

Chapter 4

LOCAL AUTHORITY SERVICES AND FUNCTIONS

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|---|---|
| 4.01 <i>Introduction</i> | 4.15 <i>The Housing Corporation</i> |
| A. SOCIAL SERVICES | 4.16 <i>Housing Associations</i> |
| 4.02 <i>Care in the Community: The Planning Documents</i> | 4.17 <i>Planning Permission</i> |
| 4.03 <i>Local Social Services Authorities as Planners, Assessors and Enablers</i> | C. EDUCATION |
| 4.03A <i>Social Services Authorities as Providers of Services</i> | 4.18 <i>Background</i> |
| 4.04 <i>Organisation of Social Services</i> | 4.19 <i>Implementation of the Warnock Report</i> |
| 4.05 <i>Accommodation provided under s. 21(1) of the National Assistance Act 1948 (Pt. III Accommodation)</i> | 4.20 <i>Legislative Structure</i> |
| 4.06 <i>Welfare Services provided under s. 29(1) of the National Assistance Act 1948</i> | 4.21 <i>Statutory Duty to provide Education to All Children of School Age</i> |
| 4.07 <i>Prevention of Illness, Care and Aftercare provided under the National Health Service Act 1977</i> | 4.22 <i>Special Education Provision</i> |
| 4.08 <i>After Care Services under the Mental Health Act 1983</i> | 4.23 <i>Identification and Assessment of children with Special Needs</i> |
| 4.09 <i>Powers of Entry and Inspection</i> | 4.24 <i>Statement of Special Needs</i> |
| 4.10 <i>Miscellaneous Functions of Local Social Services Authorities</i> | 4.25 <i>The Special Educational Needs Tribunal and the Role of the Courts</i> |
| B. HOUSING | 4.26 <i>Parental Rights and Responsibilities</i> |
| 4.11 <i>Introduction</i> | 4.27 <i>Special Schools</i> |
| 4.12 <i>General Housing Obligations</i> | 4.28 <i>Independent Schools</i> |
| 4.13 <i>Homeless Persons</i> | 4.29 <i>Integration of Children with Disabilities in Ordinary Schools</i> |
| 4.14 <i>Application of Homeless Persons Provisions to Mentally Disordered Persons</i> | 4.30 <i>Education otherwise than at school</i> |
| | 4.31 <i>Review of Local Authority's or Governors' Discretion</i> |
| | 4.32 <i>Education and Disability Discrimination</i> |

4.01 Introduction

This chapter is concerned with local authority services for mentally disordered people. The most important services are those provided by **social services authorities**—residential accommodation, welfare services and prevention, care and after-care services; by **housing authorities and housing associations**—a range of general housing and supportive housing accommodation; and by **education authorities**—responsible for providing full-time education suitable to meet the needs of every child of school age.

A. SOCIAL SERVICES

4.02 Care in the Community: The Planning Documents

Local social services authorities have primary responsibility for ensuring that people in need receive care in the community. Helping people lead full and independent lives is at the heart of community care. The objective is to help people live normally in a home-like, non-segregative, environment where they can receive an array of medical, nursing, and social services.

Sir Roy Griffiths presented a report on community care to the Secretary of State for Social Services in 1988. His central proposals were for a new Minister to be clearly and publicly identified as responsible for community care; a new specific grant to social services authorities; re-orientation of social service authorities to assess community care needs in their locality and to set local priorities and service objectives; identification and assessment of individual needs; and arrangement for the delivery of services to individuals by the public or private sector according to where they can be provided most efficiently. The key element is the new role of local authorities from direct providers to enablers—assessing, managing and then arranging services within their localities.¹

The Government's White Paper, "*Caring for People*," was published in November 1989.² The White Paper expressed confidence that community care is the most appropriate form of care for most people. Its declared objectives were to provide services to enable people to live in their own homes wherever possible, provide support for carers, provide for proper assessment of needs and good case management, promote the development of the private sector alongside good quality public services, clarify local authority responsibility and hold them accountable, and secure better value for money through a new funding structure for social care.

Key changes for local authorities covered in the White Paper "*Caring for People*" include assessing individual needs, designing care arrangements and securing delivery of services, publishing plans for the development of community services, making maximum use of the independent sector, and inspecting services and homes provided by the authority and the independent sector. A new funding structure for those seeking public support for residential and nursing home care was established, and a new specific grant was provided to promote the

¹ *Community Care: Agenda for Action: A Report to the Secretary of State for Social Services* by Sir Roy Griffiths. HMSO: London, 1988.

² *Caring for People: Community Care in the Next Decade and Beyond*. CM 849, HMSO: London, 1989. See also the response to the White Paper by the *House of Commons Social Services Committee, Seventh Report, Community Care: Quality*. HMSO: London, 11 July 1990.

development of social care for persons who are mentally ill. (As to the corresponding White Paper on the Health Service, see para. 2.01.3 *ante*; as to joint planning, joint financing and the transfer of resources from health to local authorities, see paras. 2.21 – 2.25 *ante*). The White Paper proposals were enacted in Part III of the National Health Service and Community Care Act 1990. This Act, together with other relevant legislative powers for local authority services, are described below.¹

4.02.1 *Community care for mentally ill people*

The 1975 White Paper “*Better Services for the Mentally Ill*”² first set out the policy that locally based hospital and community health services, in cooperation with local social services, provide better care and treatment for many mentally ill people than traditional specialist psychiatric hospitals. This community care approach was endorsed in the 1989 White Paper “*Caring for People*.”³ The policy of closing large, long stay psychiatric hospitals in favour of psychiatric wings in general district hospitals, as well as treatment and social care in the community, has been a slow and difficult process, with some patients being discharged without appropriate community services in place.

The “Care Programme Approach”

In September 1990, the government announced a “Care Programme Approach” to insure that mentally ill persons in the community receive the health and social care they need.⁴ The approach requires health and social services authorities to agree on specific arrangements for assessment and continuous monitoring of the needs of mentally ill people; and provide effective systems for meeting those needs. If a person’s minimal needs in the community cannot be met, in-patient treatment should be offered or continued.

Specific mental illness grant

The White Paper “*Caring for People*” stated that local authorities should continue to be responsible for providing social care to mentally ill persons. In order to increase the social care available for people with mental illness the government makes a specific grant to social services authorities.⁵ The specific grant is payable under section 7E of the Local

¹ The government published a series of documents providing guidance for implementing *Care for People*. See, e.g., *Caring for People: Community Care in the Next Decade and Beyond – Implementation Documents* (1990): *Specific Grant for Provision of Social Care for People with a Mental Illness* (CCI 5), *Planning* (CCI 6), *Purchasing and Contracting* (CCI 7), *Assessment and Case Management* (CCI 8), *Inspection Units* (CCI 9), *Complaints Procedures* (CCI 10).

² Cmnd. 6233.

³ Cm 849, chapter 7.

⁴ Health and Social Services Development “*Caring for People*”: *The Care Programme Approach for People with a Mental Illness Referred to the Specialist Psychiatric Services*, HC (90) 231 LASSL (90) 11, Sept. 10, 1990.

⁵ *Caring for People*, CM 849, paras. 7.15 – 7.16.

Authority Social Services Act 1970 as inserted by section 50 of the National Health Service and Community Care Act 1990. The specific grant is payable through Regional Health Authorities in order to ensure joint planning of services and coordination. The social services authorities must develop an agreed social care plan using the "Care Programme Approach" (see above).¹

4.03 Local Social Services Authorities as Planners, Assessors, and Enablers

At the heart of the reforms introduced in Part III of the National Health Service and Community Care Act 1990 is the change in role of local authorities from being solely the providers of services to being planners, assessors, inspectors, and enablers.²

(i) Planning

Local authorities must publish and continue to review plans for the provision of community care services³ in their areas (s. 46(1)). The authority's planning function must be made in consultation with relevant District, Family Health Services, and Housing Authorities, as well as voluntary organisations (s. 46(2)).

(ii) Assessment

Local authorities also have duties to assess persons to determine their needs for community care services wherever it appears to them that a person may have such a need (s. 47(1)).⁴ If during the assessment, the authority believes that the person may be in need of health or housing services, it must notify the appropriate authority (s. 47(3)).

(iii) Inspection

Any person authorised by the Secretary of State may at any reasonable time enter and inspect any premises in which community care services are provided whether directly or under arrangements made by

¹ *Specific Grant for the Development of Social Care Services for People with a Mental Illness*, HC (90) 24/LAC (90) 10.

² As of October 1990, there was no specific timetable for implementation of Part III of the 1990 Act. See S.I. 1990 No. 1375. Unless otherwise specified statutory references in this paragraph are to the National Health Service and Community Care Act 1990.

³ Community Care Services are provided under Part III of the National Assistance Act, section 45 of the Health Services and Public Health Act 1968, section 21 of the National Health Service Act and section 117 of the Mental Health Act 1983 (s. 46(3)).

⁴ If during the assessment of needs it appears that the person has a disability the authority must proceed to make a decision as to services as specified in section 4 of the Disabled Persons (Services, Consultation, and Representation) Act 1986 without his requesting them, and must inform him of his rights under the Act (s. 47(2)) (Section 4 of the 1986 Act provides a duty on local authorities to consider a disabled person's needs for welfare services under section 2(1) of the Chronically Sick and Disabled Persons Act 1970. See further para. 22.26 *post*).

the authority (s. 48(1)).¹ The person authorised must examine the conditions and management of the facilities and services, inspect any records (including computer records), and require the owner to furnish information (s. 48(2) (3)). The authorised person may also privately interview any resident in order to investigate a complaint or to review the quality of services (s. 48(4)).² The person exercising the power of entry must produce a duly authenticated document showing his authority. It is an offence to intentionally obstruct a duly authorised person.

(iv) *Enablers*

The White Paper "*Caring for People*" envisioned that local authorities would not be the sole providers of services, but enablers of those services. They are responsible for designing of a package of services based upon the needs assessment, appointing a case manager to monitor the appropriateness of services over time, and securing the delivery of services. The "enabling authority" should do the following: develop a mixed economy of care by determining clear specifications of service requirements and arrangements for tenders and contracts, stimulate the development of non-statutory service providers, and identify self-contained areas of their own work that could be "floated off" as self-managing units. Whenever authorities purchase services, they must monitor the quality of those services. Section 42 of the 1990 Act specifies agency arrangements for the provision of accommodation and welfare services.

4.03A Social Services Authorities as Providers of Services

The powers and duties of local social services authorities to provide services for mentally disordered people are set out in several enactments and in departmental circulars. The three most important powers are:

- (i) to provide residential accommodation for persons who by reason of age, illness, disability or any other circumstances are in need of care and attention which is otherwise not available to them (National Assistance Act 1948, s. 21(1));³
- (ii) to make arrangements for promoting the welfare of persons who suffer from mental disorder of any description, and other

¹ This does not include premises registered under the Registered Homes Act 1984, see Chapter 5 *post*.

² Only registered medical practitioners can inspect medical records and insist on a *private* interview (s. 48(5)).

³ Amended by Local Government Act 1972, s. 195(6), Sch. 23, para. 2(1) and the National Health Service and Community Care Act, 1990, s. 42(1)(a). See further para. 4.05 below.

4.03A

LOCAL AUTHORITY SERVICES AND FUNCTIONS

specified forms of handicap (National Assistance Act 1948, s.29(1));¹ and

- (iii) to make arrangements for the prevention of illness (including mental disorder), the care of persons suffering from illness, and the after-care of persons who have been so suffering (National Health Service Act 1977, s. 21(1)(b), Sch. 8, Para. 2(1)).²

The provision of services by a local social services authority under any of the above mentioned statutory provisions require approval by the Secretary of State for Social Services. However, a specific request for approval for a service is not required where it falls within the scope of general approval contained in Local Authority Circulars 13/74 and 19/74. These circulars have legal effect as if the approval and directions contained therein were provided for in an Act of Parliament. (See Appendix C *post*).

Parts II and III of the Mental Health Act 1959, which made provision relating to local authority services and mental nursing homes and residential homes, are almost entirely repealed. The Mental Health Act 1983, which consolidates the law relating to mentally disordered persons, is mainly procedural in character. There is no legislation, therefore, which affects services only for mentally disordered people. Specific powers and duties placed upon local authorities are spread among a number of Acts.

Schedule 1 (as amended) to the Local Authority Social Services Act 1970 lists the enactments which confer on local authorities social services functions. These functions are assigned to social services committees which must be established by local authorities.³

4.04 Organisation of Social Services

4.04.1 Definition of Local Social Services Authority

For the purposes of the Local Authority Social Services Act 1970,⁴ and for other specified enactments which confer social services functions,⁵ local authorities are the councils of non-metropolitan coun-

¹ Amended by *ibid.*, s. 195(6), Sch. 23, para. 2(4). See Chronically Sick and Disabled Persons Act 1970, s. 2; and para. 4.06 below.

² See para. 4.07 below.

³ The social services functions relating to the Mental Health Act 1983 are set out in s. 148, Sch. 4, para. 27 of that Act, and include the welfare of the mentally disordered, guardianship, and exercising the functions of nearest relative (Pts. II, III and VI); appointment of approved social workers (s. 114); entry and inspection (s. 115); after-care (s. 117); and prosecutions (s. 130).

⁴ Local Authority Social Services Act 1970, s. 1; Local Government Act 1972, s. 195(1).

⁵ See National Assistance Act 1948, s. 33(1) (amended by the Local Government Act 1972, s. 195(6), Sch. 23, para. 2(6)); Health Services and Public Health Act 1968, s. 45(1) (amended by the Local Government Act 1972, Sch. 23, para. 15(3)); Chronically Sick and Disabled Persons Act 1970, ss. 1, 2, 18.

ties, metropolitan districts and London boroughs, and the Common Council of the City of London. "Local social services authority" under the Mental Health Act 1983 (s. 145(1)) and the National Health Service Act 1977 (s. 128(1)) has the same meaning as that given to "local authority" under the 1970 Act.

4.04.2 *Social Services Committee*

Every local authority must establish a social services committee. All matters relating to the discharge by the authority of their social services functions stands referred to their social services committee.¹ Two or more local authorities may, instead of establishing social services committees for themselves, concur in establishing a joint social services committee.² A local authority may delegate to its social services committee any of its social services functions and, before exercising any of those functions itself, must, unless the matter is urgent, consider a report of the committee with respect to the matter.³

In the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, local authorities must act under the general guidance of the Secretary of State.⁴

4.04.3 *The Director of Social Services*

A local authority must appoint a director of social services for the purposes of its social services functions.⁵ Without the approval of the Secretary of State the director cannot be employed by his authority in connection with the discharge of any of its functions other than its social services functions.⁶

4.04.4 *Access to Information*

The Local Government (Access to Information) Act 1985 provides for greater public access to the meetings and documents of local authorities, their committees and sub-committees, and increases members' rights of access to information. The Act, by amending section 100 of the Local Government Act 1972, opens up meetings (committees

¹ Local Authority Social Services Act 1970, s. 2(1).

² *Ibid.*, s. 4(1). At least a majority of a committee or joint committee must be local authority members (s. 5).

³ *Ibid.*, s. 3(1) (substituted by the Local Government, Planning and Land Act 1980, s. 183(1)). The local authority, after considering a report from the committee, can refer a social services function to another committee (s. 3(2), substituted as above) or it can refer a non-social services function to the social services committee (s. 3A, substituted as above).

⁴ Local Authority Social Services Act 1970, s. 7(1).

⁵ *Ibid.*, s. 6(1). Two or more authorities can concur in the appointment of a director (s. 6(2)).

⁶ *Ibid.*, s. 6(5).

as well as subcommittees) of local authorities to the public. The right of public attendance, however, is not absolute as the public must be excluded where receipt of "confidential information" by the public would occur. The Act also makes provision for public inspection of agendas of meetings, background papers and reports. Again, there are exceptions to this basic principle of open government. Finally, the authority must publish additional information including a register of every member.

4.05 Accommodation Provided under Section 21(1) of the National Assistance Act 1948 ("Part III Accommodation")

A local authority may with the approval of the Secretary of State, and to such extent as he may direct must, make arrangements for providing residential accommodation for persons who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.¹ In making any such arrangements a local authority must have regard to the welfare of all persons for whom accommodation is provided and, in particular, to the need for providing accommodation of different descriptions suited to different descriptions of such persons.²

Social services authorities' powers under section 21 of the 1948 Act and under Schedule 8 of the National Health Service Act 1977 (see para. 4.07 below) are subject to the requirement to act with the approval and under the direction of the Secretary of State. Local authority circular LAC(93)10 (reproduced in Appendix C) gives guidance on the consolidated approvals and directions to take effect from 1 April 1993. Paragraphs 1 and 2 of Schedule 8 to the National Health Service Act 1977 remain in force after that date, but they have been amended by the National Health Service and Community Care Act 1990, s. 66(c) and sched 9 para. 18(14) which provides that authorities are not authorised to provide residential accommodation under para. 2. Although the intention of the White Paper *Caring for People* (Cm 849) was that local authorities should become primarily purchasers of services from the private and voluntary sectors, the Department of Health take the view that the amendments to the 1948 Act by the Community Care (Residential Accommodation) Act 1992 s. 1 will require authorities to make some direct provision for residential care under Part III of the 1948 Act. The government will expect local authorities to retain the ability to act as direct service providers, if other forms of service provision are unforthcoming or unsuitable, which is likely to be particularly important

¹ National Assistance Act 1948, s. 21(1)(a) (amended by the Local Government Act 1972, s. 195(6), Sch. 23, para. 2(1), the Children Act 1989, Sch. 13 and the National Health Service and Community Care Act 1990, s. 42. Much of the residential accommodation provided is for elderly people. See generally, G. Aldous (1982) *Housing Law for the Elderly*, Oyez Longman, London.

² *Ibid.*, s. 21(2) (amended as in previous footnote).

in services for people with high levels of dependency, or particularly challenging patterns of behaviour.

Social services authorities will have powers under paragraph 2 of Schedule 8 of the NHS Act 1977 to take action to prevent mental disorder or to provide care for those who have been suffering from it as part of their order to prevent illness and provide after-care. Because authorities' powers to provide accommodation under paragraph 2 of Schedule 8 of the 1977 Act are being removed, the approvals and directions in relation to the provision of accommodation for the prevention of mental disorder, or for persons who are alcoholic or drug dependent, have all been transferred to s. 21(1) of the 1948 Act.

4.05.1 *Management of Part III Accommodation*

A local authority can make a number of different arrangements for accommodation it is authorised or required to provide under Part III of the National Assistance Act 1948. It can provide such accommodation: in premises managed by itself;¹ in premises managed by another local authority;² in premises managed by a voluntary organisation;³ in premises managed by a private concern⁴

A local authority, in arranging for people to be accommodated in homes managed by another local authority, a voluntary organisation or a person carrying on a residential care home, must agree terms for payment to the other party.⁵ Any person authorised by a local authority can enter and inspect premises managed by a voluntary organisation or a person carrying on a residential care home.⁶

4.05.2 *The Local Authority which has the power to provide Part III Accommodation*

The local authority which has the power to provide residential accommodation is the authority in whose area the person is ordinarily resident. However, for persons in the area of a local authority who have no settled residence or who are in urgent need of Part III accommodation the authority has the power to provide residential accommo-

¹ National Assistance Act 1948, s. 21(4); Local Government Act 1972, s. 195(6), Sch. 23, para. 2(1).

² *Id.*

³ *Ibid.*, s. 26(1) and 1(A)-(E) as inserted by the Community Care (Residential Accommodation) Act 1992, s. 1.

⁴ *Id.*

⁵ As to payment to another local authority, see *ibid.*, s. 21(4) (amended by the National Health Service and Community Care Act 1990, s. 66(1), Sch. 9, para. 5; as to payment to a voluntary body or a person carrying on a residential care home, see *ibid.*, s. 26(2); Health Services and Public Health Act 1968, s. 44(2); Local Government Act 1972, Sch. 23, para. 2(3); National Health Service and Community Care Act 1990, s. 42 and Sch. 10 and s. 66(1), Sch. 9, para. 5(5).

⁶ National Assistance Act 1948, s. 26(5). see further para. 4.09.3 below.

dation as if they were ordinarily resident in its area.¹ A person is deemed to be ordinarily resident in the area in which he resided immediately before he was admitted to residential accommodation or to hospital whether or not he in fact continues to be ordinarily resident in that area.² Any dispute as to the ordinary residence of a person must be determined by the Secretary of State for Social Services.³

4.06 Welfare Services Provided under Section 29(1) of the National Assistance Act 1948

A local authority may, with the approval of the Secretary of State, and to such extent as he may direct must, make arrangements for promoting the welfare of the following persons: persons who are blind, deaf or dumb, or who suffer from mental disorder of any description, and other persons who are substantially or permanently handicapped by illness, injury or congenital deformity or such other disabilities⁴ as the Secretary of State may prescribe.⁵ The power or duty applies to persons ordinarily resident in the authority's area. The authority must inform itself of the number of such persons within its area and of the need for making arrangements for them.

Local authority circular LAC(93)10, Appendix 2, sets out the arrangements which the Secretary of State is prepared to approve and the directions he has given under section 29(1) of the 1948 Act. The circular is reproduced in Appendix C, *post*. In paragraph 3 of Appendix 2 to the circular the Secretary of State **directs** authorities, *inter alia*, to provide a social work service and such advice and support as may be needed for people living in their own homes or elsewhere; to provide whether at centres or elsewhere certain facilities including those for social rehabilitation and adjustment to disability, occupational, social, cultural and recreational activities; and for keeping registers of persons to whom section 29 applies.⁶

¹ *Ibid.*, s. 24; Local Government Act 1972, s. 195(6), Sch. 23, para. 2(2).

² *Ibid.*, s. 24(5), (6); National Assistance (Amendment) Act 1959, s. 1(1); National Health Service Reorganisation Act 1973, s. 57(1), Sch. 4, para. 45; National Health Service and Community Care Act 1990, s. 66(1) and Sch. 9, para. 5(4). See *R. v. Waltham Forest London Borough Council ex parte Vale* (1985) *The Times*, February 25, 1985.

³ National Assistance Act 1948, s. 32(3).

⁴ "Disability" includes mental as well as physical disability. National Assistance Act 1948, s. 64(1).

⁵ *Ibid.*, s. 29(1); Local Government Act 1972, s. 195(6), Sch. 23, para. 2(4); Mental Health Act 1959, s. 8(2).

⁶ Without prejudice to the generality of its power under s. 29(1) of the 1948 Act, a local authority may make particular welfare arrangements specified in s. 29(4) as amended by the Employment and Training Act 1973, s. 14(1) and Sch. 3, para. 3.

4.06.1 *Use of Voluntary Organisations*

In accordance with arrangements made under section 29 a local authority may employ as its agent any voluntary organisation or any person carrying on, professionally or by way of trade or business, activities which consist of or include the provision of services for any of the persons to whom section 29 applies, as long as the organisation or person appears to the authority to be capable of providing the service to which the arrangements apply.¹

4.07 **Prevention of Illness, Care and After-Care Provided under the National Health Service Act 1977**

A local social services authority may, with the approval of the Secretary of State, and to such extent as he may direct must, make arrangements for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have been so suffering.² "Illness" includes mental disorder within the meaning of the Mental Health Act 1983.³

Local authority circular LAC(93)10, Appendix 3, sets out the arrangements for services for mentally disordered people which the Secretary of State is prepared to approve or to direct under the National Health Service Act, schedule 8, paragraph 2(1). The circular is reproduced in Appendix C. In paragraph 3(2) of the circular the Secretary of State **directs** authorities to provide:

- (i) residential accommodation (including residential homes, hostels, group homes, minimum support facilities or other appropriate accommodation) for persons who are ordinarily resident in the authority's area and persons in the area with no settled residence;
- (ii) centres (including training centres and day centres) or other facilities (including domiciliary facilities) for training or occupation;
- (iii) the appointment of approved social workers under the Mental Health Act 1983;
- (iv) the exercise by the authority of its functions under the 1983 Act in respect of persons placed under guardianship of the authority or of other persons;
- (v) social work and related services to help in the identification, diagnosis, assessment and social treatment of mental disorder

¹ National Assistance Act 1948, s. 30(1); Local Government Act 1972, s. 195(6), Sch. 23, para. 2(5); National Health Service and Community Care Act 1990, s. 42(6).

² National Health Service Act 1977, s. 21(1)(b), Sch. 8, para. 2(1); Mental Health Act 1983, s. 148, Sch. 4, para. 47(e).

³ National Health Service Act 1977, s. 128(1).

and to provide social work support and other domiciliary and care services to people living in their homes and elsewhere.

4.08 After-Care Services under the Mental Health Act 1983

Section 117 of the Mental Health Act 1983 places a duty on the Health Authority and the social services authority to provide, in co-operation with relevant voluntary organisations, after-care services for any eligible person. The Act does not specify what after-care services are required, but the Code of Practice (para. 27.5) requires managers in the health service, NHS trusts and Directors of Social Services to ensure that all staff are aware of the care programme approach as laid down in Circular HC(90)23/LASSL(90)11 and the principles set out in the Welsh Office Mental Illness Strategy. (See para. 4.07 above). (As to the background in passing the 'after-care' amendment, see para. 1.11.1 *ante*).

4.08.1 Entitlement to Services

The duty placed on Health Authorities and local social services authorities to provide after-care services relates to persons who are compulsorily admitted to hospital for treatment (s. 3), or under a hospital order (s. 37), or transferred from prison (s. 47 or 48),¹ and then cease to be detained and leave hospital. It should be noted that there are three separate requirements which must be fulfilled:

- (i) the patient must have been compulsorily admitted to hospital under specified provisions of the Act;
- (ii) he must then cease to be detained; and
- (iii) he must leave hospital.

The Mental Health (Patients in the Community) Act 1995 amends section 117 to provide that the duty to provide after care services comes into effect when the patient leaves hospital, whether or not this is immediately after ceasing to be detained. So if a patient is detained under one of the relevant provisions and then becomes an informal patient for a period before leaving hospital, the section 117 duty comes into effect when he leaves hospital.²

4.08.2 Patients "liable to be detained"

There is a certain ambiguity in (ii) above. It is possible to argue that section 117 cannot apply to patients on a leave of absence from

¹ The duty applies in respect of patients who were subject to a hospital order or transfer direction, whether or not an accompanying restriction order or restriction direction was made.

² Mental Health Act 1983, s. 117(1) as amended by the Mental Health (Patients in the Community) Act 1995, s. 2(1), Sch. 1, para. 15.

hospital (s. 17) because they remain liable to be detained. That argument slightly weakens in relation to restricted patients who are conditionally discharged (ss. 42(2), 73, 74), although the statutory language, "liable to recall", is the same for both categories of patient (ss. 17(3), 42(3)). The contrary view is that the words "cease to be detained" should be construed as actually (physically) detained, and not as "liable to be detained". Under this construction, section 117 would apply to a patient on leave of absence or conditionally discharged. Given the fact that in other contexts the Act uses the phrase "liable to be detained",¹ it may be assumed that the distinction is purposeful and, therefore, this latter construction is to be preferred. The Code of Practice (para. 20.4) adopts the more liberal construction of section 117 by stating that the duty to provide after-care applies to patients on leave of absence.

It is clear that by virtue of (iii) above, the duty to provide after-care services does **not** extend to patients who, having been discharged from liability to detention, nevertheless remain in hospital on an informal basis. However, once the patient leaves hospital the section 117 duty is triggered, whether or not this is immediately after ceasing to be detained.²

4.08.3 *Duration of Duty*

The health and social services authorities which have the duty to provide after care services are the authorities for the area in which the person concerned is resident or to which he is sent on discharge from the hospital where he was detained. The two authorities are given a discretion which, so long as it is exercised reasonably, cannot be overridden by the Secretary of State or by a court. However, the duty continues until **both** authorities exercise a judgment (whether exercised jointly or otherwise) that the person no longer stands in need of such services. An order for *mandamus* could conceivably lie to compel either or both authorities to exercise a judgment.

4.08.4 *The Authority Responsible for Providing After-Care Services*

The local social services authority which has a duty to provide after-care services is the authority for the area (or, in the case of the duty of the health authority, the district) in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained. There is no provision in the Act to settle differences of opinion between authorities as to which authority has the duty to provide after-care services.³

¹ See *e.g.* ss. 17(1), (5), 42(2), (5), 56(1). Query, if the intention was to make s. 117 applicable to those no longer physically detained would it be necessary to include the words "and leave hospital"?

² Mental Health Act 1983, s. 117(1) as amended by the Mental Health (Patients in the Community) Act 1995, s. 2(1), Sch. 1, para. 15.

³ *Cf.* letter from Association of Metropolitan Authorities and Association of County Councils to Directors of Social Services (June 11, 1982): *Mental Health Services—Responsibility for Costs of Maintenance in Residential Accommodation*. ACC/15282.

4.08.5 *Discharge of duty to provide aftercare*

Section 117 places a mandatory duty on authorities in unequivocal language. The only discretion placed upon the authorities is in respect of the duration of the duty. In *R. v. Ealing District Health Authority, ex parte Fox*, Otton J viewed section 117(2) as mandatory: "The duty is not only a general duty but a specific duty owed to the applicant to provide him with aftercare services until such time as the district health authority and local social services authority are satisfied that he is no longer in need of such services." Section 117 imposes a "continuing duty" that is triggered at the moment of discharge.¹

A health authority cannot discharge its duty to provide aftercare services merely by consulting administrators and doctors about appropriate follow-up treatment; the authority cannot merely accept the doctors' opinions that aftercare is inappropriate. The authority has an obligation to attempt to provide services with its own resources, or to obtain them from other appropriate health authorities. At a minimum, the health authority should make inquiry of other service providers.

A patient's intervening deterioration in mental health does not relieve the health authority of its obligation to provide after care. In the case of a restricted patient, the health authority should inform the Home Secretary of the deterioration in the patient's condition so that the Home Secretary could consider referring the case back to a Mental Health Review Tribunal under section 71.²

4.08.5A *Enforcement of duty to provide aftercare*

Section 117 creates a statutory duty to provide aftercare, but how is this duty to be enforced? In particular, does the statutory duty to provide aftercare give rise to a private law claim for damages if it is not fulfilled? The Court of Appeal in *Clunis v. Camden and Islington Health Authority*³ held that Parliament did not intend to superimpose a common law duty of care in relation to the performance of the authority's statutory duty to provide aftercare. The primary method of enforcement of the obligations to provide aftercare is by complaint to the Secretary of State. The Secretary of State can hold an authority in default under section 124 if he is of opinion that the functions conferred or imposed under the Act have not been carried out. (See para. 22.20

¹ *R. v. Ealing District Health Authority, ex parte Fox* [1993] 1 WLR 373, 11 BMLR 49. See further para. 18.14A.2 *post*.

² *R. v. Ealing District Health Authority, ex parte Fox* [1993] 1 WLR 373, 11 BMLR 49. In *Campbell v. Secretary of State for the Home Department* [1988] 1 AC 120, 128, Lord Bridge said that if the tribunal defers a direction for conditional discharge under section 71(7), they have no power to reopen the issue; the authorities may be compelled to discharge a patient whose condition has deteriorated since the tribunal first considered the matter. The Home Secretary certainly has the power, when a deterioration in the condition of the patient is brought to his attention, to forestall the patient's discharge by referring the patient's case to the tribunal afresh. See para. 18.14A *post*.

³ *The Independent* 9 December 1997, *The Times* 10 December 1997 (Transcript: Smith Bernal).

post.) Relying on *X v. Bedfordshire*,¹ the Court found that since the ambit of the obligations under section 117 are quite broad (including voluntary services) and there is no traditional doctor/patient relationship, it would be unfair to impose liability.

4.08.6 *An after-care plan: practice pointers*

The goal of after-care is to enable a patient to return to his home and to provide an array of services to support him in independent living and full participation in the community. Health and social services authorities, in cooperation with voluntary organisations, should establish procedures for achieving this goal. Proper records in the form of a register should be kept, and after-care arrangements made, for all patients to whom section 117 applies. The Code of Practice states that Managers in the health service, NHS Trusts and Directors of Social Services should ensure that all staff are aware of the care programme approach.²

A multidisciplinary team should devise a written after-care plan designed to meet the patient's individual needs. The persons involved in preparing the plan should include the RMO, a nurse who cared for the patient in hospital, a social worker specialising in mental health, the GP, a CPN, relevant voluntary organisations, a person (*e.g.* relative, friend, or representative) nominated by the patient, and, where appropriate, the housing authority.

The individual after-care plan should take account of the views of the patient, of others close to the patient, and relevant agencies such as the health authority and probation service. The plan should be based upon a multidisciplinary assessment of the patient's needs in the community, including housing, day care, out-patient treatment, counselling, personal support, advocacy in obtaining welfare rights, assistance in managing finances and claiming benefits. A key worker should be appointed to monitor the implementation, of the plan, and to keep it under continued review. (Code of Practice, paras. 27.1-27.11)

4.09 Powers of Entry and Inspection

4.09.1 *By Approved Social Worker*

An approved social worker of a local social services authority may at all reasonable times enter and inspect any premises (not being a hospital) in the area of that authority in which a mentally disordered patient is living, if he has reasonable cause to believe that the patient is not under proper care. Before entering such premises he must, if asked to do so, produce a duly authenticated document showing that he is an approved social worker.³ Any person who without reasonable cause refuses to allow the inspection of any such premises, or who otherwise obstructs the approved social worker in the exercise of his

¹ [1995] 2 AC 633, [1995] 3 ALL ER 353.

² As laid down in Circular HC(90)23/LASSL(90)11.

³ Mental Health Act 1983, s. 115.

functions, is guilty of an offence.¹ A local social services authority may institute proceedings for any such offence.²

4.09.2 *By a Duly Authorised Officer of the Secretary of State*

A duly authorised officer of the Secretary of State may enter any premises provided under Part III of the National Assistance Act,³ or used as a residential care home.⁴ In the exercise of these powers the officer may examine documents which he considers necessary to enable him properly to exercise his powers. If so required, he must produce some duly authenticated document showing his authority.

4.09.3 *By a Person Authorised by a Local Authority*

Where accommodation is being provided in any premises managed by a voluntary organisation or in a disabled person's or old people's home, in accordance with arrangements made by a local authority, any person authorised by that authority may at all reasonable times enter and inspect the premises.⁵

4.10 Miscellaneous Functions of Local Social Services Authorities

4.10.1 *Approved Social Workers*

A local social services authority is under a duty to appoint a sufficient number of approved social workers for the purpose of discharging functions conferred on them by the Mental Health Act 1983.⁶ As to the need for a 24 hour ASW service, see para. 7.11 *post*. As to the duty of a social services authority to direct an ASW to consider making an application for admission, see para. 7.17 *post*.

4.10.2 *Welfare of Certain Hospital Patients*

Where certain patients⁷ are admitted to hospital or nursing home in England or Wales then the authority must arrange for visits to be made to him on behalf of the authority, and must also take such other steps as would be expected to be taken by the parents of a child in a hospital or nursing home.⁸ Note that this applies to certain patients admitted to any hospital or nursing home (not necessarily a mental illness or mental handicap hospital or a mental nursing home) whether for treatment of mental disorder or for any other reason.

¹ *Ibid.*, s. 129(1)(a), (d). A person guilty of such an offence is liable to a maximum three months imprisonment and/or a fine not exceeding level 4 on the standard scale (s. 129(3)). See further para. 25.05 *post*.

² *Ibid.*, s. 130.

³ See National Assistance (Powers of Inspection) Regulations 1948, S.I. 1948 No. 1445, regs. 3 and 4 (amended by S.I. 1963 No. 1991).

⁴ Registered Homes Act 1984, s. 17. See para. 5.14.1 *post*.

⁵ National Assistance Act 1948, s. 26(5).

⁶ Mental Health Act 1983, s. 114. See further LAC(83)7 and paras. 7.04–7.05 *post*.

⁷ That is, children or young persons where the rights of a parent are vested in a local authority; persons subject to the guardianship of an authority under s. 7 or s. 37 of the 1983 Act; and persons for whom an authority is acting as nearest relative under s. 26 of the Act.

⁸ Mental Health Act 1983, s. 116. Note, the duty to arrange for visits (not necessarily by an approved social worker) lies with the authority.

B. HOUSING

4.11 Introduction

Department of Health and Social Security statistics on reasons for admission to mental illness and mental handicap hospitals show that substantial numbers of people are admitted to hospital primarily for domiciliary and social reasons. They may then remain in hospital for prolonged periods while suitable accommodation and facilities are sought. The hospital, therefore, has had a distinct "hotel" or "asylum" function, providing lodgings for vulnerable people with no home to go to.

The previous section considered, *inter alia*, the powers and duties of local social services authorities to provide residential accommodation for mentally disordered people. The primary purpose of such accommodation is to provide care and support for the residents. This section concerns the provision of accommodation intended primarily to meet ordinary housing needs. Local housing authorities must review the housing needs in their areas; they can provide housing accommodation and certain accompanying services (see further para. 4.12 below). They also have a duty to house homeless persons and persons threatened with homelessness if they have a priority need which includes mental illness or mental handicap. (See further paras. 4.13 and 4.14 below.)

The Housing Corporation is a government agency which promotes, finances and supervises registered housing associations. Registered housing associations are non-profit making bodies managed by a voluntary committee of which there are more than 3,000 nationally. They provide a supplementary resource to local authorities, especially in stress areas and in relation to those with special needs such as the elderly, physically disabled, mentally ill and mentally handicapped.¹ (See further paras. 4.15–4.16 below.)

¹ For practical guidance on housing projects suitable for mentally disordered people see C. Heginbotham (1981) *Housing Projects for Mentally Handicapped People*. Centre on Environment for the Handicapped, London; C. Heginbotham (1980) *Housing for Mentally Handicapped People*, Royal Society for Mentally Handicapped Children and Adults, London; Housing Corporation (1979) *Accommodation Options for Mentally Handicapped People—Occasional Briefing Notes*, OBN7, Housing Corporation, London; S. Etherington (1983) *Housing and Mental Health: A Guide for Housing Workers*, MIND/Circle 33, London; Social and Community Planning Research (1983) *Housing for Mentally Ill and Mentally Handicapped People*, Department of the Environment, London.

4.12 General Housing Obligations

4.12.1 *Definition of Local Housing Authority*

For the purposes of the Housing Act 1985 local housing authority means the council of a district or London borough or the Common Council of the City of London.¹

4.12.2 *Review of Housing Needs*

It is the duty of every local housing authority to consider housing conditions in its district and the needs of the district with respect to the provision of further housing accommodation.² A local authority, in considering the housing needs of its district, must have regard to the special needs of chronically sick and disabled persons.³ Local authorities must periodically review the housing information brought to their notice by their own officers or otherwise. (s. 8(2))

4.12.3 *Provision of Accommodation and Accompanying Services*

A local authority may provide housing accommodation by erection of houses on land acquired or appropriated by it, conversion of buildings into houses, or acquiring houses. (s. 9(1)) A local authority's power to provide housing accommodation includes the power to fit out and furnish the accommodation, (s. 10) and to provide meals, refreshments, laundry facilities and services. (s. 11) The authority may, with the consent of the Secretary of State for the Environment, also provide along with housing accommodation, shops, recreational grounds and other land or buildings to benefit the occupants. (s. 12)

4.12.4 *Enforcement of Duties and Investigation of Complaints*

The powers of the Secretary of State for the Environment to hold a local housing authority in default for failure to fulfil its statutory duties have been repealed.⁴ *Mandamus* would be available to compel housing authorities to carry out the statutory reviews of their housing performance and functions. While a court might compel an authority to undertake a review required by statute, it would be unlikely to order any particular mode of discharge of housing authority functions.⁵

¹ s. 1. References in this section are to the Housing Act 1985 unless otherwise stated.

² s 8(1). The needs of persons in adjacent districts who could conveniently be housed within a local authority area must also be taken into account. *Watson v. Minister of Local Government and Planning* [1951] 2 K.B. 779, [1951] 2 All E.R. 664.

³ Chronically Sick and Disabled Persons Act 1970, s. 3(1); Housing Act 1980, s. 152, Sch. 25, para. 22.

⁴ Housing Act 1957., ss. 171–176 (repealed by Local Government Act 1972, s. 193(2), Sch. 22, para. 18).

⁵ See *Hall v. Manchester Corpn.* (1915) 84 L.J. Ch. 732 per Lord Atkinson, at 741.

4.13 Homeless Persons

A local housing authority has a duty to house homeless persons under Part III of the Housing Act 1985¹ if it is satisfied that the person is homeless or threatened with homelessness, in priority need of accommodation (mentally ill and handicapped people are included) and did not become homeless intentionally. Other homeless persons may be entitled to advice and assistance.²

The House of Lords in *Puhlhofer v. Hillingdon London Borough Council*³ diluted the importance of the homeless persons provisions

¹ Housing and social services authorities must have regard to guidance given by the Secretaries of State for the Environment, Social Services and for Wales. See *Housing (Homeless Persons) Act 1977: Code of Guidance (England and Wales)* (1977) HMSO, London. Authorities are not bound by the Code in the same way as they are bound to comply with the Act. *De Falco v. Crawley Borough Council* [1980] Q.B. 460; [1980] 1 All E.R. 913, C.A. All future references to the *Code of Guidance* in this section are to the 1977 Code.

² See generally, A. Arden (1983) *The Homeless Persons Act*. Legal Action Group, London; A. Arden (1983) *Manual of Housing Law*, chap. 10, Sweet and Maxwell, London.

³ [1986] 1 All E.R. 467.

by holding that accommodation did not have to be “appropriate” or “reasonable” for the purposes of the Housing Act 1985. Accordingly, an applicant living in unfit or overcrowded accommodation would not qualify as being “homeless”. The *Puhlhofer* problems were corrected by section 14 of the Housing and Planning Act 1986 which provides that a person shall not be treated as having accommodation unless it would be reasonable for him to continue to occupy it.¹

4.13.1 *Homelessness and Threatened Homelessness*

Generally, a person is **homeless** if there is no accommodation which he (together with any other person who normally resides with him as a member of his family² or in circumstances in which the housing authority considers it reasonable for that person to reside with him) is legally entitled to occupy; or, if he has accommodation but he cannot secure entry to it; or it is probable that occupation will lead to violence from some other person residing in it. A person is **threatened with homelessness** when it is likely that he will become homeless within twenty-eight days. (s. 58).

It is for the housing authority to decide on the facts whether a person is homeless.³ Yet, a housing authority cannot construe purely temporary, emergency accommodation (*e.g.* a woman temporarily housed in a refuge hostel⁴ or a man who slept on a day-by-day basis in a night shelter)⁵ as a home for the purposes of the 1977 Act.⁶

4.13.2 *Priority Need*

A person has priority need for accommodation when the housing authority is satisfied, *inter alia*, that:

- (i) he has dependent children residing with him or who might reasonably be expected to reside with him;
- (ii) she or anyone residing or reasonably expected to reside with the applicant is pregnant;
- (iii) he or anyone residing or reasonably expected to reside with him is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason.⁷

¹ See Hoath (1988) Homelessness Law after the Housing and Planning Act 1986: The “Puhlhofer” Amendments, *J. Soc. Wel. L.*, no. 1, p. 39.

² “Family” applies not only where there is a blood or marriage relationship but also other circumstances where people live together as if they were family members—*e.g.*, cohabitating couples, old or disabled persons with housekeepers or companions. *Code of Guidance*, para. 2.8.

³ *R.v. Beverley Borough Council, ex parte McPhee* [1979] J.P.L. 94, D.C.

⁴ *R.v. Ealing London Borough Council, ex parte Sidhu* (1982) 80 L.G.R. 534; (1982) 2 H.L.R. 41.

⁵ *R.v. Waveney District Council, ex parte Bowers* [1982] 3 W.L.R. 661; (1982) 4 H.L.R. 118; [1982] 3 All E.R. 727, C.A.

⁶ *Din v. London Borough of Wandsworth* [1981] 3 W.L.R. 918; [1981] 3 All E.R. 881; 125 S.J. 828, H.L.

⁷ s. 59. Note, the Act refers to mental illness or handicap (not “mental disorder”); neither term is defined in the Mental Health Act 1983.

The latter category includes those who are substantially disabled mentally or physically. Vulnerability as a result of "special reason" means "less able to fend for oneself so that injury and detriment will result when a less vulnerable man will be able to cope without harmful effects."¹

4.13.3 *Intentional Homelessness*

A person becomes homeless intentionally if he deliberately does, or fails to do, anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy. Being threatened with homelessness intentionally is similarly defined, and there is no distinction in principle between the two concepts.² An act or omission in good faith on the part of a person unaware of a relevant fact is not intentional homelessness (s. 60).

Before an authority can properly hold that a person made himself intentionally homeless it must find that each of the limbs of the definition are fulfilled: something must be done or omitted **deliberately**, which must have **caused** homelessness; the lost accommodation must have been **available** for the person; and it must have been **reasonable** for the person to remain in occupation.³

4.13.4 *Inquiries into Possible Homelessness*

If a person applies to a housing authority for accommodation or assistance in obtaining it and the authority has reason to believe that he may be homeless or threatened with homelessness, it must make such inquiries as are necessary to satisfy itself whether the person is homeless or threatened with homelessness; and, if so satisfied, make any further inquiries as to whether he has a priority need and whether he became homeless intentionally (s. 62). On completing its inquiries the authority must notify the applicant of its decision (s. 64).

4.13.5 *Housing Authority Duties*

If a housing authority has reason to believe that an applicant⁴ may be homeless and have a priority need it must secure that accommodation is made available for his occupation pending the results of its inquiries (s. 63). If, as a result of its inquiries, it is satisfied that the applicant is homeless or threatened with homelessness, the authority has a duty towards him, the nature of which depends upon the results of the inquiries (s. 65):

¹ *R.v. Waveney District Council, ex parte Bowers*, [1982] 3 W.L.R. 661.

² *Dyson v. Kerrier District Council*, [1980] 1 W.L.R. 1205; (1980) 124 S.J. 497; [1980] 3 All E.R. 313, C.A.

³ On the issue of intentional homelessness see *R. v. Hillingdon London Borough Council, ex parte Islam; Re Islam (Taffazzul)*, [1981] 3 W.L.R. 942; [1981] 3 All E.R. 901; *R. v. Knowsley Borough Council, ex parte Bowen*, Q.B.D., CO/44/91 (Transcript: Marten Walsh Cherer) 4 June 1992.

⁴ The duties of the authority are not only to the applicant, but also to any person with whom he might reasonably be expected to reside (s. 75).

4.13.5

LOCAL AUTHORITY SERVICES AND FUNCTIONS

- (i) if satisfied that the applicant is homeless or threatened with homelessness, but not in priority need, its duty is only to provide advice and appropriate assistance;
- (ii) if satisfied that the applicant is homeless and in priority need, but that he has become homeless intentionally, its duty is to provide advice and appropriate assistance and to secure that temporary accommodation is secured for his occupation for such period as will give him a reasonable opportunity to find accommodation for himself;
- (iii) if satisfied that the applicant is homeless, in priority need and that he did not become homeless intentionally, it is under a permanent obligation to secure that accommodation is made available for his occupation.

The authority's duty to secure that accommodation is made available does not require it to provide its own accommodation under Part III of the Housing Act 1985. It can also secure that he obtains housing from some other person or body such as a housing association, a voluntary organisation, a private landlord or a social services authority.¹ However, the housing that is provided to the homeless person must be "suitable". In determining "suitability", the authority must have regard to Parts IX (slum clearance), X (overcrowding) and XI (multiple occupation) of the Housing and Planning Act 1986.² The authority must also examine whether the accommodation is suitable for the person who is homeless, considering his or her personal and family circumstances. The accommodation may not be suitable simply because it is in an acceptable condition. The authority must take account of the person's social, emotional and mental condition.³

4.13.6 *Local Connections*

Where an authority would otherwise be under an obligation to secure accommodation for a homeless person, it can transfer that responsibility to another authority under the following circumstances. It must be of the opinion that no member of the applicant's household has a local connection with its area; at least one member of the household has a local connection with another area; and no member of the household will run the risk of domestic violence in that other area. In these circumstances it can notify another authority of the application and, if that authority agrees, the duty to secure accommodation passes to it (s. 67). Any dispute between authorities must be determined by agreement between them, or according to procedures adopted by the local authority associations. In default of such agreement it will be determined by the Secretary of State for the Environment. Until

¹ See *Code of Guidance*, para. 4.4, for use of social services accommodation to fulfil a permanent housing obligation.

² Housing and Planning Act 1986, s. 14.

³ *R. v. London Borough of Brent, ex-parte Omar*, (1991) 23 H.L.R. 446, Q.B.D.; *R. v. London Borough of Lewisham, ex parte Dolan* (1992) 25 H.L.R. 68, Q.B.D.

responsibility is determined, the notifying authority must secure that accommodation is made available. If a person has no local connection with the area of any housing authority, the duty to secure accommodation rests with the authority to which he applies.¹

4.13.7 *Co-operation Between Authorities*

A housing authority may request, *inter alia*, a housing association, another housing authority or a local social services authority to assist it in the discharge of its functions. Such co-operation includes, on the part of the local social services authority, prevention (informing the housing authority of the possibility of homelessness at an early stage); crisis intervention and other emergency services; and making available social services accommodation.²

4.14 **Application of Homeless Persons provisions to Mentally Disordered Persons**

Part III of the Housing Act 1985 is a potentially important statute for mentally disordered people, particularly where there is no medical need to remain in hospital and where the institution serves primarily a social or domiciliary purpose. There are several issues which arise in the construction of the 1985 Act.

4.14.1 *Homelessness*

It is arguable that the term "homelessness" could include patients who remain in institutional care only because there is no alternative accommodation in the community—*i.e.* what could be called "hidden homeless". However, until a patient is actually discharged he would have an express or implied licence to occupy the accommodation in the hospital and would be unlikely to be regarded as homeless under section 58 of the 1985 Act. The Code of Guidance states that "people may become homeless on being discharged from hospital or prison" (para. A1.11), suggesting that they are not considered homeless until discharged.

4.14.2 *Threatened with homelessness*

A patient could be regarded as threatened with homelessness if he is likely to be discharged from hospital within twenty-eight days (s. 58(4)). Authorities should be prepared to advise and assist people where the possibility of becoming homeless is known more than twenty-eight days in advance.³ Given the need for careful planning for the discharge of a patient from hospital, local housing and local social services authorities should co-operate well in advance of the proposed date of discharge to ensure that sufficient housing and after-care arrangements are made.⁴

¹ *R. v. Hillingdon Borough Council, ex parte Streeting*, [1981] 1 W.L.R. 1430; [1980] 3 All E.R. 417, C.A. See *Code of Guidance*, para. 5.5.

² *Code of Guidance*, para. 7.5.

³ *Code of Guidance*, para. 2.11.

⁴ *Ibid.*, paras. 7.5, A.4.1–A.4.2.

4.14.3 *Intentional homelessness*

A reasonable justification for discharge, or a threat of discharge, must exist in order to avoid the conclusion that the person rendered himself intentionally homeless. A compulsorily detained patient is, or is threatened with, homelessness if his liability to detention is, or will be, discharged or expired. The patient would have to declare an intention not to remain in hospital on an informal basis and, arguably, the hospital would have to regard continued residence as undesirable. It would be difficult in these circumstances to conclude that the patient rendered himself intentionally homeless for it could not be said to be reasonable for a person to continue to occupy a hospital bed when the medical need for it has ended.¹ It is for the housing authority to satisfy itself whether the person is homeless or threatened with homelessness intentionally; the burden does not rest with the applicant.²

The legal issues are finer where informal patients are concerned. Self-discharge against medical advice could be regarded as intentional homelessness. Discharge by the consultant of an otherwise homeless patient unambiguously brings about unintentional homelessness; however, this is something doctors might refrain from doing for fear of having their intentions misinterpreted. The question arises whether an informal patient who no longer required treatment in hospital could discharge himself. It would not appear to be reasonable for a patient to remain in hospital if it were not medically indicated, particularly as research suggests that continued residence in an institution can heighten a person's social disabilities.³ It is likely that a housing authority might require some evidence from the doctor clarifying the medical position.⁴

4.14.4 *Incapacity to manage affairs*

A mentally disordered person who has lost his home in the community, for example, for failure to pay his rent or mortgage, due to an incapacity to manage his affairs will not be regarded as having made himself intentionally homeless.⁵

In *R v Tower Hamlets LBC ex parte Begum* [1993] 1 All ER 447 applications for priority need housing were made on behalf of two mentally handicapped adults. In both cases earlier applications by the applicants' parents had been rejected on grounds of intentional homelessness. The local authority also rejected applications made sub-

¹ Whether a person discharged by operation of law (Mental Health Act 1983, s. 18(4); see para. 11.14 *post*) is intentionally homeless is unclear. Is it reasonable for a person to be in hospital when Parliament has determined that, following a period of unauthorised absence from hospital, the liability for detention should lapse?

² *Code of Guidance*, para. 2.19.

³ J. Wing and G. Brown (1979) *Institutionalism and Schizophrenia*, Tavistock, London.

⁴ *Code of Guidance*, para. A.1.11. recommends that health authorities should give early warning of the impending discharge of patients with nowhere to live.

⁵ *Ibid.*, para. 2.15.

sequently by the applicants themselves, because they lacked the mental capacity to make or to acquiesce in an application for housing, and that their purported applications were only a device to get round the finding that the families were intentionally homeless. The local authority further argued that those incapable of making an application themselves did not come within the 1985 Act. Their needs fell to be met under s. 21(1)(a) of the National Assistance Act 1948 which authorises a local authority to make arrangements for persons aged eighteen or over who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them. The National Assistance Act is administered by social services authorities.

Although Rose J accepted the authority's argument on the grounds that the word "application" prima facie involved knowledge on the part of the applicant that an application is being made, the Court of Appeal rejected this interpretation in favour of a more purposive approach, unanimously granting the applicants' appeals, and holding that there was nothing in the Act to demonstrate that there was a hurdle of mental capacity to be surmounted before an application could be accepted. The purpose of the legislation was to include those with mental illness or mental handicap without reference to a definable cut-off point of mental capacity. An application can be made under s. 59(1)(c) by a person with capacity to make it, or by another with the consent of the applicant, or by someone on behalf of a person who is entitled to make an application but is unable through mental incapacity to make or consent to the making of an application. The person making an application on behalf of an incapacitated person must demonstrate that he or she has reasonable grounds for making it and that he is acting bona fide in the incapacitated person's interests.

The Court of Appeal recognised the important practical difference between residential accommodation provided by social services authorities for the person in need him or herself under the 1948 Act and housing under the 1985 Act where there was an obligation under s. 75 to house not only the applicant, but also members of his family who come within the definition of "any other person who might reasonably be expected to reside with him." As the court also recognised, with the shift to community care the importance of adequate and secure housing for families who have to look after mentally vulnerable members should not be underestimated.

The House of Lords allowed the local authority's appeal in *Garlick v. Oldham Metropolitan Borough Council and related appeals* [1993] 2 All ER 65. Lord Griffiths delivered the leading judgment, holding that it was implicit in the provisions of the 1985 Act that a local authority's duty to make an offer of permanent accommodation was only owed to those who had the capacity to understand and respond to such an offer, and, if they accepted it, to undertake the responsibilities involved. People who were incapable in this sense were "protected" by s. 21 of

the National Assistance Act 1948. A decision by a local housing authority that that a particular applicant lacks the capacity to make an application because he cannot understand or act upon an offer of accommodation could be challenged on judicial review, only if it could be said to be *Wednesbury* unreasonable. If the carer of a person who was vulnerable by reason of mental incapacity became *unintentionally* homeless, s. 59(c) gave him the status of priority need and he would qualify for an offer of accommodation which would enable him to continue to look after the vulnerable person. Lord Slynn dissented, declining, like the Court of Appeal, to read into the statute a requirement of capacity which was not spelt out therein.

4.14.5 *Priority Need*

It might wrongly be assumed that, if the medical need for treatment in hospital has ended, the person cannot have a priority need due

to vulnerability as a result of mental illness or handicap or other special reason (s. 59(1)). However, it should be possible to establish that a person, even if he were no longer diagnosed as mentally ill or handicapped, was in priority need if he retained a marked social handicap resulting, for example, from prolonged residence in an institution. Housing authorities are advised to take a wide and flexible view of what constitutes substantial disability. The help of the district health authority and social services authority may be appropriate for the purposes of assessment.¹

4.14.6 *Local connection*

A patient in hospital for many years may have difficulty establishing a local connection with any particular housing authority. A compulsorily detained patient will not normally have a local connection with the authority in which the hospital is situated solely by reason of confinement in the hospital. It may follow that an **informal** patient can claim a local connection with the area where he is receiving treatment for a period of time.

Establishing a local connection should not pose a problem for an otherwise homeless patient: the duty to secure accommodation can be transferred to an authority where the patient has a local connection; or, in the absence of a local connection with any authority, the duty rests with the authority to which the patient applies. (See para. 4.13.6 above).

4.14.7 *Protection of personal property*

Section 70 of the 1985 Act requires housing authorities in certain circumstances to protect the personal property of certain groups of homeless people. A mentally disordered person may qualify for this protection after he has applied to the authority. The authority must have reason to believe that there is a danger that his personal property may be damaged or lost because he is unable to protect or deal with it, and that no other suitable arrangements have been made.²

4.15 The Housing Corporation

The Housing Corporation is established under Part III of the Housing Associations Act 1985 to promote and assist the development of registered housing associations; facilitate and publicise the proper exercise and performance of the functions, aims and principles of such associations; establish and maintain a register of housing associations

¹ *Ibid.*, para. 2.12(c)(ii). See *R. v. Waveney District Council, ex parte Bowers*, [1982] 3 W.L.R. 661.

² *Code of Guidance*, paras. 8.1-8.7.

4.15

LOCAL AUTHORITY SERVICES AND FUNCTIONS

and exercise supervision and control over them; and undertake, to the extent it considers necessary, the provision of dwellings and of hostels.

4.16 Housing Associations

A housing association is a society, body of trustees or company which does not trade for profit, which is established for the purpose of constructing, improving, managing, facilitating or encouraging the construction or improvement of houses.¹

4.16.1 *Promotion and Assistance of Housing Associations by Local Authorities*

A local authority for the purpose of securing the provision of housing accommodation may promote the formation or extension of, or may assist, a housing association. The general powers of local authorities to sell or lease houses may be used to help provide housing associations with houses. The powers of housing associations themselves to acquire, build or in other ways provide houses are derived from their constitutions rather than from express statutory provision.

4.16.2 *Financial Assistance*

Among the kinds of financial assistance which may be available for housing associations are a grant or loan by a local authority to assist it; a loan by the Housing Corporation; and a housing association grant by the Secretary of State for the Environment.² Housing association grant is payable to any registered housing association undertaking a project which is approved for that purpose by the Secretary of State. The grant is equal to the net cost of the project (*i.e.*, to meet the gap between income from rents and the costs of the project). The Secretary of State may also, at his discretion, provide a grant towards the annual revenue deficits of registered housing associations.

4.16.3 *"Joint Funding" Arrangements*

Registered housing associations can provide hostel accommodation that gives a substantial degree of care to tenants, provided that

¹ Housing Associations Act 1985. The National Federation of Housing Associations (86 Strand, London WC2R OEG) was established to promote, advise and assist housing associations.

² As to finance of Housing Associations see generally Part II of the Housing Associations Act 1985.

the additional "caring" costs above the normal hostel allowances are met by other statutory bodies or from charitable sources. Projects under these "joint funding" arrangements—*i.e.* where local social services authorities or recognised voluntary organisations make "topping-up" contributions in respect of management costs of a supportive nature—are eligible for housing association grant. Projects that are not eligible for grant are those required to be registered under the Registered Homes Act 1984 (see Chapter 5), or are clearly designed to provide accommodation involving an intensive degree of care and support—for example, where social services authorities are empowered to assume responsibility for the fees of individual residents under the National Assistance Act 1948 (s. 21(1)) or the National Health Service Act 1977 (s. 21(1)).¹

All grant-aided projects should reflect the government housing priorities indicated in the annual Approved Development Programme for the Housing Corporation;² priorities for local authority housing investment, including lending to housing associations, are indicated in the Secretary of State's annual letter on Housing Investment Programmes.³ The range of accommodation which can be provided include hostels, group homes, individual lettings and clusters of bedsits or flatlets.

4.17 Planning Permission

Mentally disordered people often have special needs sometimes requiring accommodation with special design and/or with multiple occupation. This may require building property or adapting existing structures. This form of development could require planning permission from the local planning authority.⁴

If a "development"⁵ is planned the developer must obtain planning permission from the local planning authority unless permission is auto-

¹ Housing Corporation Circular 1/77: Joint Funding Arrangements for Caring Hostel Projects.

² For the Approved Development Programme 1983/84, £75 million (12% of net allocation) was allocated for sheltered housing, hostels, and special design accommodation for the elderly, disabled, mentally ill and mentally handicapped.

³ Department of Environment Circular 14/83, Annex 1, para. 2.

⁴ Town and Country Planning Act 1990, s. 57. Planning legislation is now consolidated in the Town and Country Planning Act 1990, the Planning (List Buildings and Conservation Areas) Act 1990 and the Planning (Hazardous Substances) Act 1990 and the Planning (Consequential Provisions) Act 1990, which together are known as "the planning acts".

⁵ Development is defined in s. 55 of the 1990 Act as the carrying out of building, engineering, mining or other operations in, on, and over or under land, or the making of any "material change" in the use of any buildings or other land. The use as two or more separate dwelling houses of any building previously used as a single dwelling is a material change in use (s. 55(3)(a)). See *Birmingham Corporation v. Minister of Housing and Local Government and Habib Ullah* [1964] 1 Q.B. 178; *Neale v. Del Soto* [1945] K.B. 144, C.A.; *Cole v. Harris* (1945) K.B. 474, C.A.

matically granted by the General Development Order 1988.¹ If permission is refused or granted subject to conditions unacceptable to the applicant then he has the right to appeal to the Secretary of State under s. 78(1) of the 1990 Act. The Act (s. 79(7), Sch. 6) provides for appeals from a planning decision to be heard and determined by an Inspector appointed by the Secretary of State.² The decision of the Secretary of State can be challenged by the “aggrieved person” within six weeks in the High Court on a point of law.³

4.17.1 *Restrictions on Development on “Green Belt” Land*

Planning permission may be difficult if the accommodation is to be situated in a rural or “green belt” area,⁴ which can often be the case if development is to be undertaken near a mental illness or mental handicap hospital. Hospitals were traditionally built away from centres of urban population, and are frequently to be found in “green belt” or rural areas.

In *Brent and Harrow Area Health Authority and Praetorian Housing Limited*, the Inspector upheld an appeal against the decision of the Hertsmeare Borough Council to refuse outline planning permission for ten two-person flats on land at Shenleybury Farm Villa, adjacent to Shenley Hospital, a mental illness hospital. The issue determined was whether there were special circumstances which were sufficient to override the presumption against residential development in the Metropolitan Green Belt. The Inspector determined that the accommodation would provide an essential step between hospital and everyday society for Shenley patients who no longer required hospital care, but who were not prepared to meet the full responsibilities and demands entailed by a discharge into the open community: “I am of the opinion that accommodation nearby [the hospital] for the rehabilitation of former patients is a special need in this case and an exception should be made to the normal location of such accommodation in an urban area.”⁵

4.17.2 *Restrictive Covenants*

The objective of the government’s “*Care in the Community*” policy is to enable persons who have suffered from mental disorder to

¹ S.I. 1988 No. 1813. The “Development Control Policy Notes” published by the Department of the Environment provide guidance as to planning policy.

² The procedure is governed by the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules 1988, S.I. 1988, No. 954.

³ Town and Country Planning Act 1990, s. 284(3), 288(1)(3)(4). See, *J. Sainsbury Ltd. v. Secretary of State for the Environment and Colchester Borough Council* [1978] J.P.L. 379; *J. J. Steeples v. Derbyshire County Council* [1981] J.P.L. 582.

⁴ Green Belt (London and Home Counties) Act 1938. See *Halsbury’s Laws of England* (1980; 4th ed.) Open Spaces and Historic Buildings, vol. 34, paras. 544–561, Butterworths, London.

⁵ Application No. 0/532/78. Decision of the Inspector under the 1971 Act, s. 36, Sch. 9, August 21, 1979.

leave hospital and to live in the community as independently as possible. Pursuant to this community care policy, the Secretary of State for Health purchased private dwelling homes to be occupied by former in-patients of a nearby hospital. The residents were treated and rehabilitated by the National Health Service with a view to a full return to the community.

In *C & G Homes Ltd. v. Secretary of State for Health*¹ the question arose whether this use of a private dwelling home was a breach of restrictive covenants contained in the transfer of the properties to the Secretary for Health—whether the use was as a “private dwelling house” only and whether the use constituted a “nuisance, annoyance, danger, or detriment.” The Court of Appeal held that the use of the home would be a breach of the “private dwelling house” covenant, but not the “nuisance, annoyance or detriment” covenant.

In many respects the *C & G Homes* case met the requirements for use as a private dwelling: the residents determined the composition of their group, and shared domestic duties and decisions; the number of occupants in each house was small, not more than four; the relationship between them was that of a group of friends or associates, and the occupants made no payment for their board. The Court of Appeal, however, chose to emphasise the facts that the house was owned by the Secretary of State who was responsible for the residents’ continuing care, and that a staff member providing care and support was present in the house.

The Court of Appeal found no breach of the second covenant, banning acts or things which cause “annoyance, damage or detriment.” The impaired marketability of other homes in the development was an insufficient reason for a finding of a breach of this covenant.

The Court of Appeal’s narrow conception of a private dwelling house may pose obstacles to health and social services authorities in planning living arrangements for persons with mental illness or mental handicap in the community. These living arrangements are a critically important component in enabling patients to live a more normal and independent life in the community.

¹ [1991] 2 W.L.R. 715, CA.

4.17.2

LOCAL AUTHORITY SERVICES AND FUNCTIONS

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C. EDUCATION

4.18 Background

4.18.1 *Transfer of Responsibilities to Local Education Authorities*

The Education Act 1944 allowed local education authorities to avoid their responsibilities for providing education to severely mentally handicapped children. Section 57 laid a duty on authorities to ascertain which children in their areas were "unsuitable for education at school." Such children were generally regarded as ineducable and their treatment, care and training were the responsibility of local health authorities.

Local health authorities lost the power to provide training for mentally handicapped children under section 1 of the Education (Handicapped Children) Act 1970. The duty to provide education, together with staff and premises, now rests with local education authorities.¹ The Department of Education and Science clarified the 1970 Act by stating that "no child within the age limits for education . . . will be outside the scope of the educational system."²

4.18.2 *Classification of Children*

The 1944 Act provided for education authorities to identify any child needing special education by classifying him into one of the categories of handicap defined by the Secretary of State. These formal categories included educationally subnormal (ESN) pupils.³ In practice, two broad groupings emerged within the educationally subnormal category: moderate—ESN(M), and severe—ESN(S). The ESN categories have now been abolished (see para. 4.18.4 below).

4.18.3 *Integration of Handicapped Children in Ordinary Schools*

Section 10 of the Education Act 1976 required local education authorities to arrange for the special education of all handicapped pupils to be given in ordinary schools, except where this was incompatible with efficient instruction in the schools or involved unreasonable expenditure. The provision, however, was never implemented by the Secretary of State. The case for integrated education is that the handicapped person is entitled to education within a normal school environment, reflecting the normal diversity and problems in society, in order to prepare for participation and integration within the community. Integration is also thought to be beneficial for non-handicapped pupils

¹ DHSS (1980) *Mental Handicap: Progress, Problems and Priorities*, Appendix D.

² Department of Education and Science Circular 15/70. See Gostin, *The Law Relating to Mental Handicap in England and Wales*, in *Tredgold's Mental Retardation* 280-83 (Craft, M., ed.; 12th ed., 1979) Ballière Tindall, London.

³ Handicapped Pupils and Special Schools Regulations 1959, S.I. 1959 No. 365 (repealed).

4.18.3

LOCAL AUTHORITY SERVICES AND FUNCTIONS

to help them overcome their inhibitions and lack of knowledge about handicapped people, and to provide early experience in relating to handicapped pupils as people first. Section 160 of the Education Act 1993 places a duty on anyone exercising any functions in respect of a child with special educational needs who should be educated in a school to secure that the child is educated in a school which is not a special school unless that is incompatible with the wishes of his parent. This is a qualified duty and only applies if educating the child in a mainstream school is compatible with: (a) his receiving the special educational provision which his learning difficulty calls for; (b) the provision of efficient education for the children with whom he will be educated; and (c) the efficient use of resources see further para. 4.29 below.

4.18.4 *The Warnock Report*

The Committee of Enquiry into the Education of Handicapped Children and Young People (chairman: Mary Warnock) reported in 1978.¹ It recommended that the planning of services should be based upon the assumption that one in five children at some time in their school career will require some form of special educational provision. This would considerably widen the scope of those for whom special education could be provided.

The Committee considered that the statutory classification of handicapped pupils as educationally subnormal (ESN) provided an indelible and inflexible label which unnecessarily stigmatised the child, and drew a sharp distinction between handicapped and non-handicapped children. The Committee's central recommendation, therefore, was that special education should be conceived in terms of children with "special educational needs" calling for "special educational provision", rather than of defined categories of handicap. The term "children with learning disabilities" should be used to describe mentally handicapped people and those with education difficulties.

The categorisation of a handicap as ESN brought with it the safeguard that the special education of the child so identified was ensured. The Warnock Committee, therefore, recommended a system of recording the need for special education provision for those children who, based on a detailed profile of their needs prepared by a multidisciplinary team, are judged to require special educational provision not generally available in ordinary schools.

4.19 Implementation of the Warnock Report

The Warnock Report was followed by a White Paper in 1980² and the Education Act 1981. The 1981 Act followed the broad framework

¹ *The Report of the Committee of Enquiry into the Education of Handicapped Children and Young People* (Warnock, 1978) Cmnd. 7212, HMSO, London.

² Department of Education and Science (1980) *Special Educational Needs*, Cmnd. 7996, HMSO, London.

of the Warnock Report. It represented a move away from a medical model, whereby special educational provision was based on categories of handicap, towards a developmental one where it would be based on special educational needs. This approach has been maintained in Part III of the Educational Act 1993 (ss. 156–191) which amends and replaces the provisions of the 1981 Act with relation to special educational needs.¹ As many as 20 per cent of the school population might have special educational needs, and for the most part, the plans for their education would be left to the school, operating in accordance with the Secretary of State for Education's *Code of Practice on the Identification and Assessment of Special Educational Needs*.² The local authority must, however, identify a more limited category, estimated to be around two per cent of the child population, where the local education authority has a duty to make formal provision and to maintain a statement of a child's special educational needs.³ Parents have the right to be kept informed at every state of the process, and to make representations. They may appeal to a Special Educational Needs tribunal against an authority's decision to refuse to assess their child, to refuse to review a previous assessment, or to refuse a statement.⁴ They may also appeal against the contents of a statement.⁵

4.20 Legislative Structure

The law of education is constituted from numerous statutes, the most significant being the Education Act 1944, the Education Reform Act 1988, and the Education Act 1993. Part III of the 1993 Act amends and consolidates the law relating to special educational needs. The Education (Special Education Needs) Regulations 1994⁶ regulate the making of assessments and statements under Part III of the 1993 Act. The Education (Special Educational Needs) (Information) Regulations 1994⁷ require governing bodies of all county, voluntary, maintained special, grant-maintained, and grant-maintained special schools to publish information about the provision of education for pupils with special educational needs. This information should have been published by 1 August 1995, and governing bodies are required to include specified information in their annual reports published thereafter. Section 177 of the 1993 Act establishes Special Educational Needs Tribunal to hear appeals. The tribunal procedures are prescribed by the Special Educational Needs Tribunals Regulations 1994.⁸ In carrying out their func-

¹ Unless otherwise indicated, section numbers in the remaining paragraphs of this chapter refer to the Education Act 1993.

² London HMSO (1994). This came into force on September 1 1994 (Education (Special Education Needs Code of Practice) (Appointed Day) Order 1994 (S.I. 1994 No. 1414)).

³ Education Act 1993, ss. 165, 167, 168.

⁴ *Ibid.*, ss. 173, 172, and 169 respectively.

⁵ *Ibid.*, s. 170.

⁶ S.I. 1994 No. 1047.

⁷ S.I. 1994 No. 1048.

⁸ S.I. 1994 No. 1910.

tions under Part III of the 1993 Act, local education authorities, governing bodies, the Tribunal and anyone else involved must have regard to Secretary of State for Education's *Code of Practice on the Identification and Assessment of Special Educational Needs*.¹

4.21 Statutory Duty to Provide Education to All Children of School Age

It is the duty of each local education authority to secure that there are available for its area sufficient schools for providing full-time primary and secondary education to all children of school age. The schools are not deemed to be sufficient unless they are sufficient in number, character and equipment to afford all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities and aptitudes, including practical instruction and training appropriate to their respective needs.²

4.21.1 *Education up until the age of nineteen*

Compulsory school age is from five to sixteen years of age.³ However section 8(1)(b) of the Education Act 1944 states that education authorities must provide full-time education suitable to the requirements of **senior pupils**. A senior pupil is defined in section 114 of the 1944 Act as a person who has not attained the age of nineteen years. Thus, although compulsory school age ends at the age of sixteen, authorities are bound to provide full-time education for all young people who wish to receive it, until the age of nineteen. Education for mentally handicapped people between the age of sixteen and nineteen is important because of their particular needs for further educational development. Although adult training centres run by social services authorities may provide some educational work in their programmes, attendance in such centres would not meet the education authority's responsibilities under the 1944 Act.⁴

¹ London HMSO (1994). This came into force on September 1 1994 (Education (Special Educational Needs Code of Practice) (Appointed Day) Order 1994 (S.I. 1994 No 1414)).

² Education Act 1944, s. 8; Education (Miscellaneous Provisions) Act 1948, s. 3.

³ Education Act 1944, ss. 35, 114(1); Raising of the School Leaving Age Order 1972, S.I. 1972 No. 444; Education (School Leaving Dates) Act 1976, s. 3(3).

⁴ In June 1980 the Oxfordshire Education Authority announced it would no longer provide education beyond the age of sixteen for mentally handicapped people. The Secretary of State informed the authority of its legal duty, and in February 1981 the authority reversed its decision. See Children's Legal Centre, MIND and the Advisory Centre for Education (1981) *Education to 19: The Right of All Mentally Handicapped People*, MIND, London.

4.22 Special Educational Provision

In fulfilling its basic duty to provide education the local education authority must, in particular, have regard to the need for securing that special educational provision is made for pupils who have special educational needs.¹ Authorities also have a duty to keep under review the arrangements made by them for special educational provision and, in doing so must, to the extent that it appears necessary or desirable for the purpose of coordinating provision for children with special educational needs, consult the funding authority and the governing bodies of county, voluntary, maintained special, grant-maintained, and grant-maintained special schools in their area (s. 159).

4.22.1 *Meaning of Special Educational Needs*

A child has "special educational needs" if he has a learning difficulty which calls for special educational provision to be made for him (s. 156(1)). A child has a "learning difficulty" if he has a significantly greater difficulty in learning than the majority of children of his age; or he has a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided in schools within the area of the local authority concerned; or he is under the age of five years and is, or would be, if special educational provision were not made for him, likely to fall within one of the above categories (s. 156(2)). A child must not be regarded as having a learning difficulty solely because the language or form of language of the home is different from the language in which he or she is or will be taught. Special educational provision is defined in the case of a child of two or over as educational provision which is additional to or different from that made generally for children of his age in schools maintained by the local education authority. The local authority has a duty to identify the children in their area who have special educational needs which require special educational provision to be determined by the authority, as opposed to those where the decision may be left to the school. Authorities must also keep their arrangements for special education under review.

4.22.2 *Duty of Governors*

Governors of all county or voluntary (mostly church) schools or the education authority of maintained nursery schools have three duties under section 161(1):

- (i) to use their best endeavours to secure that, if any registered pupil has special educational needs, the special educational provision that is required for him is made;

¹ Education Act 1944, s. 8(2)(c), substituted by the Education Act 1981, s. 2(1).

- (ii) to secure that, where the responsible person has been informed by the local education authority that a registered pupil has special educational needs, those needs are made known to all who are likely to teach him; and
- (iii) to secure that the teachers in the schools are aware of the importance of identifying, and providing for, those registered pupils who have special educational needs.

These duties placed on the governors apply to the wider group of people whose educational needs do not require a formal assessment by the authority in order to decide on necessary special educational provision.

4.23 Identification & Assessment of Children with Special Needs

For the vast majority of children, special needs are met by their school, with outside help if necessary. The governors have a statutory responsibility to ensure that needs are met. Where the child's special educational needs are of a severity or complexity which requires the local education authority (LEA) to determine and arrange special educational provision for the child, this is done by means of a statutory statement of special educational needs. Statements are issued for an estimated two per cent of children nationally. The 1993 Act required the issue of a Code of Practice on the Identification and Assessment of Special Educational Needs. This was issued in 1994, and all LEAs and schools must have regard to it.

The Code of Practice states that, whilst in practice it is a matter for individual schools to apportion responsibility within the school for meeting the needs of its pupils with special educational needs, schools should bear in mind the following points:

- **the governing body** should, in co-operation with the head teacher, determine the school's general policy and approach to provision for children with special educational needs, establish the appropriate staffing and funding arrangements and maintain a general oversight of the school's work.
- **the governing body** may appoint a committee or name one of its members to monitor the school's work on behalf of children with special educational needs.
- **the head teacher** has responsibility for the day to day **management** of all aspects of the school's work, including provision for children with special educational needs. He will keep the governing body fully informed. At the same time he will work closely with the school's SEN Co-ordinator (SENCo).
- **the SEN coordinator**, working closely with fellow teachers, has responsibility for the day to day **operation** of the Schools SEN

policy and for coordinating provision for pupils with special educational needs, particularly at stages 2 and 3.

- **all teaching and non-teaching staff** should be involved in the development of the school's SEN policy and be fully aware of the school's procedures for identifying, assessing and making provision for children with special educational needs.

The 1993 Act requires each school to have a responsible person, usually the head teacher or the SENCo, whom the LEA must inform when they conclude that a pupil at the school has special educational needs, and who then must ensure that all who will teach the child know about his or her special educational needs.

The Code of Practice requires each school to have a policy including the following: (1) basic information about the school's special educational provision; (2) information about the school's policies for identification, assessment and provision for all pupils with special educational needs; and (3) information about the school's staffing policies and partnership with bodies beyond the school.

The Code recommends that schools adopt a five stage response to give specific help to children with special educational needs. Responsibility for pupils within stages 1-3 lies with the school, although LEA will be closely involved in stage 3. The LEA and the school share responsibility for stages 4 and 5.

The trigger for stage 1 is when a teacher, parent or other professional gives evidence of concern. The class teacher will initially identify and discuss the problem with the SENCo, and then take appropriate action within the classroom to support the child. Stage 2 is reached if the extra help provided at Stage 1 has not resulted in satisfactory progress. At this stage the school SENCo takes the lead in assessing the child's learning difficulty, planning, monitoring and reviewing arrangements made. Additional information about the child's progress, including details of discussions with parents and contacts with external agencies, is recorded on a Stage 2 intervention form. An individual education plan (IEP) is drawn up, setting out specific learning targets, using materials and resources within the school.

Stage 3 is reached if the measures taken at stages 1 and 2, including an IEP with up to two reviews, have not been successful. Support will be then be sought from outside agencies, with parental approval, including the Pupil Support Service, Child Health Services, and social services. A new IEP will be drawn up in consultation with the parents by the SENCo, with the help of the external specialist. The specialist may be involved in teaching the child directly or may act in an advisory capacity. The SENCo should set a review date within the term. If progress has not been made, the Headteacher will consider referring the child to the LEA for statutory assessment.

Statutory assessment is the focus of Stage 4. The LEA, working with

the school, the child's parents, and relevant outside agencies, will decide whether a statutory assessment of the child's special educational needs is necessary, and if so will conduct that assessment. The school must demonstrate that the child's needs remain so substantial that they cannot be met from the resources ordinarily available. The Code of Practice sets out criteria for making a statutory assessment, a timetable of 26 weeks for carrying out the whole process from start to finish, and the procedures which should be followed.

Stage 5 is where a full statement of special educational need is made by the LEA outlining the needs of and appropriate provision for the pupil. Statementing proceeds when the LEA is satisfied that the child's needs are significant and/or complex, have not been met by measures taken by the school, or may call for resources which cannot reasonably be provided within mainstream budget. A statement is a means of access to extra resources, which provides a precise educational prescription for the child, based on an accurate and detailed account of his needs. Parental preferences must be taken into account and LEAs must review all statements annually.

Once a statement has been issued, it will be reviewed annually. The LEA must give the Headteacher at least 2 months' notice of the date by which the review report must be returned to it. A meeting must be held to assist in the preparation of the report. The headteacher must invite the following to the meeting (a) a representative of the LEA; (b) the child's parents; and (c) a relevant teacher.

The Code provides a list of questions which the review meeting must address, laying particular emphasis on the parents' and the pupil's views. The meeting will make appropriate recommendations. The statement may be maintained or amended or the LEA may cease to maintain it.

4.23.1 *Identification of Special Needs*

It is the duty of every local education authority to secure that, of the children for whom they are responsible,¹ those with special educational needs which call for the authority to determine the special educational provision that should be made for them, are identified (s. 165(1) and (2)).

4.23.2 *Duties of District Health Authority: Referral for Advice of Voluntary Organisation*

If a district health authority or National Health Service Trust forms the opinion that a child under the age of five years has, or probably has, special educational needs, the authority must inform the

¹ For the children for whom an authority is responsible see the 1993 Act, s. 165(2).

parent; and, after giving the parent an opportunity of discussion, the health authority must bring it to the attention of the appropriate education authority (s. 176(2)). If the district health authority is of the opinion that a particular voluntary organisation is likely to be able to give the parent advice or assistance in connection with any special educational needs that the child may have, it must inform the parent (s. 176(3)).

4.23.3 *Assessment of Special Needs of Children Under Age Two*

Where an authority is of the opinion that a child under the age of two has, or probably has, needs which call for the authority to determine the special provision that should be made for him, it may make such an assessment. An assessment of a child under two may be made only with the consent of the parent, and **must** be made if the parent requests it. After making an assessment the authority **may** make a statement of the child's educational needs (s. 175).¹ The assessment and statement may be made in any manner the authority considers appropriate; it need not comply with the detailed regulations in respect of assessments and statements made for children aged two and older (s. 175(3)).

4.23.4 *Assessment of Special Needs of Children Aged Two and Older*

Where an authority is of the opinion that a child has, or probably has, special educational needs which call for the authority to determine the special provision that should be made for him, they **must** make an assessment of needs. Before making an assessment they must serve notice on the parent informing him that they propose to make an assessment; the procedure to be followed; the name of the officer of the authority from whom further information may be obtained; and of his right to make representations and submit written evidence to the authority within a specified period of not less than 29 days (s. 167(1)). If, after taking account of any representations, the authority decide to make an assessment, it must notify the parent in writing of the decision and their reasons for making it (s. 167(4)).

If, at any time after serving notice on the parent of their intention to assess, the authority decides not to assess the educational needs of the child concerned, they must give written notice of their decision to the child's parent (s. 167(6)). For the purpose of making an assessment an authority must seek medical, educational and psychological advice, advice from the social services authority, and from any other source which they consider appropriate for the purpose of arriving at a satisfactory assessment. The authority must take into consideration the advice

¹ Note that, except for the provisions concerning consent and requests by the parent regarding an assessment, the Act enables, but does not compel, an authority to make an assessment and statement for a child under age two.

4.23.4

LOCAL AUTHORITY SERVICES AND FUNCTIONS

received and any representations made or evidence submitted by or at the request of the child's parent.¹

4.23.5 *Parental Requests for Assessments*

If the parent of a child for whom the authority is responsible but for whom **no statement is maintained** requests an assessment, and such an assessment has not been made within the six month period ending with the date of the request, the authority must comply with the request if it is necessary for them to make an assessment.² If the authority decide not to comply with the request, they must give notice of their decision to the parent, and inform him of his right to appeal to the Special Educational Needs Tribunal (s. 173(2)). The tribunal may dismiss the appeal, or order the authority to arrange for an assessment to be made (s. 173(3)).

4.23.6 *Examinations for the Purpose of Assessment*

Where a local authority proposes to make an assessment it may serve notice on the parent requiring the child's attendance for examination. The parent is entitled to be present at the examination (Sch. 9, para. 4).

4.24 **Statement of Special Needs**

4.24.1 *Duty to Make and Maintain a Statement*

If, in the light of any assessment made by the local authority and of any representation³ made by the child's parent concerning the proposed statement, it is necessary for the local authority to determine the special educational provision which the child's learning difficulty calls for, the authority must make and maintain a statement of his special educational needs (s. 168(1)). Before making a statement the authority must provide the parent with a copy of the proposed statement. The form of the notice, the proposed statement and the statement itself must "substantially correspond" to that set on in Schs A and B of the Education (Special Educational Needs) Regulations 1994 (S.I. 1994 No. 1047). The notice must include a written explanation of the following rights: the right to express a preference as to the maintained, grant maintained or grant maintained special school at which he wishes education to be provided for his child, and the reasons for his preference (Sch. 10, para. 3); to make representations to the authority about the content of the statement (Sch. 10, para. 4(1)(a)); to have a meeting

¹ Education Act 1993 Sched 9 para. 2(2) and the Education (Special Educational Needs) Regulations 1994 S.I. 1994 No. 1047, rr. 6-10.

² Education Act 1993, s. 173. Previously, under s. 9(1) of the Education Act 1981 the local authority had to comply unless the authority considered the request was unreasonable. Now it is a question of whether assessment is necessary.

³ Under Sch. 10 of the Education Act 1993.

with an officer of the authority to discuss the statement (Sch. 10, para. 4(1)(b)); and, if he still disagrees with any part of the assessment, to require the authority to arrange such further meetings as they consider will enable him to discuss the relevant advice with the appropriate person or persons (Sch. 10, para. 4(2), (3)). This process must be undertaken within specified time periods (Sch. 10, paras. 3(2) and 4(4)–(6)). See also the Education (Special Educational Needs) Regulations 1994 S.I. 1994 No. 1047, r. 11. Where the parent has specified the name of a school where he wishes his child to be educated, the authority must name that school in the statement, unless—(a) the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or (b) the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources (Sch. 10, para. 3(3)(a), (b)).

The authority may not make a statement until they have considered the representations made, and the period for making further representations has expired. The statement may be in the form originally proposed or a form modified in the light of the representations (Sch. 10, para. 5). The authority must then serve a copy of the statement on the child's parent, and must give notice of his right to appeal against the description in the statement of the child's special educational needs, against the provision specified in the statement, or, against the authority's failure to name a school in the statement (s. 170 and Sch. 10, para. 6). The parent must also be told the name of a person to whom he may apply for information and advice about the child's special educational needs.

4.24.2 *Appeals Against Refusals to Statement and Against the Content of Statements*

Appeals to the Special Educational Needs Tribunal replace appeals to the Secretary of State for Education or the local education appeal committee. Appeals may be made against refusals to assess at the parent's request, against a refusal to issue a statement, against the content of statements, against any amendments to them, against denials of parental choice of the school to be named, and against decisions to cease to maintain a statement. If, after making an assessment, the authority decides that it is not required to determine the special educational provision that should be made, it must give the parent notice of its decision in writing and inform the parent of his right to appeal to the Special Educational Needs Tribunal (ss. 169(1)–(2)). If the tribunal upholds the appeal they may order the authority to make a statement or consider the matter (s. 169). Where the appeal is against the content of the statement, the tribunal may, if they uphold the appeal, either (a) order the authority to amend the statement, so far as it describes the authority's assessment of the child's special educational needs or

specifies the special educational provision, and make any consequential amendments they think fit, or (b) order the authority to cease to maintain the statement.

4.25 The Special Educational Needs Tribunal and the Role of the Courts

The Special Educational Needs Tribunal was established by s. 177 of the Education Act 1993. Its jurisdiction is delineated in ss. 169(2), 170(1), 172(3), 173(2) and Sch. 10, paras. 8 and 11. Its procedure is regulated by the Special Educational Needs Tribunals Regulations 1994 (S.I. 1994 No. 1910). The panel for each hearing consists of a lawyer chairman¹ and two lay members. The lay members must have satisfied the Secretary of State that they have, knowledge and experience in respect of—(a) children with special educational needs; or (b) local government.² There is an appeal on a point of law under section 11 of the Tribunals and Enquiries Act 1982 to the Divisional Court of the Queen's Bench Division. The application must be made by a parent and not by a next friend on behalf of the child,³ which means that legal representation will be available only if the parents qualify for legal aid or are sufficiently wealthy to fund an application themselves. It remains to be seen whether the courts will entertain applications for judicial review in respect of tribunal decisions.

In *Keating v. Bromley London Borough Council* the House of Lords held that no action lay against the local authority for breach of statutory duty in relation to the duty to provide pupils of differing abilities with proper schooling under section 8 of the Education Act 1944, nor was there an action for breach of a common law duty of care in respect of the exercise of statutory discretion conferred by the Act.⁴ In *E (A Minor) v. Dorset County Council*⁵ decided at the same time in relation to the Education Act 1981, Lord Browne-Wilkinson held that “an education authority owes no common law duty of care *in the exercise of its powers and discretions* relating to children with special educational needs specifically conferred to them by the Act of 1981.”⁶ His Lordship said that the statute provided its own detailed machinery for securing that the statutory purpose is performed, and if, “despite the complex machinery for consultation and appeals contained the Act, the scheme fails to provide the benefit intended, that is a matter more appropriately remedied by the Ombudsman looking into the matter than by way of

¹ The chairman must have been called to the bar or admitted as a solicitor before 1991, or have held a right of audience under the Courts and Legal Services Act 1990 for at least seven years (s. 178(1)).

² Special Educational Needs Tribunals Regulations 1994 (S.I. 1994 No. 1910), r. 3.

³ *S v. Special Educational Needs Tribunal and another* [1996] 1 All E.R. 171.

⁴ [1995] 1 F.L.R. 276.

⁵ *Ibid.*, [1995] 3 All E.R. 353.

⁶ *Ibid.*, per Lord Browne-Wilkinson at p. 314, [1995] 3 All E.R. 353 at 392.

litigation."¹ However, he went on to hold that the authority could be liable, both directly and vicariously for negligence in the *operation* of the psychology service and negligent advice given by its officers.² The head teacher giving advice to the parents of a child with special educational needs and any advisory teacher brought in to advise on the special needs of a child both owe a duty to the child to exercise reasonable care and skill.³

4.26 Parental Rights & Responsibilities

4.26.1 *Duty of Parents to ensure that Child receives Education*

The parent or guardian of a child of between five and 16 years has an obligation to cause him to receive efficient full time education suitable to his age, ability and aptitude and any special educational needs he may have, either by attendance at school or otherwise, and if he is a registered pupil at a school, to ensure that he attends regularly.⁴ Where it appears that a parent or guardian has failed in his duty to cause the child to receive full time education, and in the authority's view it is expedient that the child should attend school, the authority must make a school attendance order requiring the registration of the child at a school named in the order.⁵ In the case of a pupil with special educational needs in respect of whom the authority maintains a statement, any school specified in the statement must also be named in the school attendance order (s. 196(2)). If no school is named in the statement, but one is named in the school attendance order, the statement must be amended to specify that school (s. 196(3)). Failure to comply with an order is an offence (s. 198), unless it can be shown that the child is receiving efficient full-time education otherwise than at school suitable to his age, ability and aptitude and any special needs that he may have.

A parent who fails to comply with the duty to see that the child attends regularly the school at which he is registered commits an offence (s. 199). No offence is committed if the absence is with leave, or is due to sickness or other avoidable cause, if the day in question has been set apart for religious observance by the body to which the parents belong, or that the school at which the child is registered is not within walking distance from his home and that no suitable arrangements have been made by the local authority for transport or for boarding accommodation.⁶

¹ *Ibid.*, pp. 313–14, [1995] 3 All E.R. 353 at 393–4.

² *Ibid.*, p. 315. Negligence would be established in accordance with the test in *Bolam v. Friern Barnet Hospital Management Committee* [1957] 1 W.L.R. 582.

³ *Ibid.*, p. 317, [1995] 3 All E.R. 353 at 316.

⁴ Education Act 1944, s. 36, Education Act 1993, ss. 198 and 199.

⁵ For the procedure to make a school attendance order, see Education Act 1993, ss. 192–196.

⁶ *R v. Essex County Council ex p C* [1994] E.L.R. 54.

4.26.2 *Parental Involvement*

In carrying out their powers and duties, local education authorities must have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents.¹ The duties under Part III of the Education Act 1993 to involve parents at all stages of the decision-making process in relation to children with special educational needs are in addition to that general duty.

4.27 Special Schools

Sections 182–190 of the 1993 Act provide for the recognition, and conduct of special schools. Special schools are those which are specially organised to make special educational provision for pupils with special educational needs and which are approved by the secretary of state for Education and Employment as special schools. Section 82 distinguishes between two types of special school: (a) those maintained by the local authority which are to be known as maintained special schools; and (b) grant maintained special schools. The latter were made possible by s. 182 of the 1993 Act. A grant-maintained special school is one conducted by a governing body incorporated in pursuance of proposals for the purpose made by either (a) one of the Funding Authorities to be appointed by the Secretary of States for Education and Wales (ss. 182(3) and 183); or (b) by virtue of the school transferring from maintained or grant-maintained status (s. 186).²

4.28 Independent Schools

Authorities can use independent schools if they are approved by the Secretary of State for Education for the admission of children for whom statements are maintained,³ or if the Secretary of State consents to the child being educated there.⁴ If the authority sends a child to an independent school, they must pay the fees for the education provided; and if board and lodging is provided and the child could not receive education appropriate to his special needs without it, then the authority must also pay the costs of accommodation.⁵

¹ Education Act 1944, s. 76, as amended by Education Act 1993 Sch. 19, para. 20, see also the European Convention on Human Rights Protocol 1, Article 2.

² For the governance of grant-maintained special schools see the Education Act 1993, Sch. 11.

³ Education (Special Educational Needs) (Approval of Independent Schools) Regulations 1994 (S.I. 1994 No. 651).

⁴ Education Act 1993, s. 189.

⁵ *Ibid.*, s. 190.

4.29 Integration of Children with Disabilities in Ordinary Schools

Where an authority maintain a statement for a child, they have a general duty, subject to the following conditions, to secure that he is educated in a school which is not a special school unless that is incompatible with the wishes of his parent.¹ The conditions are that educating the child in a school which is not a special school is compatible with:

- (a) his receiving the special educational provision which his learning difficulty calls for,
- (b) the provision of efficient education for the children with whom he will be educated, and
- (c) the efficient use of resources.

Where a child who has special educational needs is being educated in an ordinary school, those responsible for making special educational provision must secure that, so far as its compatible with the foregoing conditions, that the child engages in the activities of the school together with children who do not have special educational needs.² (As to the background to the principle of integration see para. 4.18.3 above; see also para. 4.32 below.)

4.30 Education otherwise than at school

An education authority's duties to provide full-time suitable education do not cease because a child is in hospital. If an authority is satisfied that it would be inappropriate for the education required for a child to be made in a school, it may, after consulting the child's parent, arrange for it to be made elsewhere (s. 163). The authority is still required to provide full-time education suitable to the child's needs, for example by providing tuition in hospital or at home.

4.31 Review of Local Authority's or Governors' Discretion

4.31.1 *Secretary of State's Power to Prevent Unreasonable Exercise of Functions*

If the Secretary of State for Education and Employment for Wales is satisfied, on complaint or otherwise, that a funding authority (established under the 1993 Act), a further education funding council, a local education authority, or a governing body have acted, or are proposing to act unreasonably in the exercise of any power or the performance of any duty, he may give such directions as to the exercise of the power or the performance of the duty as he considers expedient.³ In *Secretary of State for Education and Science v. Metropolitan Borough of Tameside* the House of Lords held that "unreasonable" meant con-

¹ *Ibid.*, s. 160.

² *Ibid.*, s. 161(4).

³ Education Act 1944, s. 68, as amended by the Education Reform Act 1988 and the Education Act 1993.

duct in which no sensible authority acting with due appreciation of its responsibility would have decided to adopt.¹ “Unreasonable” does not mean “wrong”.² Before the Secretary of State can lawfully issue directions he must satisfy himself not only that he does not agree with the authority, nor even that the authority is mistaken or wrong. Rather he must believe that no reasonable authority could act in the way it is acting.³ The Secretary of State’s directions, if lawful, may be enforced by an order of *mandamus*.⁴

A complaint to the Secretary of State is the proper remedy where a person considers an authority acted unreasonably. However, direct resort to the courts may be appropriate where it is alleged the authority acted *ultra vires*.⁵

4.31.2 Default Powers

If the Secretary of State for Education and Science is satisfied, on complaint by any interested person or otherwise, that an authority or governors have failed to discharge any duty imposed upon them he may make an order declaring them in default and may give such directions to enforce its execution as appear to him to be expedient. Any such directions are enforceable by *mandamus* on an application made by or on behalf of the Secretary of State.⁶

It is generally considered that where an Act provides its own administrative machinery for enforcement of any duties, recourse must be made to that machinery, and *mandamus* will not lie.⁷ It is clear that failure to seek recourse to the Secretary of State’s default powers under the 1944 Act will constitute grounds for refusing *mandamus*.⁸

The Secretary of State is open to judicial review in respect of his default powers under section 99.⁹ If a complaint is in respect of the discharge of obligations concerning the school curriculum or the provision of information, it must be pursued under the machinery in section 23 of the Education Reform Act 1988 before the Secretary of State may exercise his powers under section 68 or 99 of the 1944 Act.¹⁰ Local

¹ [1976] 3 All E.R. 665 at 695, [1976] 3 W.L.R. 641 at 681, H.L., per Lord Diplock.

² [1976] 3 All E.R. at 703, H.L., per Lord Russell of Killowen.

³ [1976] 3 All E.R. at 700, H.L., per Lord Salmon.

⁴ [1976] 3 All E.R. at 673, C.A., per Scarman, L.J.

⁵ *Cummings v. Birkenhead Corpn.* [1971] 2 All E.R. 881 at 885, C.A.; *Herring v. Templeman* [1973] 2 All E.R., *aff’d on other grounds* [1973] 3 All E.R. 569, C.A.

⁶ Education Act 1944, s. 99(1); Education (No. 2) Act 1968, s. 3(3)(c). See also *A-G v. West Riding of Yorkshire County Council* [1907] A.C. 29, H.L.

⁷ *Passmore v. Oswaldtwistle U.D.C.* [1898] A.C. 387.

⁸ *Watt v. Kesteven County Council* [1955] 1 Q.B. 408 at 416, [1955] 1 All E.R. 473, C.A.; *Wood v. Ealing London Borough Council* [1967] Ch 364, [1966] 3 All E.R. 514; *Bradbury v. London Borough of Enfield* [1967] 3 All E.R. 434, [1967] 1 W.L.R. 1311, C.A.

⁹ *R v Secretary of State for Education ex parte Prior* [1994] ELR 231.

¹⁰ Education Reform Act 1988, s. 23(2).

authorities must establish formal arrangements to be agreed by the Secretary of State, for dealing with complains about unreasonable exercise of their own powers or those of governing bodies or failure to discharge their duties, concerning the curriculum or the provision of information in county, voluntary or maintained special schools (other than hospitial special schools).

4.32 Education and Disability Discrimination

Some of the provisions of the Disability Discrimination Act 1995 (discussed in full at para. 24.38 below) apply in relation to education, although these provisions are limited in their extent. The 1995 Act provides that local education authorities are required to publish statements regarding their arrangements for admission of disabled pupils, those measures taken to ensure that disabled pupils are not subject to less favourable treatment than other pupils and those facilities provided to assist access to the school by disabled pupils.¹ Some education bodies are excluded, such as examination/assessment activities where these arise out of education which is provided by exempt education institutions and facilities provided for research students.² Educational bodies are presently excluded from the provisions in the 1995 Act which relate to "service providers" (see para. 23.32 above), however they may be covered where they provide "non-educational" services. It is the view of the Department of Education and Science that such services include such matters as skiing holidays, fund raising events organised by parent-teacher associations, services offered to parents such as governing body meetings, let rooms for community use.³ Such activities would be covered by the general provisions of the legislation regarding goods and services.

Further and higher education establishments are covered by the Further and Higher Education Act 1992 which was amended by the Disability Discrimination Act 1995. Funding conditions for further education and colleges include requirements to provide disability statements at set intervals.⁴ In addition the Higher Education Funding Council may make it a condition of university funding that disability statements are to be published at required intervals.⁵ Failure by an institution to comply with such statements may be grounds for judicial review.

¹ Education Act 1996, s. 528 (formerly s. 30(8) Disability Discrimination Act 1995). Circulars have been issued eg DES 3/97 and DES 12/97.

² The Disability Discrimination (Services and Premises) Regulations 1996, S.I. No. 1836.

³ DES Circular 12/97.

⁴ Further and Higher Education Act 1992 (as amended), s. 5.

⁵ Further and Higher Education Act 1992, s. 65(4A)(B).

LOCAL AUTHORITY SERVICES AND FUNCTIONS