can be used for very limited short-stay residential provision.

Unless an exclusion applies, the local authority must make a direct payment to any person who wants to receive one. The exclusions relate to people who are covered by certain mental health and criminal legislation relating to mental disorder and drug/alcohol dependency. It is important to remember that the person must consent to having a direct payment, and the local authority cannot simply opt to make a direct payment rather than providing services.

The Welsh Government produces Direct Payments Guidance, which must be followed by all local authorities in Wales. The Guidance notes that there is no maximum or minimum amount for direct payments, and the local authority must pay the amount that it thinks it would reasonably cost to provide the service. As with the direct provision of services, the local authority can apply a resources assessment and may require the person to contribute towards the costs of some services and set the amount of the direct payment accordingly.



Is a direct payment the right option for the person you are supporting?

A direct payment arrangement can only be entered into where the person has capacity to consent to the arrangement. Therefore, if the person lacks capacity they will not be able to agree to receiving a direct payment rather than services. However, if the person has a 'suitable person' to act for them (such as someone with a lasting power of attorney), the suitable person can enter into a direct payment arrangement on the person's behalf. The Welsh Government produces specific Direct payments 'suitable person' guidance.

If the person you are supporting has capacity, they will still need to think very carefully about whether a direct payment is right for them, and the local authority will have to be satisfied that the person will be able to manage the direct payment. Managing a direct payment budget can be demanding. For example, if the person requires help with their personal care they will need to commission that care themselves and be responsible for making the payments to the carers. Therefore, both the local authority and the person need to be sure that the appropriate services will actually be commissioned if a direct payment is made. Diverse Cymru has a Direct Payments website, which provides a great deal of information about what is involved in managing

a direct payments budget, and Diverse Cymru also offers a ‘payroll service’ to help manage payments to carers.

Property adaptations

In some cases a property adaptation will be required to enable a person to remain in their home. Where the person is in local authority accommodation this will require cooperation between the adult services department and the housing department. Information about the obligations that social landlords have to make adaptations for disabled tenants is contained in the separate ‘Housing Law: The rights of tenants with a disability’ tool kit (Part 3 – Repairs and improvements).

Can the local authority withdraw services?

Before a local authority changes the services being provided under a care plan, there should always be a reassessment of the person’s needs. Any reassessment should usually take place face-to-face.

The local authority will be entitled to withdraw services if the reassessment shows that either:

- the person’s needs have changed; or
- the person’s needs can reasonably be met by a different service; or
- the local authority’s eligibility criteria have changed and the person no longer qualifies for assistance (e.g. a local authority that had been providing services in respect of moderate needs revises its criteria so that only substantial or critical needs are eligible for services).

It is also possible for a local authority to withhold services where the person is behaving unreasonably, but the local authority will need to ensure that it complies with its own policies and procedures, particularly where the person’s behaviour is linked to mental health problems. If you

are supporting someone with mental health problems, and the local authority threatens to withdraw services due to the person's behaviour, it is essential that you ensure that the local authority is aware of, and has taken account of, the person's particular difficulties.

Carers' assessments

Many people with a disability will be receiving informal, unpaid support, usually from their families. Carers (aged 16 or over) have a number of rights, and if you are supporting a family where informal care is being provided it is important to consider whether any carer is receiving the support to which they are entitled. In particular, carers are entitled to:

- receive a carer's assessment;
- request flexible working from their employers;
- claim Carer's Allowance.

In addition, carers are entitled to request that their views about how best to meet the needs of the person for whom they are caring are taken into account when the person's needs are being assessed.

Under the **Carers and Disabled Children Act 2000**, a carer is entitled to an assessment if they are caring for an adult in respect of whom the local authority has the power to provide social care services, even if the person they are caring for has not been assessed or has been assessed and found to be ineligible for services. This is very important as a carer's assessment may result in services being provided that would not be provided in response to an assessment of the person being cared for. For example, if a carer needed someone to sit with the person they are looking after for a couple of hours per week to enable the carer to participate in a recreational activity, then this is likely to be low level need, which would not attract services, if considered as part of the cared for person's assessment. However, the service sought is likely to make a very significant difference to the carer's well-being and so may well be

provided via a carer's assessment. Where the carer is caring for a disabled child, any assessment will be undertaken under **s17 Children Act 1989**.

By virtue of **s47 Employment Act 2002**, carers who have worked for an employer for at least 26 weeks have the right to request flexible working in order to care for an adult or disabled child. Employers are usually only able to refuse requests where there is a clear business reason to do so.

A carer will also be entitled to receive **Carer's Allowance** if they:

- spend at least 35 hours per week caring for someone;
- are not in full time education or studying for 21 hours per week or more; and
- do not earn more than £110 per week (after tax and other allowable deductions).

In addition, the person who is receiving the care must be in receipt of a qualifying benefit (such as disability living allowance, personal independence payment or attendance allowance).

Part 2 – The duties and obligations of local health boards

Like social care, health care is a devolved function, which means that the Welsh Government has responsibility for the NHS in Wales. Delivery of health services in Wales is via:

- seven local health boards, which are each responsible for a particular geographical area; and
- three NHS trusts ('Ambulance Services', 'Velindre' and 'Public Health Wales'), which each have an all-Wales focus.

An overview of the NHS in Wales, including the geographical boundaries of each of the local health boards, can be found at [Health in Wales](#). For simplicity, the term 'local health board' is used throughout this tool kit to encompass all the various NHS bodies operating in Wales.

What obligations do local health boards have to provide health care services?

The main duties relating to the NHS in Wales are contained in the National Health Service (Wales) Act 2006 (NHS (Wales) Act 2006). Under **s1 NHS (Wales) Act 2006** the Welsh Ministers have a general duty to ensure that Wales has a comprehensive health service, which secures improvement in the physical and mental health of the people of Wales, and improves prevention, diagnosis and treatment of illness. **Section 3** sets out the health services that must be provided:

- hospital accommodation;
- other accommodation for the purpose of any service provided under NHS (Wales) Act 2006;
- medical, dental, ophthalmic, nursing and ambulance services;
- services for the care of pregnant or breastfeeding women, and young children;

- services for the prevention of illness, for the care of people suffering from illness and after-care services;
- such other services as are required for the diagnosis and treatment of illness.

However, the legislation does not contain a specific list of services that have to be provided, and the duties imposed on local health boards are very general. This means that local health boards can usually argue lack of resources as a defence to not providing specific services. For example, if a waiting time target for treatment is missed, a legal challenge is unlikely to succeed as the local health board is meeting its general obligation to provide treatment, it is simply the timeliness of the provision that is in issue. This is obviously very different from the position of local authorities providing social care, where all eligible needs have to be met regardless of resourcing issues.

Legal challenges have been successful where the issue is a local health board's failure to follow government guidance, as this is likely to render the local health board's actions unlawful. Similarly, the courts have ruled that a local health board cannot adopt blanket policies concerning a particular patient group/treatment, as this fetters their discretion to provide the care that the particular person requires.

How are health care services accessed?

For most people their main involvement with health care services will be via their general practitioner or as a result of a hospital admission. Therefore, unlike social care services, there is generally no formal assessment process needed to access health care services. Citizens' Advice (Wales) provides online guides explaining the core NHS services in Wales, which set out the services that patients should receive from GPs and hospitals.

The more problematic areas are where the service required is community-based as, due to the funding implications, disputes will often arise between local authorities and local health boards regarding whether the service required constitutes social care or health care. The ways in which the key community-based health care services are provided are considered in the following sections.

Continuing NHS health care

Where a person's primary need is a health care need, they may be entitled to a package of care, including personal care, which is arranged and funded solely by the local health board. A continuing NHS health care (CHC) package can be arranged to support a person who is living in a range of settings, including a hospital, hospice, care home or their own accommodation. A key advantage of obtaining a CHC package is that any personal care services are usually provided free of charge, notwithstanding that a similar service would be charged for if it were provided by a local authority as part of a package of social care. The Welsh Government publishes a National CHC Framework, which sets out the obligations on local health boards and local authorities to work together to assess eligibility for CHC packages. (The web link will also take you to a number of general guides regarding accessing CHC services, including 'Easy Read' versions.)

It is the local health board's responsibility to take reasonable steps to ensure that a CHC assessment is carried out in all cases where it is required. Therefore, a CHC assessment can be triggered in a number of ways:

- where a person is being discharged from hospital and it appears that they may have a need for CHC support;
- where a person is being assessed for social care services and it appears to the local authority that the primary need is a health need;

- where a person is receiving residential care and their physical or mental health deteriorates so that the level of care provided is no longer adequate;
- where there is a deterioration in a person's physical or mental health and a referral is made via the person's GP.

Once it becomes apparent that a person may have a primary health care need, a **care co-ordinator** will be appointed. The co-ordinator will explain the assessment process and ensure that the person understands the process and consents to the assessment being completed. A person is entitled to be supported through the assessment, and the co-ordinator will provide information about available advocacy services.

The assessment will be multi-disciplinary, and will involve at least two professionals from a range of disciplines, such as doctors, nurses, therapists and social workers. The person, and their family/carers, will also be involved in the assessment. The assessment will look at whether the person has a primary health need, and will focus on four key areas:

- **Nature** – the type of needs the person has (e.g. physical, mental health or psychological). It also describes the effects on the person and the type of help required to manage the identified needs.
- **Intensity** – identifies which need(s) is so severe that the person requires ongoing care.
- **Complexity** – assesses how symptoms interact, and whether symptoms are difficult to manage or control, or whether skill is required to monitor symptoms, treat the condition and/or manage the care.
- **Unpredictability** – describes the degree to which the person's needs fluctuate and how difficult those needs are to manage. It also describes the level of risk to an individual's health if the right care is not provided quickly.



Assessing a person with a learning disability.

The National CHC Framework specifies that, as for social care assessments, where the person has a learning disability, the assessment must comply with the Statement on Policy and Practice for Adults with a Learning Disability (March 2007).

Once the assessment has been completed a recommendation will be made to the local health board regarding whether the person's needs have the characteristics that demonstrate a primary health care need. If so, the person will be entitled to a CHC support package, and a care plan will be devised. Normally, all of the services contained in the care plan will be funded by the local health board, and the person will not be required to make any contribution to the costs. Whilst many people assessed as being eligible for CHC services will move into nursing homes, it is perfectly possible to have a CHC package to support the person living in their own home, provided the person's primary need is a health need. Home-based CHC provision will still be funded entirely by the local health board.

If the person is found not to be eligible for CHC services, it is still possible that they may be eligible for **NHS funded nursing care** and/or social care services (see **Part 1 – The duties and obligations of local authorities**).

Within 3 months of the person beginning to receive CHC services, the care co-ordinator will arrange a **multi-disciplinary review**. The review will consider whether the person still has a primary health need and, if so, whether the services being provided are meeting that need. Any

necessary changes will be made to the care plan, and if the person is no longer assessed as having a primary health need the CHC services can be withdrawn. If the review concludes that there is still a primary health need, the person will continue to receive CHC services and future reviews will take place on an annual basis.

Age Cymru produces a factsheet NHS Continuing health care and NHS funded nursing care in Wales, which contains detailed information about the provision of CHC services in Wales.

Where the CHC assessment identifies that a person requires nursing care, disputes can sometimes arise regarding where that care will be provided. The National CHC Framework (paragraph 4.11) notes that commissioning decisions should take into account the recommendations of the CHC assessment and the person's preferences, but these must be balanced against the need to ensure that CHC provision is sustainable. The position would, therefore, appear to be that the starting point will be for the local health board to identify a nursing home that meets the person's needs. If the person then wishes to live in a different home (e.g. because it is closer to family members), that request should be considered by the local health board, and if there are no financial implications it is likely that the local health board will agree to the person's choice of home.

However, if the person's preferred home charges more than the local health board believes is necessary to meet the person's needs, consideration will have to be given to whether the additional benefits identified by the person, such as being able to maintain social relationships, justify the additional expenditure. If they do, then it is possible for the local health board to agree to fund the full costs. However, if the local health board is not prepared to meet the higher costs, it is possible (in limited situations) for the person, or someone on their behalf, to pay a 'top up' to cover the additional expenditure. The

situations in which this is possible are considered in the National CHC Framework (paragraphs 4.24 – 4.45).

Where the person's needs require them to move to a placement outside their current local health board area, the general principle is that, as for residential social care, it is the local health board in which the person was originally resident that is responsible for meeting the costs of the CHC package. The National CHC Framework notes that detailed information about commissioning CHC care packages is available via the Complex Care Information & Support website. Where there are disputes about commissioning out of area placements, the Funded Nursing Care Guidance sets out the approach that should be taken. However, even if there is a dispute about the commissioning arrangements, the provision of CHC services should not be delayed, as funding issues can be rectified retrospectively.

A person is not generally entitled to continue to receive their preferred services where a decision has been made to withdraw the service. As with provision of residential care, the courts have generally held that the key issue is to ensure that the local health board has consulted appropriately and has taken account of all relevant issues, and that appropriate alternative provision will be made. For example, in ***R (Morris) v Trafford Healthcare NHS Trust* [2006] EWHC 2334 (Admin)**, the High Court quashed the local health board's decision to close a number of hospital wards, on the basis that the local health board had not consulted adequately about the closures. However, even though the decision was quashed, the Court declined to order the local health board to re-open the wards pending the correct decision-making process being undertaken.

NHS funded nursing care

Where the person does not qualify for CHC services, but still requires some nursing care, they will usually be entitled to NHS funded nursing care. Usually a person will qualify for funded nursing care where they are living

in a nursing home, and have been assessed as requiring the services of a registered nurse, but do not qualify for a package of CHC services.

The most common situation in which NHS funded nursing care arises is when a CHC assessment finds that the person does not meet the CHC criteria but does require nursing care. In these situations, a place in a nursing home will be arranged, and the local health board will pay a set amount towards the nursing home's fees, which is designed to meet the costs of the person's nursing care. However, the other costs charged by the nursing home will have to be met by the local authority and/or the person themselves in the same way that a social care package in a residential home would be funded (see **Residential care**).

As with CHC services, entitlement to NHS funded nursing care will be reviewed after three months and, thereafter, on an annual basis.

It is not possible for someone who is in a residential home, rather than a nursing home, to receive NHS funded nursing care. This is because residential homes do not employ nursing staff. If a person whose needs are being met in residential care requires any nursing services, these will be provided free of charge by the local health board via community-based health services, such as district nurses.

Mental capacity and mental health issues

Where a person is being assessed for CHC services (or for social care), the professionals undertaking the assessment must ensure that the person being assessed is able to participate fully in the assessment process.

If it appears that the person being assessed is not able to understand the assessment and decision-making process, then it may be necessary to undertake a mental capacity assessment. Any assessment should be undertaken in accordance with the **Mental Capacity Act 2005** and the Mental Capacity Act Code of Practice. If a mental capacity assessment is undertaken, and the person has nobody (other than paid staff) to

represent them, then an Independent Mental Capacity Advocate (IMCA) must usually be appointed. Even where the person has family/friends who are willing to be consulted, decisions about capacity are complex and it may still be appropriate to engage an IMCA. The IMCA's role is to:

- support and represent the person who lacks capacity;
- present information to help assess what is in the person's best interests, including helping the person to communicate their views;
- challenge any decisions which may not be in the person's best interests.

In Wales, IMCA services are currently provided on a regional basis by Advocacy Support Cymru and IMCA Wales.

Even if the person is assessed as lacking capacity, the care and support provided to them should limit their freedom in the least restrictive way possible. However, the Mental Capacity Act 2005 does allow for a person who lacks mental capacity to be deprived of their liberty if:

- it is in the person's best interests to protect them from harm;
- it is a proportionate response to the likelihood and seriousness of the harm; and
- there is no less restrictive alternative.

Wherever the care plan for a person imposes restraints upon their liberty, the Deprivation of Liberty Safeguards (DoLS) apply. The meaning of deprivation of liberty was considered by the Supreme Court in **P v Cheshire West and Chester Council & Another [2014] UKSC 19**. The Supreme Court noted that deprivation of liberty required three things:

- that the person is confined to a particular restricted place for a non-negligible period of time;
- that the person cannot (or does not) consent; and

- that the State (usually a local health board or local authority) is responsible for the deprivation of liberty.

In assessing when a person could be classed as being deprived of their liberty, the Court went on to note that the deprivation did not require the person to be being cared for in a hospital or other residential setting, and that a person who was receiving community-based care and support, which amounted to continuous supervision from which they were not free to leave, may also be being deprived of their liberty.

Where a person is deprived of their liberty authorisation is required, otherwise the deprivation is unlawful. If the deprivation of liberty is by way of residing in a hospital or care home, then authorisation must be sought from the local health board or local authority as applicable. Where the person is being cared for in their own home, but the care regime still amounts to deprivation of liberty, the authorisation must be obtained from the Court of Protection. Therefore, the impact of the ‘Cheshire West’ decision has been considerable, as it has required all local authorities and local health boards to review the care packages for any person who lacks capacity in order to assess whether the package amounts to deprivation of liberty, and, where a potential deprivation of liberty is identified, to ensure that authorisation is obtained.

In addition to the mental capacity assessment, the authorisation process requires a **best interests assessment** to be completed in order to consider whether the deprivation of liberty meets the criteria under the Mental Capacity Act 2005. Again, an IMCA should be made available to support the person and their family/friends.

If authorisation for the deprivation of liberty is obtained, then a **relevant person’s representative** will be appointed to keep in contact with the person, and make sure that decisions are being made in their best

interests. The relevant person's representative will usually be a relative or friend, but can be a professional if no relative or friend is available.

Any authorisation should be for the shortest period possible, and so should take into account whether there is likely to be any change in the person's mental capacity in the future. If it appears that a further period of deprivation is required, an application can be made for a further authorisation. Similarly, if the authorising authority, or the relevant person's representative, believes that the deprivation is no longer required, an application can be made to terminate the authorisation. (The NHS (Wales) website has a number of standard [Forms and letters](#) relating to authorisation applications.)



External Resources – Mental Capacity.

The law relating to mental capacity and deprivation of liberty is complex, but there are a number of useful external resources available:

- [Deprivation of Liberty Safeguards](#) - Guidance produced jointly by the Department of Health and Welsh Government.
- [Deprivation of Liberty Safeguards](#) – fact sheet produced by Age Cymru.
- [Deprivation of liberty: a practical guide](#) – online resource for assessing whether a person is being deprived of their liberty produced by the Law Society.

Where a person has a 'mental disorder', and needs to be detained in hospital for either assessment or treatment, then an application can be

made for a 'section' under the **Mental Health Act 1983**. Detention under section is serious step, and can involve proceedings before a Mental Health Review Tribunal. If you are supporting someone where a section is being considered, then you should obtain specialist advice. [Advocacy Support Cymru](#) provides an Independent Mental Health Advocacy service, and the Law Society's [Find a Solicitor](#) facility will help you to locate a solicitor who specialises in mental health law.

If you are supporting someone who has been released following a section, then **s117 Mental Health Act 1983** places local authorities and health authorities under a duty to provide aftercare services. Aftercare services must be provided free of charge, and can cover both residential care and home-based services.



External Resources – Mental Health.

As with mental capacity, the law relating to mental health and the use of sections is complex, but there are a number of useful external resources available:

- [The Mental Health Act 1983](#) – fact sheet produced by the Alzheimer's Society.
- [Getting it right for people with learning disabilities](#) – guide produced by NHS England to support the families of people with mental health problems, where a period of hospitalisation and aftercare is required. *[Although the guide is produced by NHS England, and so some of the statutory provisions will differ from those applicable in Wales, it is very comprehensive and the general principles covered are applicable to Wales.]*

Part 3 – Challenging Decisions

Given the complexity of the law relating to social and health care, and the fact that different agencies may be involved, disputes can arise regarding what services should be provided and how services will be funded. This Part summarises the various ways in which decisions can be challenged.

Before challenging any decision it is very important that the person challenging the decision gathers together all the relevant evidence. In particular, if services have been refused, it is essential to ask the local authority or local health board to set out in writing the reasons why the refusal was made so that there is a clear record of the decision being challenged. For example, if a local authority were to refuse to meet an eligible need due to funding constraints, it would be essential to have that decision in writing, as the rationale for the decision would be unlawful and so a complaint would be bound to succeed.

Review Procedures

If a person is unhappy about the outcome of a social care assessment it is advisable to try and resolve the issue informally by discussing it with the person who carried out the assessment or their manager. For example, if a key piece of information has been misunderstood during the assessment process it may be possible to correct this and change the outcome decision. If the issue cannot be resolved informally, then it will be necessary to use the local authority's **Complaints Procedures**.

Where a person is unhappy about the outcome of a continuing NHS health care assessment, it is again sensible to raise the issue with the care co-ordinator in order to see if it can be resolved informally through the **local review procedure**. If the dispute cannot be resolved via the local review procedure, then the person is entitled to ask for their case to be referred to an **independent review panel**. If the dispute is not

resolved via the review panel then it may be possible use the local health board's **Complaints Procedures**, although the complaints procedure may not be able to add anything to the local review and the independent review. If using the complaints procedure is not appropriate, then it may still be possible to make a referral to **The Public Services Ombudsman for Wales**.

Complaints Procedures

Every local authority and local health board has to have a complaints procedure, and details of how to access the procedure should be available via the organisation's website. Alternatively, you could contact the organisation directly and request a copy of the procedure. If the complaint relates to a service being provided by another organisation (e.g. a care provider on behalf of a local authority), the person making the complaint is likely to be asked to consent to details of the complaint being provided to the other organisation as part of the investigation process.

Since 1st August 2014, where the complaint is about social care provided by a local authority, the Welsh Government's Guide to handling complaints and representations by local authority social services must be followed. This procedure divides any complaint into two stages:

- **Stage 1 (local resolution)** - requires the local authority to arrange to hold a discussion with the complainant within 10 days in order to try and resolve the matter as quickly and efficiently as possible.
- **Stage 2 (formal investigation)** – if the complainant is not happy with the outcome of Stage 1, they can request that an independent investigator be appointed who will prepare a report and make any appropriate recommendations. The local authority will then produce a formal response to the complaint, taking into account the outcome of the independent investigation, and this response should be issued within 25 days of the Stage 2 process being commenced.

Where the complaint is about residential or home-based care provision, it may also be appropriate to contact the Care and Social Services Inspectorate Wales (CSSIW). The CSSIW is responsible for inspecting, regulating and maintaining standards of social care in Wales. Therefore, if the care home, or agency providing home-based care, is registered with the CSSIW, it may be appropriate to make the CSSIW aware of the complaint.

The Welsh Government also produces guidance regarding how the NHS in Wales should deal with a complaint. The guidance is called Putting Things Right, and sets out the stages that will be followed when a complaint is made. The guidance notes that a final response should be provided within 30 working days. In Wales, local community health councils are required to provide independent advocacy services to support adults making a complaint about the service that they have received from the NHS. Information regarding where the local advocacy service is based, and how to contact an advocate, can be found on the Complaints Advocacy Service website.

Sometimes asking a local councillor, Assembly Member or Member of Parliament to raise or support a complaint can bring effective pressure to bear. In addition, asking the media to become involved can also be effective. However, the media will obviously be looking for a story, and involving the media is likely to mean that personal details about the complainant's life will be reported in the press. General information about how to make a complaint about a public service in Wales is available from the Complaints Wales website.

The Public Services Ombudsman for Wales

The Public Services Ombudsman for Wales is an independent person who has a legal power to review decisions made by public bodies and independent care providers in Wales.

Before you can ask the Ombudsman to investigate, you will usually need to have already made a formal complaint to the relevant local authority or local health board. If the Ombudsman decides that the service provided has been inadequate, he will usually issue a report and recommendations. Whilst the recommendations are not binding, the local authority or local health board will usually comply with any recommendations made.

The ombudsman produces a series of Factsheets, which explain what the Ombudsman can and cannot do in relation to the issues about which he often receives complaints, including care provision. The website also has a Casebook, which summarises cases that the Ombudsman has investigated and explains the outcomes.

Judicial Review

Judicial Review is a legal process that allows the court to review a decision by a public body. If the court decides that the way in which the decision was taken was wrong in some way (e.g. because important information was not taken into account), the court can order that the decision-making process is undertaken again. However, judicial review only looks at the decision-making process and not at the merits of the decision. This means that, even where a judicial review application is successful, the court cannot substitute its own decision in place of that of the local authority or local health board, and the most the court can usually do is require the decision to be taken again using the correct process. Of course, this could result in a different decision being made (e.g. if new information is considered, which was not considered previously).

Judicial review is a complex process and must be started within 3 months of the date of the disputed decision. If it appears that judicial review may be necessary, then you should suggest that the person you are supporting consults a solicitor to see whether they have grounds for judicial review

and whether legal aid is available to cover the costs involved. The Law Society has an online [Find a Solicitor](#) search facility, which allows you to search for a solicitor specialising in judicial review cases in the local area. In addition, the Legal Aid Agency has an [online eligibility checker](#), which asks a series of questions about the type of dispute and the person's financial circumstances, and then provides an indication regarding whether legal aid may be available.

Cardiff Law School pro bono unit

Cardiff Law School operates a programmes of clinical legal education schemes where its students offer pro bono advice and assistance. The [Law in Healthcare scheme](#), offered in conjunction with Hugh James Solicitors, specialises in disputes relating to NHS continuing health care.

Future Changes

The law governing social and health care services is complex, and much of the legislation is many years old. In England, attempts have been made to consolidate the relevant law with the introduction of the Care Act 2014. However, as social and health care are devolved matters, the Welsh Assembly has power to legislate in these areas, and the Care Act 2014 generally does not apply in Wales. In Wales changes will be implemented by The Social Services and Well-being (Wales) Act 2014 (SSWB Act 2014), which received Royal Assent on 1st May 2014. The SSWB Act 2014 is expected to come into effect in April 2016, and will make changes to a number of aspects of this tool kit relating to social care provided by local authorities, principally:

The ‘well-being’ duty

Under SSWB Act 2014, local authorities are placed under a general duty to promote the well-being of:

- people who need care and support; and
- carers who need support.

The assessment of adults

The existing statutory framework for the assessment of adults will no longer apply in Wales, and will be replaced by a duty to assess whether an adult is ‘in need of care and support’ under s19 SSWB Act 2014. There will be two types of needs assessment, ‘simple’ and ‘complex’, and eligibility will be assessed against the eligibility criteria for adults under Reg 3 of the Care and Support (Eligibility) (Wales) Regulations 2015. This is a major change as it means that there will be all Wales eligibility criteria, which will have to be applied by all local authorities in Wales.

An individual will be eligible for ‘care and support’ (which will replace the term ‘services’) if:

- the need is due to physical or mental ill health, age, disability or dependence on alcohol or drugs; and
- the need relates to at least one of the specified well-being outcomes set out in the Regulations (e.g. basic self-care or domestic routines); and
- the adult can, and can only, overcome the barriers to achieving their well-being outcomes by virtue of the local authority preparing a plan and ensuring that it is delivered (the “can and can only” test).

Where the individual is assessed as being eligible, the local authority must devise a ‘care and support’ plan setting out how the care and support required will be provided.

Consolidation of existing guidance

The implementation of the SSWB Act 2014 will be supported by additional Regulations and Guidance (or Codes), which are likely to replace a number of the existing guidance documents issued by the Welsh Government referred to in the tool kit.

Additional Resources

The following websites contain useful information:

Organisation	Website
Advocacy Matters (Wales) (Charity offering support, including representation, to adults with a learning disability)	www.advocacymatterswales.co.uk/
Advocacy Support Cymru (Specialist provider delivering independent advocacy in relation to mental capacity and mental health)	www.ascymru.org.uk/english/
Age Cymru (Produces a series of 'home and care' facts sheets, which provide guidance regarding accessing social and health care)	www.ageuk.org.uk/cymru/
British and Irish Legal Infor mati on Institute (BAILII) (Provides free access to law repor ts)	www.bailii.org
Care and Social Services Inspectorate Wales (Has responsibility for inspecting, regulating and maintaining standards of social care in Wales)	http://cssiw.org.uk/?lang=en

Citizens Advice (Wales) (Produces a range of legal information guides, which can be searched to take into account differences in law resulting from devolution)	<u>www.citizensadvice.org.uk/wales/</u>
Complaints Wales (Telephone and web based signposting service offering advice on how to complain about a public service in Wales)	<u>www.complaintswales.org.uk/en.aspx</u>

Diverse Cymru (Provide a range of services that promote equality and independent living, including 'direct payments' service)	www.diversecymru.org.uk/index.php
IMCA Wales (Independent mental capacity advocacy service)	www.imcawales.org/
Law Society (Will help you find a solicitor in your area)	www.lawsociety.org.uk
Law Wales (Website sponsored by the Welsh Government to provide information on all areas of law developed to Wales)	http://law.gov.wales/?lang=en
Luke Clements (Resources relating to social care law authored by Professor Luke Clements)	www.lukeclements.co.uk/
Public Services Ombudsman (Investigates complaints about public bodies in Wales)	www.ombudsman-wales.org.uk/en.aspx

For More Information you can also contact:

The Wales Learning Disability Helpline on **0808 808 1111**

Or e-mail helpline.wales@mencap.org.uk

