

# EXHAUST ALL OPTIONS

LOCAL AUTHORITIES' POWERS  
TO ACCOMMODATE BEYOND  
THE HOUSING ACT 1996

Guidance on Local Authority  
Housing and Homeless Services  
from the Law Centres Network

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# INTRODUCTION

This guidance is intended to assist local authorities in exercising their statutory powers to provide emergency accommodation to unhoused persons who are ineligible for assistance under Part VII of the Housing Act 1996.

Most of the powers discussed in this guidance should generally only be used where accommodation cannot lawfully be provided under Part VII Housing Act 1996<sup>1</sup>, or where a duty to accommodate under that Part has been discharged. Housing officers should therefore first assess whether a person is eligible for assistance under Part VII in all cases.

Many such applicants may be entitled to accommodation from the Home Office, for example under sections 4 or 95 of the Immigration and Asylum Act 1999. It is best practice to signpost or refer applicants to organisations providing immigration advice. However, these routes to accommodation often take considerable time, and authorities will need to consider the below accommodation options in the interim. It should not be assumed that just because Home Office accommodation may be available, there is not an existing duty or power to accommodate.

Officers should also keep in mind that these powers can be used not only for persons who are ineligible under section 185 Housing Act 1996, but anyone who is not being accommodated under Part VII for any reason. This could include, for example, persons who have been found intentionally homeless or who do not have a priority need for housing.

The government has set an ambitious goal of ending street homelessness by 2024. In order to achieve this goal, authorities will need to adopt a multi-faceted approach, utilising all powers available and tailored to the needs of individual people experiencing and at risk of homelessness and their families. This will often

require close cooperation and joint working between multiple departments, such as housing departments, children's services, adult social services, and public health.

At the start of the pandemic in March 2020, the Government announced the Everyone In initiative<sup>2</sup>. Local authorities took unprecedented action to provide emergency accommodation to some 37,000 people sleeping on the streets (or at risk of doing so) as well as other unhoused persons, and people at risk of homelessness. The scale and success of this undertaking has demonstrated what can be achieved when a determination is made that, by whatever means available, all unhoused persons should be accommodated.

In keeping with the government's aim of ending street homelessness for good, the guiding principle behind all local authority decisions on accommodation should be a positive assumption that, if accommodation *can* be provided, then it *will* be provided. This will further help ensure that authorities are complying with government guidance under the Everyone In initiative, the work of which is ongoing<sup>3</sup>.

## **This guidance will look at six Acts and their possible uses:**

- **Section 2B NHS Act 2006**
- **Section 138 Local Government Act 1972**
- **Children Act 1989**
- **Care Act 2014**
- **Mental Health Act 1983**
- **Localism Act 2011 (General Power of Competence)**

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1 Additional useful resources can be found at the NRPF Network website (<https://www.nrpfnetwork.org.uk/>)

2 Letter from Luke Hall MP, Minister for Local Government and Homelessness, to Local Authority Chief Executives, dated 26 March 2020.

3 *Coronavirus: Support for rough sleepers (England)*, House of Commons Library Research Briefing, 12 October 2021, at pg.27. The same was confirmed by Eddie Hughes MP, Under-Secretary of State for Housing, Communities and Local Government, in a House of Commons debate dated 19 July 2021.

# SECTION 2B NHS ACT 2006

## Key points

- All local authorities have a duty to improve the health of people in their area.
- If a step is appropriate for improving public health, then it must be taken.
- This provision can be used to provide accommodation to people experiencing or at risk of homelessness.

## What is the power?

Local authorities have a target duty to improve the health of people in their area. In doing so, they have powers to: (i) provide assistance (including financial) to help individuals minimise any risks to health arising from their accommodation or environment<sup>4</sup>; and, (ii) make available the services of any person or any facilities<sup>5</sup>. Authorities can also provide grants and loans for the same purpose<sup>6</sup>.

## When does it apply?

Section 2B NHS Act includes both a duty and a power.

Where an authority considers a step appropriate to improve public health, then they *must* take that step<sup>7</sup>.

Where the duty is engaged, it may be fulfilled by exercising the powers under section 2B(3) and (4). It should be noted that the steps listed there are not exhaustive, and that accommodation can be provided<sup>8</sup>.

A comparison can be drawn with other forms of accommodation which are provided by an authority to address a public health need. Examples include residential drug and alcohol treatment centres, in-patient mental health facilities, and accommodation provided under a

severe weather emergency protocol. In the case *R (Ncube) v Brighton and Hove City Council*, the High Court indicated that these forms of accommodation could in principle be provided under section 2B, and as such would not be limited to people with recourse to public funds<sup>9</sup>.

In the same way, if an authority considers that providing accommodation to people sleeping out or other unhoused persons would improve the health of people in the local area, then they are able to provide such accommodation under section 2B NHS Act 2006.

It should be noted that the power can be engaged not just where the accommodation is expected to improve the health of the people being accommodated, but also the general public, as in the case of the pandemic. Local authority housing departments should work together with public health departments, as well as following guidance from Public Health England, to determine when the duty is engaged.

Section 2B applies to county councils, London borough councils, and unitary authorities. District councils in counties with a county council are not subject to the duty<sup>10</sup>.

Authorities will need to bear in mind that section 2B cannot be used to circumvent section 185 Housing Act 1996 or Schedule 3 Nationality, Immigration and Asylum Act 2002. Where accommodation is provided under section 2B, it must be connected with the duty to improve health.

The section 2B duty and power were not introduced specifically to address public health needs during a pandemic. As the duty to take steps to improve public health is a mandatory one, authorities will need to consider whether they should be providing accommodation under this duty/power in other contexts.

4 [National Health Service Act 2006, section 2B\(3\)\(e\)](#).

5 [NHS Act 2006, section 2B\(3\)\(g\)](#).

6 [NHS Act 2006, section 2B\(4\)](#).

7 [Explanatory Note to the Health and Social Care Act 2012, section 12, para 130](#) (referring to s.2B NHS Act 2006).

8 [R \(Ncube\) v Brighton and Hove City Council \[2021\] EWHC 578 \(Admin\)](#) at para 74.

9 Ibid.

10 [Explanatory Note to the Health and Social Care Act 2012, section 12, para 130](#) (referring to s.2B NHS Act 2006).

**SECTION 2B NATIONAL HEALTH SERVICE ACT 2006**

Is there a public health need in the local area that will affect unhoused persons? **YES**

Will providing accommodation improve the health of unhoused persons, or local residents generally? **YES**

Is the particular applicant eligible for homelessness assistance under Part VII Housing Act 1996? **YES** **NO**

**YES: take a homeless application and provide accommodation under s.188(1) HA 1996**

**NO: provide accommodation under s.2B NHS Act**

# SECTION 138 LOCAL GOVERNMENT ACT 1972

## Key points

- **Applicable before or during an emergency or disaster involving destruction of property or danger to life.**
- **If the local area will be affected, the authority can incur expenses in order to alleviate or eradicate the effects of the emergency/disaster.**
- **Those expenses can include providing accommodation.**

## What is the power?

Section 138 Local Government Act 1972 creates a power to incur expenses to take action to avert, alleviate, or eradicate the effects of an emergency or disaster<sup>11</sup>.

## When does it apply?

The power applies when (a) an emergency or disaster involving destruction of property or danger to life has occurred or is imminent, and (b) it has affected or is likely to affect your local area or some or all of its inhabitants<sup>12</sup>. It also applies where an authority has reasonable ground for apprehending such an emergency or disaster.

Section 138 does not create a threshold for the severity of an emergency or disaster or its effects. All that is needed to engage the power is an emergency/disaster giving rise to a danger to the life of some inhabitants of the local area.

The power can also be used pre-emptively, as it applies when an emergency or disaster is imminent (or is reasonably apprehended). In the context of the Covid-19 pandemic, this could apply for example where public health experts (national or local) anticipate a significant worsening of the pandemic, e.g. a further wave of infections, a local outbreak, or a new variant of concern.

Section 138 provides a broad power that leaves much to the discretion of the local authority exercising it. In circumstances in which, in the context of an emergency or disaster, it is not practicable to assess unhoused persons under Part VII Housing Act 1996, this power can be used to provide emergency accommodation pending such assessments. If a person is subsequently found to be eligible under Part VII, they can then be accommodated e.g. under section 188(1) Housing Act 1996.

As with section 2B NHS Act discussed above, section 138 cannot be used to circumvent section 185 Housing Act 1996 or Schedule 3 Nationality, Immigration and Asylum Act 2002.

Where an unhoused person has alternative accommodation potentially available to them, the authority may wish to take this into consideration. However, authorities should take a pragmatic approach, particularly in relation to when such accommodation will become available. For example, a failed asylum seeker may in principle be entitled to accommodation under section 4 of the Immigration and Asylum Act 1999. In practice, it can take considerable time for such accommodation to be secured. If the conditions under section 138 are met, authorities should provide accommodation under that power while the person seeks alternative accommodation. Authorities may wish to refer such persons to third party organisations for support where appropriate (whilst also providing accommodation pending alternative arrangements).

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11 [Local Government Act 1972, section 138\(1\)\(A\).](#)

12 [Local Government Act 1972, section 138\(1\).](#)

**SECTION 138 LOCAL GOVERNMENT ACT 1972**

Has an emergency/disaster occurred, or is one imminent?

YES

Does it involve destruction of property or danger to life?

YES

Has it affected or will it affect at least some local residents?

YES

Will providing accommodation avert, alleviate, or eradicate the effects?

YES

Is the person ineligible for statutory homelessness assistance?

YES

If they are not ineligible, has a duty/power to accommodate been discharged?

YES

**If the answer to all of the above questions is YES, then accommodation should be provided.**

# CHILDREN ACT 1989

## Key points

- **Authorities can provide accommodation to children and their families in order to safeguard and promote children's welfare.**
- **A child in need must be provided with accommodation if no other person is able to do so.**
- **Certain children who have left care, or are soon to be leaving, may also need to be accommodated.**

Authorities will already have experience and knowledge of providing accommodation under the Children Act 1989. This guidance will therefore briefly discuss a modern approach to principles of best practice. For more detailed guidance on the duties and powers under Part 3 of the 1989 Act, authorities are referred to the statutory guidance<sup>13,14</sup>, and the Public Law Working Group's Best Practice Guidance<sup>15</sup>.

## Section 17

Under section 17(1), authorities are required to safeguard and promote the welfare of children in their area whom they assess as being in need, and insofar as is consistent with that duty, to promote the upbringing of such children by their families. In carrying out that duty, services provided by authorities can include provision of accommodation together with a child's family<sup>16</sup>.

## Section 20

Section 20 provides that every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of:

- a. There being no person who has parental responsibility for him;
- b. His being lost or having been abandoned; or,
- c. The person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

Additionally, authorities may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare<sup>17</sup>.

Section 20 therefore creates both a mandatory duty and a discretionary power.

## Section 23C

Children who have left care, or are soon to leave care, must be provided with accommodation in some circumstances<sup>18</sup>. There are three categories of children for whom authorities might be required to provide accommodation. These are as follows:

- i. Eligible children: children aged 16 or 17 who have been 'looked after' by the authority for at least 13 weeks.
- ii. Relevant children: those who would be eligible children, but who the authority has ceased to look after and are not being looked after by any other authority.
- iii. Former relevant children: people aged 18 and over who were relevant children, or who were eligible children immediately before they ceased being looked after by the authority.

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13 [Prevention of homelessness and provision of accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation, April 2018.](#)

14 [The Children Act 1989 guidance and regulations, July 2021.](#)

15 [Public Law Working Group Best practice guidance: Section 20 / section 76 accommodation, March 2021.](#)

16 [Children Act 1989, section 17\(6\).](#)

17 [Children Act 1989, section 20\(4\).](#)

18 [Children Act 1989, section 23C.](#)

## CHILDREN ACT 1989 (CONTINUED)

In respect of eligible children, authorities must conduct an assessment of the child's needs to establish what advice, help, and support the authority should provide to the child both while it is looking after the child and when it is no longer doing so. This can include the provision of accommodation.

The duty owed to relevant children is the same as for eligible children, but also includes a requirement to 'stay in touch'. Unless the authority is satisfied that their welfare does not require it, relevant children must be provided with suitable accommodation. This creates a positive presumption in favour of accommodation being provided. Thus, if a relevant child would otherwise be homeless, it follows that their welfare will require accommodation to be provided.

For former relevant children, authorities have a power to pay a contribution towards the costs of accommodation if it is connected with education expenses.

### **In practice**

All authorities should operate on the principle that no child should be left homeless in any circumstances.

Individual assessments must be made to determine whether, and if so which, section must or should be used to provide accommodation to a child. It is unlawful for an authority to adopt a fixed policy of only accommodating under section 20, so if that section is to be used, authorities should record clear reasons for preferring it over section 17 in an individual case.

Authorities should also keep in mind their duty under section 11 of the Children Act 2004 to make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children.

To inform any such decisions, an assessment should first be conducted to identify the child's needs, both in relation to their accommodation needs and their welfare more generally. Regard should be had to that assessment in complying with and exercising any of the above duties and powers.

As section 17(1) includes a duty to promote the upbringing of children in need by their families, there should be a presumption that whichever power is used, the accommodation provided will be suitable for the whole family.

Circumstances in which an authority may wish to provide accommodation under the Children Act 1989 to a person with dependent children include the following:

- i. Where they have been found intentionally homeless;
- ii. Where they have been found ineligible under section 185 Housing Act 1996 (though advice will need to be sought from the authority's legal department to determine whether it is lawful to accommodate such person under section 17 Children Act 1989);
- iii. Where any of the duties under Part VII Housing Act 1996 have been discharged, such that accommodation is no longer being provided under that Part.

In general, in any cases involving unhoused persons with dependent children, authorities should always consider whether they can lawfully provide accommodation under the Children Act 1989 to avoid any risk of a child becoming homeless. If they can do so, then they should do so.



# CARE ACT 2014

## Key points

- **Where a vulnerable adult appears to have care needs, they must be assessed to determine those needs.**
- **If these include a need for accommodation, then section 19 provides a power to provide such accommodation.**
- **Ineligible migrants can be accommodated under section 19 if their need for accommodation arises from an illness or disability.**
- **Section 19 does not apply where there is a duty to accommodate under Part VII Housing Act 1996.**

As with accommodation provided under the Children Act 1989, local authorities are likely to be familiar with their powers to accommodate under the Care Act 2014. Unhoused persons who are eligible for such accommodation are by definition some of the most vulnerable people requiring support, and so all such cases must be handled with care.

This guidance will not cover matters such as eligibility criteria, needs assessments, or ordinary residence in detail. Authority officers are referred to the relevant statutory guidance<sup>19</sup>. The following is therefore an overview which is intended to give authorities a general understanding of when Care Act accommodation may be a suitable option.

Authorities should note that section 19 Care Act 2014 has replaced section 21 National Assistance Act 1948. Where authorities would previously have provided accommodation under the latter, they should now do so under the former.

## Section 19

The Care Act creates a duty and a power. The duty is under section 18, and involves various conditions being met. Whether those conditions are met will be identified by a care needs assessment. Such assessment must be carried out where it appears to an authority that an adult may have needs for care and support<sup>20</sup>. This is a positive duty, and a relevant adult does not need to make a request for an assessment to be carried out.

The power falls under section 19, and is available where:

- i. The adult is ordinarily resident in the authority's area, or is present in its area but of no settled residence;
- ii. The section 18 duty does not apply; but,
- iii. The adult does have needs for care and support.

The power can also be used to support an adult who is ordinarily resident in another authority's area, and/or where the adult has needs which appear to be urgent even though a needs assessment has not yet been completed.

Authorities must consider specifically whether an adult's needs for care and support include a need for accommodation which is not otherwise available. If the adult is entitled to accommodation under Part VII Housing Act 1996, then the responsibility rests with the housing department and accommodation cannot be provided under the Care Act<sup>21</sup>.

Care Act accommodation can be provided to migrants and asylum seekers in some circumstances. The exclusion under section 115 Immigration and Asylum Act 1999 (i.e. the exclusion from benefits) applies, and so an authority must be satisfied that the adult's needs for care and support arise from something beyond destitution or its physical effects<sup>22</sup>.

In practice, this generally means that an otherwise ineligible migrant can be provided with accommodation under the Care Act where they have a need for care and support (and specifically for accommodation) arising from e.g. a disability, medical condition, or illness. Such

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19 [Care and support statutory guidance](#), August 2021.

20 [Care Act 2014, section 9](#).

21 [Care Act 2014, section 23\(1\)](#).

22 [Care Act 2014, section 21\(1\)](#).

## CARE ACT 2014 (CONTINUED)

accommodation can also be provided where a failure to do so would risk breaching the adult's rights under the European Convention on Human Rights. The human rights that will most commonly be engaged are Article 2 (right to life), Article 3 (subjection to inhuman or degrading treatment), and/or Article 8 (the right to respect for a person's private and family life).

Human rights issues are of fundamental importance and must be considered very carefully, particularly given the classes of persons who may have needs for care and support. Individual assessments must be done in all cases. Authorities should be alert to situations such as (but not limited to) the following:

- i. Adults with severe disabilities who would be at risk of suffering significant harm while homeless.
- ii. Adults with chronic and/or life-threatening medical conditions or illnesses who may face a risk to their life while homeless.
- iii. Adults with conditions such as incontinence who may be unable to access toilet/washing facilities without accommodation.
- iv. Adults who are immune-compromised and risk contracting serious illnesses while homeless.
- v. Adults who have limited life expectancy.

Crucially however, the risk of a human rights violation is not a prerequisite to the provision of accommodation under the Care Act; rather it is one consideration which could justify its provision.

# MENTAL HEALTH ACT 1983

## Key Points

- **Accommodation can be provided as part of a person's aftercare package following discharge from hospital.**
- **Authorities must arrange such accommodation together with their local NHS Clinical Commissioning Group.**
- **Aftercare accommodation is not considered a 'public fund' and so can be provided to persons with NRPF.**

Accommodation provided under the Mental Health Act is the responsibility of the NHS Clinical Commissioning Group for an area, together with an authority's social services department. This is generally not 'mainstream' accommodation, but rather a form of supported accommodation. It is provided as part of a person's aftercare package under section 117 for persons who have been admitted to hospital under:

- i. Section 3 MHA 1983 (detained in hospital for treatment)
- ii. Section 37 or 45A (a hospital order)
- iii. Section 47 or 48 (transfers to hospital from prison)

The purpose of such accommodation being provided is to reduce the risk of a person being readmitted to hospital after being discharged. It must additionally be provided to meet a need arising from or related to the person's mental health condition.

After care services, including accommodation, are not considered a public fund. Accordingly, such accommodation can be provided to people with an NRPF condition.

In practice, authorities must be alert to whether a person has recently been discharged from hospital under any of the above sections. If so, officers should liaise with the local Clinical Commissioning Group and the relevant hospital to determine whether accommodation should be provided as part of an aftercare package.

# LOCALISM ACT 2011: GENERAL POWER OF COMPETENCE

## Key Points

- Shelter can be provided to people with lawful leave to enter or remain in the UK, but with NRPF.
- Shelter can also be provided to other ineligible people, including some failed asylum seekers and those in the UK unlawfully, where it is necessary to avoid a breach of their human rights.
- This power cannot be used to circumvent section 185 Housing Act 1996 by providing an equivalent service.

The General Power of Competence (GPOC) is contained in section 1 of the Localism Act 2011. It provides a very broad power for local authorities “to do anything that individuals generally may do.” This includes things that an individual may do even though they are in nature, extent or otherwise (a) unlike anything that a particular authority may do, or (b) unlike anything that other public bodies may do<sup>23</sup>.

The government has stated in guidance produced for local authorities that the GPOC enables local authorities to provide shelter and support to some people who are ineligible for statutory accommodation under the Housing Act 1996 or access to public funds because of their immigration status.

In respect of people with lawful leave to enter or remain in the UK, but without recourse to public funds, the government’s position is that authorities have a discretionary power to provide shelter. As with the NHS Act and Local Government Act, this cannot be used to circumvent the limitations under section 185 Housing Act 1996 or Schedule 3 Nationality, Immigration and Asylum Act 2002. In practice, this means that authorities cannot for example determine a person to be ineligible under Housing Act 1996, and simply opt to provide accommodation under the GPOC instead. Authorities should instead carry out an assessment to determine whether there are any other reasons why shelter can or should be provided using the GPOC, taking into account local circumstances, available resources, etc.

The government’s guidance on people with no access to public funds who may not be helped using the GPOC as a result of restrictions in Schedule 3 of the Nationality, Immigration and Asylum Act 2002 (e.g. some failed asylum seekers, people in the UK unlawfully) requires an additional justification. Namely, shelter can only be provided via the GPOC where it is necessary in order to avoid a breach of a person’s human rights. A common example with which authorities will be familiar is during extreme cold weather, when shelter is needed to protect life.

If an authority is considering using the GPOC to provide shelter, it should assess the person’s individual needs, taking into account matters such as their age, mental and/or physical health conditions and disabilities, and any other factors that make them vulnerable.

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23 [Localism Act 2011, section 1\(1\) and \(2\)](#).

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