Department of Health consultation on the Care Act 2014

Questions considered:

- **Question 17:** Are you content that the eligibility regulations will cover any cases currently provided for by section 21 of the National Assistance Act 1948?
- **Question 81:** Are there other considerations around preparation for implementation of the April 2015 elements of the Care Act on which national guidance would be helpful?

**Introduction**

The No Recourse to Public Funds (NRPF) Network is a network of organisations focusing on the statutory response to people with care needs who have no recourse to public funds. The Network, established in 2006, aims to share information and good practice amongst local authorities, work with government departments to raise practical and policy issues, and to develop a strategic response to NRPF.

There are over 2,800 members of the NRPF Network representing local authorities, the voluntary sector, central government, the police and the NHS. The NRPF Network runs an information and guidance enquiry line, provides training to local authorities, researches the scale and nature of NRPF, works with government departments on a number of policy concerns and provides information on developments in case law, policy and good practice. The NRPF Network also project manages the NRPF Connect database, which is a system that enables local authorities supporting migrants who have NRPF to share case information with the Home Office effectively and securely.

**Adults with care needs who have NRPF**

No recourse to public funds (NRPF) is a condition imposed on someone due to their immigration status. Section 115 Immigration and Asylum Act 1999 states that a person will have "no recourse to public funds" if they are subject to immigration control, i.e., they have: leave to enter or remain in the UK with the condition "no recourse to public funds"; or have leave to enter or remain in the UK that is subject to a maintenance undertaking; or they require but do not have leave to enter or remain (for example, visa overstayers, illegal entrants, refused asylum seekers who claimed asylum after entering the UK).
Such migrants cannot access specified welfare benefits, or local authority housing and homelessness assistance provided under the Housing Act 1996. This, therefore, sets this group of people apart from other adults, for example, British Citizens, migrants with settled status, and those recognised as refugees or who have humanitarian protection, all of whom normally have full recourse to public funds. The provisions of section 21 National Assistance Act 1948, which compels local authorities to provide accommodation when the specified eligibility requirements are met, will therefore need to be considered for adults who have NRPF and present to the local authority as destitute and with an appearance of need that triggers an assessment for services under section 47 NHS and Community Care Act 1990.

The NRPF client group also encompasses EEA nationals who are unable to access welfare benefits and/or housing due to failing the relevant eligibility tests, and asylum seekers, or refused asylum seekers who do not fall under the definition of “subject to immigration control” as set out in section 115 Immigration and Asylum Act 1999 (see above), and have care needs.

Under Schedule 3 Nationality, Immigration and Asylum Act 2002, the following four categories of people are excluded from assistance under section 21 National Assistance Act 1948: a person with refugee status granted by an EEA country and any dependents; European Economic Area (EEA) nationals and any dependents; refused asylum seekers who have failed to comply with removal directions; and a person unlawfully present in the UK (including those whose visa has expired and illegal entrants). However, assistance must be provided if such support is necessary to prevent a breach of human rights or European Community Treaty rights.

The NRPF client group therefore has different needs to those who have full access to public funds, and there is currently a distinct eligibility criteria that would only be applied to this group, and some others in very limited circumstances, when accommodation is required.

**The current eligibility requirements for the provision of accommodation**

Section 21(1)National Assistance Act 1948 states:

“(a) Subject to and in accordance with the provisions of this Part of this Act, a local authority may, with the approval of the Secretary of State and to such extent as he may direct shall, make arrangements for providing:

(a) residential accommodation for persons aged eighteen or over 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..

(aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.”

Local Authority Circular (93) 10 directs a local authority to make arrangements under section 21(1)(a) and empowers a local authority to make arrangements under section 21(1)(aa).

The interpretation of “care and attention” has been formed by case law, the key judgments of which are referred to here.
In the House of Lords judgement, *M v Slough Borough Council* (2008), Baroness Hale held that a need for care and attention means a need for "looking after", describing this at paragraph 33:

"The natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list. The provision of medical care is expressly excluded... This definition draws a reasonable line between the 'able bodied' and the 'infirm'..."

In *SL v Westminster* (2013), the Supreme Court set out a cumulative test to determine whether accommodation must be provided under section 21:

1. the person in question must be in need of "care and attention";
2. the need must arise by reason of age, illness, disability or other circumstances; and
3. the care and attention which is needed must not be available otherwise than by the provision of accommodation under section 21.

The Supreme Court also found that:

- a local authority must disregard asylum support which might be hypothetically be available;
- "care and attention" means "looking after" (in line with *M v Slough*), but does not cover all forms of social care and practical assistance, for example, it does not include the provision of physical things, even things as important as food and accommodation;
- the meaning of "care and attention" must take some colour from its association with the duty to provide residential accommodation;
- "care and attention" is not confined to that which can only be provided at specialist residential accommodation;
- something well beyond merely monitoring an individual is required;
- the words "not otherwise available" govern "care and attention", not "accommodation". If services provided are independent of accommodation arrangements and can be provided in the same way whether or not a person has accommodation of any particular type, or at all, then the services would be available otherwise than by the provision of accommodation under section 21.

Section 21(5) National Assistance Act 1948 defines accommodation as:

"..including references to board and other services, amenities and requisites provided in connection with the accommodation except where in the opinion of the authority managing the premises their provision is unnecessary."

This means that accommodation may include other services. The types of accommodation that the courts have accepted as "residential accommodation" include:
Care Act 2014 and draft eligibility regulations

Section 8(1) Care Act 2014 sets out how needs may be met, which includes the provision of “accommodation in a care home or in premises of some other type”.

The draft regulations set out a three-stage eligibility test to determine whether a local authority will have a duty to meet a person’s needs:

(1) “An adult’s needs meet the eligibility criteria if—

(a) the adult’s needs are caused by a physical or mental impairment or illness;

(b) as a result of the adult’s needs the adult is unable to achieve an outcome specified in paragraph (2); and

(c) as a consequence there is, or is likely to be, a significant impact on the adult’s well-being”.

Section (2)(8) Care Act 2014 defines an adult as “a person aged 18 or over”.

Consideration of the new eligibility criteria

The key difference is that where there is currently a separate provision for providing accommodation under section 21 National Assistance Act 1948, and for reasons outlined above, would only (apart from rare occasions) be considered for service users who have NRPF, the provision of accommodation is not distinguished under the draft eligibility regulations. As will be seen, this leads to further clarity being required.

(1) Stage one of the new eligibility criteria: (a) “the adult’s needs are caused by a physical or mental impairment or illness”

The cause of needs under the current legislation includes age or other circumstances, in addition to a physical or mental impairment or illness. Therefore the proposed criteria, appears more limiting. However we are not aware of any examples where in practice this more limited criteria would prevent those who are currently provided with accommodation under section 21(1)(a) from accessing such support.

Section 21(1)(aa) National Assistance Act 1948 also provides the local authority with the power to assist expectant and nursing mothers. There appears to be no specific provision for providing services to ‘expectant and nursing mothers’ under the new eligibility criteria.

Section 17(1) Children Act 1989 sets out the duty for local authorities to safeguard and promote the welfare of children within their area who are in need. Therefore destitute nursing mothers with NRPF may be provided with accommodation under section 17 Children Act 1989. However, mothers with no children, who do not have an illness or physical/mental
impairment, appear to be excluded from the provision of accommodation under the new eligibility regulations.

We note that section 19(1) Care Act 2014 provides local authorities with the power to meet the needs of an adult who is ordinarily resident, or present in the area with no settled residence and does not satisfy the eligibility criteria that engages the duty to meet needs under section 18. Also, paragraph 6.82 allows for local authorities to meet needs that are not deemed to be eligible. Is it therefore the intention that expectant mothers could be provided with accommodation on this basis? We request that further clarity is provided, and stress that childless pregnant mothers with NRPF remain a referral group, albeit in small numbers.

(2) Stage two of the new eligibility criteria: (b) “as a result of the adult’s needs the adult is unable to achieve an outcome specified in paragraph (2)”

It appears that the new regulations adequately cover (and perhaps even provide more clarity) as to what might be considered to be a care activity in regulation (2)(a)(d)(e) and (3). This is welcomed.

The need for ‘looking after’ is expressed in M v Slough as “doing something for the person being cared for which he cannot or should not be expected to do for himself”. The draft Regulations set out a different test of “unable to achieve an outcome”, which is more specific than the subjective test of “should not be expected”. However this test is not expected to exclude anyone who currently would receive assistance under section 21(1)(a) National Assistance Act 1948.

However, the lack of a specific test that relates to the provision of accommodation under the new eligibility criteria means that it appears that any eligible need could trigger the duty to provide accommodation.

An example could be: when an adult’s needs are caused by a physical or mental impairment or illness; as a result of these needs the adult is unable to achieve the outcome of “maintaining family or other significant personal relationships” without assistance, and as a consequence there is a significant impact on the adult’s wellbeing in terms of their “domestic, family and personal relationships”. If the provision of accommodation is necessary to enable such a need to be met then the eligibility criteria relating to the provision of accommodation could be much wider than it is at present.

Another concern is that the test set out in SL v Westminster, i.e., that the care and attention which is needed must not be available otherwise than by the provision of accommodation under section 21, does not appear to be replicated in the draft regulations or elsewhere in the Care Act, so there is no clearly expressed requirement that accommodation is only to be provided when it is needed in order to facilitate the provision of services in relation to meeting a care need.

We acknowledge that the Care Act 2014 maintains the current position, by prohibiting a local authority from providing services that are required to be provided under the NHS Act 2006 (section 22), under the Housing Act 1996 (section 23), or to migrants subject to
immigration control whose needs have arisen due to destitution alone (section 21). However it is unclear whether, in the circumstances when care needs are met by the provision of non-NHS services e.g. counselling from voluntary sector, under the new criteria the local authority may still be required to provide accommodation if that is needed by the service user.

Paragraph 6.91 of the Guidance states that: “…Local authorities are not required to meet any eligible needs which are being met by a carer, but those needs should be recognised and recorded as eligible during the assessment process”. Is it intended that when a carer might be able to meet all the basic care activities and support with achieving outcomes but is not in a position to provide accommodation, the local authority then has the duty to provide accommodation?

(3) Stage three of the new eligibility criteria (c) “as a consequence there is, or is likely to be, a significant impact on the adult’s well-being”

Section 21(1)(a) and (aa) National Assistance Act 1948, and the case law that considers this, do not require someone qualifying for support on the basis of their needs to demonstrate that their failure to be able to undertake the activities in question has or would have a significant impact on their well-being. This appears to be a different test.

In many instances there would be a clear correlation between inability to perform relevant tasks and impact on wellbeing, particularly as “control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided)” and “suitability of living accommodation”, which are most pertinent to this client group, are listed in the considerations of “wellbeing” that are set out in section 1 Care Act. However, further clarity is required to define what is “significant”, in the way that the current FACs criteria defines “critical”, “substantial”, “moderate” and “low”. The current guidance is not sufficient to clarify this, and more relevant case studies or examples would be helpful.

(4) Accommodation

Section 8(1) Care Act 2014 refers to “premises of some other type”, in reference to the provision of accommodation to meet needs. Further clarity is required as to what this may encompass. We would be concerned if the Act does not provide for normal accommodation i.e. B&Bs and private tenancies, to be made available in order to meet needs, as this would not cover the majority of adults with NRPF who are currently receiving accommodation under the provisions of section 21 National Assistance Act.

Further to this, section 39(1) sets out the ordinary residence requirements relating to adults accommodated in a care home, shared lives scheme, and supported accommodation. These types of accommodation are defined in the draft Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014. Section 39(3) allows regulations to make provision to determine for these purposes whether an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in the regulations. We understand that such provisions have not been made in any regulations. It is of concern that in this context, the needs of the NRPF client group, who, as a result of lack of access to welfare benefits and housing, may be provided with accommodation under section...
21 National Assistance Act because the only way to meet their need for care and attention is by providing accommodation, have not been considered within this provision. If the intention of these requirements is to clarify when a person, who has been provided with accommodation in order to meet their needs, is ordinary resident, then it would also be necessary to specify other types of accommodation, such as private tenancies and B&Bs, which might be provided to the NRPF client group.

(5) The interplay between the provision of accommodation and subsistence by a local authority and Home Office asylum support

_NASS v Westminster_ (2002) established that should an asylum seeker or refused asylum seeker have eligible needs, it will be the responsibility of the local authority to provide accommodation under section 21 National Assistance Act 1948.

There is no provision in the Care Act excluding anyone from services that can be provided under Immigration Asylum Act 1999. Is it the intention for the reasoning in _NASS v Westminster_ to continue to be applied to the provision of accommodation under the Care Act?

(6) Schedule 3 Nationality Immigration and Asylum Act 2002

We would like to know whether it is the intention to exclude the provision of services under the Care Act 2014 to the same groups of migrants (see above) who are currently excluded from assistance under section 21 National Assistance Act, other than instances when such support is necessary to prevent a breach of human rights of European Community Treaty rights. Annex K of the Guidance does not make reference to an amendment being made to Schedule 3 Nationality Immigration and Asylum Act 2002.

**Conclusion**

The clarity of the new eligibility regulations, with regards to the definitions covering basic care activities and being unable to achieve an outcome is welcomed.

However, the NRPF Network is concerned that the Care Act and draft eligibility regulations do not appear to consider the needs of the NRPF client group, i.e. people who have no access to mainstream benefits and housing.

**Response to question 17: Are you content that the eligibility regulations will cover any cases currently provided for by section 21 of the National Assistance Act 1948?**

Generally, yes, but it is unclear whether local authorities will retain a power to provide expectant mothers with accommodation.

**Question 81: Are there other considerations around preparation for implementation of the April 2015 elements of the Care Act on which national guidance would be helpful?**
Yes, the provisions of the Care Act and new eligibility regulations do not seem to have considered the needs of the NRPF client group; the key areas of concern which require further clarity are as follows:

- There is no specific test relating to the provision of accommodation and any eligible need could trigger the duty to provide accommodation.
- It appears that, in circumstances when care needs are met by the provision of non-NHS services, the local authority may still be required to provide accommodation if that is needed by the service user.
- There is lack of guidance regarding what constitutes "a significant impact" on the adult's well-being.
- It is unclear whether ordinary accommodation can be provided in order to meet a person's needs.
- Ordinary accommodation that has been provided in order to meet an adult's needs for care and support is not included in the regulations relating to ordinary residence.
- No regulations have been made in order to confirm the circumstances when needs for care and support can only be met by the provision of accommodation in relation to section 39.
- It is unclear whether it will still be the responsibility of the local authority to provide accommodation to asylum seekers and refused asylum seekers who have care needs, who would otherwise be accommodated by the Home Office.
- It is unclear whether the same groups of migrants that are currently excluded from assistance under section 21 National Assistance Act, will be excluded under the Care Act 2014, other than in instances when such support is necessary to prevent a breach of human rights of European Community Treaty rights.

The NRPF Network therefore requires that further clarity is provided on these points. If, as a result of the legislative changes, greater numbers of migrants with NRPF are able to access accommodation from the local authority, under a test which is contrary to the very specific requirements set out in SL v Westminster, then this would be very costly to local authorities when NRPF service provision is not funded by central government. Additionally, if these areas are not properly clarified, as well as causing confusion amongst practitioners and inconsistent practices across local authorities, it is likely that such matters will only be resolved by extensive and costly litigation following legal challenges being made to local authorities.