LOCAL AUTHORITY CIRCULAR

DEPARTMENT OF HEALTH

To: The Chief Executive
English Non-Metropolitan County Councils
English Metropolitan District Councils
London Borough Councils
Common Council of the City of London
Council of the Isles of Scilly

Copy to: The Director of Social Services
Regional Health Authorities
District Health Authorities

23 December 1992

NATIONAL ASSISTANCE ACT 1948 (CHOICE OF ACCOMMODATION)
DIRECTIONS 1992

Summary

Directions have been made by the Secretary of Health concerning the rights of individuals to choose where they receive residential care under new community care arrangements. A copy of the directions is attached, together with guidance on its operation.

Background

1. The directions are intended to ensure people have a genuine choice over where they receive residential care arranged for them by local authorities. The directions are described in detail in the attached guidance.

Action

2. Authorities should ensure that they are in a position to comply with the requirements of the directions when they come into force on 1 April 1993.

Enquiries

3. Enquiries about this circular should be addressed to James Fowles at the address below (telephone 071 972 4640, fax 071 972 4102).

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The Secretary of State in exercise of the powers conferred by section 7A of the Local Authority Social Services Act 1970\(^a\) and of all other powers enabling her in that behalf hereby makes the following Directions:

Citation, commencement and extent

1. (1) These Directions may be cited as the National Assistance Act 1948 (Choice of Accommodation) Directions 1992 and shall come into force on 1st April 1993.

(2) These Directions extend only to England.

Local authorities to provide preferred accommodation

2. Where a local authority have assessed a person under section 47 of the National Health Service and Community Care Act 1990\(^b\) (assessment) and have decided that accommodation should be provided pursuant to section 21 of the National Assistance Act 1948\(^c\) (provision of residential accommodation), the local authority shall, subject to paragraph 3 of these Directions, make arrangements for accommodation pursuant to section 21 for that person at the place of his choice within the United Kingdom (in these Directions called "preferred accommodation") if he has indicated that he wishes to be accommodated in preferred accommodation.

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\(^a\) Section 7A of the 1970 Act was inserted by section 50 of the National Health Service and Community Care Act 1990 (c.19).

\(^b\) 1990 c.19.

\(^c\) 1948 c.29. Relevant amendments to Section 21 are as follows. Section 21(1), (2) and (4) are amended by paragraph 2(1) of Schedule 23 to the Local Government Act 1972 (c.70). Section 21(1)(a) was amended by paragraph 11(1) of Schedule 13 to the Children Act 1989 (c.41) and section 42(1)(a) of the National Health Service and Community Care Act 1990 and paragraph (aa) is inserted into section 21(1) by section 42(1)(b) of the 1990 Act. Section 21(1)(b) was repealed by the Schedule to the Housing (Homeless Persons) Act 1977 (c.48). Section 21(4) is amended by paragraph 5(1) of Schedule 9 to the 1990 Act. The 1990 Act amendments come into force on 12th April 1993.
Conditions for provision of preferred accommodation

3. Subject to paragraph 4 of these Directions the local authority shall only be required to make or continue to make arrangements for a person to be accommodated in his preferred accommodation if -

(a) the preferred accommodation appears to the authority to be suitable in relation to his needs as assessed by them;

(b) the cost of making arrangements for him at his preferred accommodation would not require the authority to pay more than they would usually expect to pay having regard to his assessed needs;

(c) the preferred accommodation is available;

(d) the persons in charge of the preferred accommodation provide it subject to the authority's usual terms and conditions, having regard to the nature of the accommodation, for providing accommodation for such a person under Part III of the National Assistance Act 1948.

Preferred accommodation outside local authority's usual limit

4.(1) Subject to sub-paragraphs (2) and (3), paragraph 3(b) of these Directions shall not apply to a local authority which make arrangements which cost more than the local authority would usually expect to pay in order to provide a person with their preferred accommodation if a third party's contribution to that person (which is treated as that person's resources as assessed under the National Assistance (Assessment of Resources) Regulations 1992* is such that he can reasonably be expected to pay for the duration of the arrangements an amount which is at least equal to the difference between -

(a) the cost which the local authority would usually expect to pay for accommodation having regard to the person's assessed need, and

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*S.I. 1992/2977*
(b) the full standard rate for that accommodation as specified in section 22(2) of the National Assistance Act 1948 (liability to pay full cost of local authority accommodation, the "standard rate") or pursuant to section 26(2) to (4) of that Act (liability to pay full cost of other accommodation arranged by local authority).

(2) Sub-paragraph (1) shall not apply in respect of cases in which the third party's contributions are made by a person who is liable under section 42 of the National Assistance Act 1948 to maintain the person who wishes to be provided with preferred accommodation.

(3) Nothing in these Directions shall prevent a local authority from making or continuing to make arrangements for a person to be accommodated in his preferred accommodation where the cost of making such arrangements is more than the local authority would usually expect to pay having regard to the person's assessed needs.

Signed by authority of the Secretary of State


* Section 22(2) of the National Assistance Act 1948 was amended by section 44(3) of the National Health Service and Community Care Act 1990.

b Relevant amendments to section 26 of the 1948 Act are as follows. Sub-section (2) is amended by section 44(2) of the Health Services and Public Health Act 1968 (c.46) and paragraph 5(2) of Schedule 9 to the National Health Service and Community Care Act 1990. In sub-section (2) the words "arrangements" to "section" were substituted for England and Wales by paragraph 2(3) of Schedule 23 to the Local Government Act 1972. A new subsection (3A) was inserted by section 42(4) of the 1990 Act. Sub-section (4) was amended by the Schedule to the Housing (Homeless Persons) Act 1977 and section 20(1)(b) of the Health and Social Services and Social Security Adjudications Act 1983 (c.41). The 1990 Act amendments come into force on 12th April 1993.
GUIDANCE

NATIONAL ASSISTANCE ACT 1948 (CHOICE OF ACCOMMODATION) DIRECTIONS 1992

Purpose

1. Under new community care arrangements social services authorities will increasingly be making placements in residential and nursing home care. This direction is intended to ensure where that happens that people are able to exercise a genuine choice over where they live.

2. It also gives people the right to enter more expensive accommodation than they would otherwise have been offered if there is a third party willing and able to pay the difference in cost.

3. This direction is intended to formalise the best practice which most authorities would in any case have adopted. It sets out the minimum that individuals should be able to expect. It is not, however, intended to mark the limits of the choice that authorities may be able to offer people. Even where not required to act in a certain way by this direction, authorities should exercise their discretion in a way that maximises choice as far as possible within available resources.

Summary

4. If after an assessment of need an authority decides to provide residential care for someone either permanently or temporarily, it will make a placement on their behalf in suitable accommodation.

5. If the individual concerned expresses a preference for particular accommodation ("preferred accommodation") within the UK the authority must arrange for care in that accommodation, provided
* the accommodation is suitable in relation to the individual's assessed needs
d* to do so would not cost the authority more than it would usually expect to
p* pay for accommodation for someone with the individual's assessed needs
* the accommodation is available
* the person in charge of the accommodation is willing to provide
  accommodation subject to the authority's usual terms and conditions for
  such accommodation

6. If a resident requests it, the authority must also arrange for care in accommodation
more expensive than it would normally fund provided there is a third party willing and
able to pay the difference between the cost the authority would usually expect to pay and
the actual cost of the accommodation.

**Preferred Accommodation**

7. As with all aspects of service provision, there should be a general presumption in
favour of people being able to exercise choice over the service they receive. The
limitations on authorities' legal obligation to provide preferred accommodation set out in
the direction are not intended to deny people reasonable freedom of choice, but simply to
ensure that authorities are able to fulfil their obligations for the quality of service
provided and for value for money. The terms of the direction are explained more fully
below. Where for any reason an authority decides not to arrange a place for someone in
their preferred accommodation it must have a clear and reasonable justification for that
decision which relates to the criteria of the direction.

**Suitability of accommodation**

7.1. Suitability will depend on the authority's assessment of individual need.
Each case must be considered on its merits.

7.2. Consequently accommodation will not necessarily be suitable simply because
it satisfies registration standards. On the other hand accommodation will not
necessarily be unsuitable simply because it fails to conform with the authority's
preferred model of provision, or meet the letter of a standard service specification.
7.3. This direction does not affect Section 26(1D) of the National Assistance Act 1948 as inserted by the NHS and Community Care Act 1990 which prevents an authority making arrangements for residential care with anyone convicted of an offence under the Registered Homes Act 1984. Similarly, the direction does not require an authority to contract with any accommodation where for any other reason it is prevented by law from doing so.

Cost

7.4. The test should be whether the cost of preferred accommodation is more than the authority would usually expect to pay for someone with the same assessed needs as the individual concerned. This is not necessarily the same as the cost that the authority would in fact have incurred had the particular individual not decided to exercise their right to choose, since that might be either higher or lower than the authority would usually pay. For example, the cost of a one particular placement at a given time might be determined by the fortuitous availability for whatever reason of a place below the cost that an authority would usually expect to meet, or else by the temporary unavailability of accommodation at the authority's usual price.

7.5. The costs being compared should be gross costs before income from charging. Given the different amounts that authorities will recover from individuals by way of charges it would not be possible to determine a usual net cost an authority would expect to pay.

7.6. Costs will vary around the country. There may be circumstances where an authority might judge the need to move to another part of the country to be an integral part of an individual's assessed needs (eg in certain cases to be near a relative), and therefore one of the factors to be considered in determining what the authority would usually expect to pay.

7.7. Costs may also vary according to the type of care. For example, the cost an authority might usually expect to pay for respite care might be different from its usual cost for permanent care.
Availability

7.8. A place in an individual’s preferred accommodation may not always be available immediately. If the client wishes, authorities should where appropriate be willing to consider making temporary or intermediate arrangements until a place becomes available.

Conditions

7.9. In order to ensure that they are able to exercise proper control over the use of their funds, authorities need to be able to impose certain technical conditions, for example in relation to payment regimes, review, access, monitoring, audit, record keeping, information sharing, insurance, sub-contracting etc.

7.10. The contract conditions required of preferred accommodation should be broadly the same as those it would impose on any other similar operation. Stricter conditions should never be used as a way of avoiding a placement. As with suitability, account should be taken of the nature and location of the accommodation. There may be reasons why it would be reasonable to adapt standard conditions and unreasonable not to. For example, authorities should take into account the fact that homes in other areas, or those which take residents from many areas, may have geared themselves to the normal requirements of other authorities.

7.11. In setting their usual terms and conditions authorities are reminded that Part II of the Local Government Act 1988 stipulates that they may not specify non-commercial considerations in contracts.

More expensive accommodation

8. The direction also places a duty on authorities to make placements in more expensive accommodation than they would usually expect to provided there is a third party able and willing to pay the difference. A third party in this case might be a relative (but not a liable relative, see 11.13), a friend, or any other source.
9. This direction applies only where a resident explicitly chooses to enter accommodation other than that which the authority offers them, and where that preferred accommodation is more expensive than the authority would usually expect to pay.

10. This direction does not mean that authorities may set an arbitrary ceiling on the amount they are willing to contribute towards residential care and require third parties routinely to make up the difference. If challenged an authority would need to be able to demonstrate that its usual cost was sufficient to allow it to provide people with the level of service they could reasonably expect did the possibility of third party contributions not exist.

11. Similarly, the direction is not intended to allow authorities to require third party contributions in cases where the authority itself decides to offer someone a place in unusually expensive accommodation - for example, where there is at the time in question no suitable accommodation available at the authority's "usual cost".

Responsibility for costs of accommodation

11.1. When making arrangements for residential care for an individual under the National Assistance Act 1948, an authority is responsible for the full cost of that accommodation. Therefore where an authority places someone in a more expensive accommodation it must contract to pay the accommodation’s fees in full. The third party’s contribution will be treated as part of the resident’s income for charging purposes and the authority will be able to recover it in that way.

11.2. The prospective resident in these cases will therefore need to demonstrate that there is a third party able and willing to pay the difference between the authority’s normal cost and the accommodation’s actual fees.

11.3. In order to safeguard both residents and authorities from entering arrangements which are likely to fail, the third party must reasonably be expected to be able to continue to contribute for the duration of the arrangements. Authorities should assure themselves that there is every chance that the third party will continue to have the resources to make the required payments.

11.4. Authorities will be aware that under Section 26(3A) of the National Assistance Act 1948 (as inserted by the NHS and Community Care Act 1990), it is open to them to agree with both the resident and the person in charge of their
accommodation that instead of paying a contribution to the authority, the resident may pay the same amount direct to the accommodation, with the authority paying the difference. In such a case the third party would also pay the accommodation direct on behalf of the resident. However, it should be noted that even where there is such an agreement for the resident to make direct payments, the authority continues to be liable to pay the full cost of the accommodation should either the resident or relative fail to pay the required amount.

11.5. Authorities should also note that because arrangements under section 26(3A) of the 1948 Act require the agreement of all parties, it would not be reasonable for them to refuse people their preferred accommodation on the grounds that they (or their preferred accommodation) would not enter such an arrangement.

The amount of the third party contribution

11.6. The amount of the third party contribution should be the difference between the actual fee for the accommodation and the amount that otherwise the authority would usually have expected to pay for someone with the individual's assessed needs. In determining this amount the authority should apply the same consideration as above (7.4 - 7.8), except that in these cases it will need to state a precise figure in each case.

11.7. The amount of the third party contribution should be calculated on gross costs, i.e. the difference between the preferred accommodation's fees and the fees that an authority would usually expect to pay. The fact that residents might not have been able to meet the full cost of the accommodation that the authority would otherwise have arranged does not affect their ability to benefit from this part of the direction. When the third party’s contribution has been taken into account, the cost net of charges to an authority of the more expensive accommodation should be the same as it would have been in accommodation at the authority’s usual price.

Price Increases

11.8. Arrangements between the authority, resident and third party will need to be reviewed from time to time to take account of changes to the accommodation's fees and also changes to the amount the authority would usually expect to pay. These may not change at the same rate, and residents and third parties should be
told that there cannot be a guarantee that any increases in the accommodation’s fees will automatically be shared evenly between the authority and third party should the particular accommodation’s fees rise more quickly than the costs the authority would usually expect to pay for similar people. An authority may find it useful to agree with the resident and third party that the third party’s contribution will be reviewed on a regular basis.

Responsibilities of residents and third parties

11.9. Authorities should make clear to residents and third parties the basis on which arrangements are to be made when they seek to exercise their right to more expensive preferred accommodation. It should be clear from the outset to the resident, third party and person providing the accommodation

- that failure to keep up payments will normally result in the resident having to move to other accommodation
- that an increase in the resident’s income will not necessarily lessen the need for a contribution, since the resident’s own income will be subject to charging by the authority in the normal way
- that a rise in the accommodation’s fees will not automatically be shared equally between authority and third party
- that if the accommodation fails to honour its contractual conditions, the authority must reserve the right to terminate the contract

11.10. Authorities may wish to consider making a binding legal agreement with the third party to this effect, though they should note there are restrictions on the ability of charitable contributors to enter into such contracts.

Suitability and Conditions

11.11. The criteria of suitability, and willingness to provide on the basis of normal conditions should be applied in the same way as for other preferred accommodation (para 7.1 ff).

11.12. An exception to this is that it would be reasonable to expect providers entering this kind of arrangement to agree to do so on the basis that the authority has the right, subject to notice, to terminate the contract should the third party’s payments cease or cease to be adequate.
Liable relatives

11.13. Because they may already be obliged to contribute to the cost of accommodation, these arrangements do not apply to relatives liable to contribute to the cost of accommodation under section 42 of the National Assistance Act 1948. In other words, for the purposes of this direction such people cannot act as third parties for the care of the relative to whose care they are already obliged to contribute.

11.14. However, although the direction imposes no legal duty to do so, there is no reason why authorities should not enter in similar arrangements with liable relatives who have the resources both to meet their liability and make an additional third party payment. Indeed, there is no reason why authorities should not, at the request of the resident, arrange more expensive accommodation for someone who can from their own resources afford to pay the additional cost.

People already resident in residential care

12. People already placed by an authority in residential accommodation have the same rights under this direction as those who have yet to be placed. An individual who wishes to move to different or more expensive accommodation may seek to do so on the same basis as anyone about to enter residential care for the first time.

People who are unable to make their own choices

13. There will be cases in which prospective residents are unable to express a preference for themselves. It would be reasonable to expect authorities to act on the preferences expressed by their carers in the same way that they would on the resident’s own wishes, unless exceptionally that would be against the best interests of the resident.

Effect on tendering, effect on block contracting.

14. Many authorities will already be consulting on, or involved in formal tendering and contracting procedures. As this direction is intended simply to formalise best practice, there should be no conflict between it and arrangements authorities have already made.
15. However, authorities will need to review their arrangements to see if any further action is needed. In particular, where authorities have already published details of their contracting policies, they will need to inform prospective providers of any amendments to that policy required in the light of this direction.

16. For example, where authorities are conducting, or have completed, exercises designed to draw up closed lists of approved suppliers they will need to make it clear that as a result of this direction such a list cannot now be regarded as an exhaustive statement of those providers with whom the authority will contract. It would not be reasonable for an authority to use as a test of the suitability of accommodation its presence on or absence from a previously compiled list of approved suppliers. The direction does not, however, prevent an authority having a list of preferred providers with which it will contract where a potential resident expresses no preference for particular accommodation, nor from recommending such providers to prospective residents.

Information

17. For individuals to be able to exercise genuine choice they need information about the options open to them. They should be given fair and balanced information with which to make the best choice of accommodation. Authorities should explain to individuals their rights under this direction. Individuals should be told explicitly that they may allow the authority to make a placement decision on their behalf, that they may choose from a preferred list (if the authority operates such a system) or if they wish that they are free to choose any accommodation which is likely to meet their needs subject to the constraints set out in this direction. Authorities might consider including this in a leaflet for prospective residents and their carers.

Complaints

18. Complaints about the application of this direction and decisions taken in individual cases will fall within the scope of authorities’ statutory complaints procedures. As in all aspects of their activity, authorities should ensure that prospective residents are aware of the existence of the complaints procedure and of their rights under it.