1. This paper seeks to cover two principal topics, both of which relate to the duty imposed on local and health authorities by section 117 of the Mental Health Act 1983 to provide after-care services following the discharge of an individual previously detained pursuant to sections 37, 45A, 47 or 48 of the Act.

2. The first concerns the extent to which those duties can arise prior to release, with particular regard to the recent decision in *R(B) v Camden LBC Ors* (2006) ACD 31. The second seeks to address some of the practical problems that face local and health authorities in providing the services section 117 requires them to provide.

**Duty to Prepare for Release**

3. Pursuant to section 117 of the MHA 1983, a local authority is subject to a duty, in respect of any person residing in their area who has been detained under the MHA 1983, to provide after-care services upon that person’s ceasing to be detained. (The local health authority is subject to an identical duty under section 117).

4. The language of section 117, on its face, does not obviously suggest that a local authority’s duties under section 117 can be triggered whilst the detained person is still in detention. On the contrary, the wording of section 117 would appear to limit the duty to provide after-care services to persons who have been detained or admitted to hospital under the Act and who then ‘cease to be detained …’ (see section 117(1)).

5. However, an issue that often arises in practice is the extent of the
authorities’ obligations under s.117 in respect of an individual who is still in detention but in respect of whom there is shortly to be a contested hearing before the MHRT. Can a local or health authority simply sit back and wait to see what the MHRT decides to do, or is it under an obligation to make preparatory arrangements for aftercare in advance of the hearing?

6. The basic approach to be followed by a local/health authority once a conditional release has been ordered by the MHRT is reasonably well established. Where that release is conditional upon the provision of suitable aftercare services in the community the local and/or health authority acts unlawfully if it does not “seek to make practical arrangements for aftercare” so as to permit discharge to take place: see *Ealing District Health Authority ex p. Fox* [1993] 3 All ER 170 per Otton J.

7. The essential proposition that local/health authorities are under a duty to put in place those aftercare arrangements which the MHRT has identified as necessary preconditions to discharge was subsequently confirmed by Scott Baker J in *R v Mental Health Review Tribunal ex p Hall* [1999] 3 All ER 132. His judgment contained the following assertion as to the state of the law:

> “an authority’s duty to provide after-care services includes a duty to set up the arrangements that will be required on discharge. It is not a duty that arises for the first time at the moment of discharge...An authority with a duty to provide after-care arrangements acts unlawfully by failing to seek to make arrangements for the fulfilling of conditions imposed by a Mental Health Review Tribunal under section 73(2).”

8. Some sensible qualification was applied to these propositions by Stanley Burnton J in *R(W) v Doncaster MBC* [2003] EWHC Admin 192, in which he said that the duty identified in *Fox* and *Hall* did not require authorities to start making after care arrangements before the MHRT had made its
decision. To do so would be waste of time. Most contested applications to
the MHRT fail and one would not know until the decision precisely what
services the MHRT considered necessary.

9. That is not to say, however, that authorities should not give the matter
some thought. Reference was made in W to Paragraph 27.7 of the Code of
Practice which would appear to require authorities to take some steps “to
identify” appropriate services to be provided after discharge.

10. So far so good – the position would seem to be that the authorities duty to
provide services only bites from the point at which the MHRT makes its
decision to order conditional discharge, but some thought should be given
by the authorities to the nature and availability of services before the
contested hearing.

11. A good example of the operation of these principles in practice is provided
by the recent decision of the Administrative Court in the case of R(B) v
Camden LBC Ors (2006) ACD 31, which came before Stanley Burnton J
in April 2005.

12. B was a paranoid schizophrenic who had been detained in 1998 under
sections 37 and 41 MHA 1983 following his conviction on offences of
inflicting grievous bodily harm and unlawful wounding. The offences had
been committed in Camden where B was resident. In August 2002, when
he began to take unescorted leave, B was made subject to an exclusion
order which prevented him from visiting Camden. This order was made
because there had been concerns about B’s possible contact with victims.

13. On 11 September 2003 the Mental Health Tribunal found that the
exclusion order should remain in place but made an order for B’s
conditional discharge subject to the condition precedent that there should
be available to B, at the point of discharge, suitable hostel accommodation.
The Tribunal did not set down a further hearing to review whether the
conditions of the discharge had been satisfied and did not send a copy of its decision to Camden or anyone else. In fact, it was only on 5 November 2003 that Camden were notified of the Tribunal’s decision.

14. Thereafter, there were delays in finding B a suitable placement, such delays having been caused in part by funding concerns on the part of Camden. B was eventually conditionally discharged from detention in 2 July 2004.

15. B then brought a claim for damages against the local authority and the local health authority on the basis that the authorities: (a) had breached their statutory duties by failing to arrange suitable accommodation for him over the period September 2003 until June 2004; and (b) had, thereby, infringed B’s rights under Articles 5 and 8 ECHR. The authorities defended the claim on the basis that they had not breached the statutory duty they owed to B under section 117 and in any event B was not entitled to any damages.

16. In his judgment, which proceeded upon a fairly literal interpretation of s.117 Stanley Burnton J held as follows:

(i) the terms of section 117(1) ‘are clear’. The duty to provide after care services was owed only ‘to a person who ceases to be detained and leaves hospital’ (para. 57);

(ii) in the present case, the authorities’ duties under section 117 ‘could not have arisen until after the decision of the tribunal that the preconditions for B’s discharge had been satisfied and that he was conditionally discharged.”

(iii) it could not be said that a person who has been the subject of a conditional discharge order which is itself subject to condition precedents (i.e. conditions which must be met before discharge is
to be permitted) has ceased to be detained within the meaning of section 117 (para. 57);

(iv) because section 117 is not engaged until the detained person is discharged, there is no duty under that section to monitor the needs of the detained person with a view to considering whether preparatory steps need to be taken in respect of the provision of after-care services (paras. 60-61).

17. On the face of it, the judgment would seem to represent a significant departure from the position established following Fox and Hall. If the duty to act under s.117 is not engaged until discharge then there would appear to be no duty to take the steps necessary to ensure that the discharge comes about.

18. However, the judge’s conclusions in B have to be read in the context of the various concessions made on behalf of the local authority during the course of the hearing, as follows:

(i) whilst it may not be subject to a duty to provide services under section 117, it nonetheless had a power to take preparatory steps before a detained patient was discharged;

(ii) that power had to be exercised lawfully and its exercise may be challenged on ordinary public law principles;

(iii) a lawful exercise of the power required Camden to use reasonable endeavours to take steps to enable them to fulfil their duty under section 117.

19. The judge accepted Camden’s concessions, noting that similar ones had been made in R(K) v Camden & Islington HA [2002] QB 198. Whilst the fact that the decision in B was based, to a significant extent, upon
concessions voluntarily made by a party to the proceedings would mean
that there is nothing to stop a party to different proceedings taking the
point that there was no s.117 duty to do anything until release, it is difficult
to conceive of a case in which that argument would succeed.

20. In my view it is clear for the cases discussed above that authorities cannot
simply sit back and wait for discharge to occur before engaging with
Article 117. If discharge is made conditional on the provision of service
the authorities concerned will have to use their “best endeavours” to
ensure that those services are provided, or face the risk of judicial review
proceedings being brought against them.

21. In a case in which the Claimant was still detained the outcome of those
proceedings would inevitably be an order requiring best endeavours to be
used to provide the necessary services. However, in a case in which the
Claimant had been discharged (albeit later than might otherwise have been
the case had the authorities acted with greater diligence) he will not be
entitled to damages under Article 5 ECHR.

22. In this regard Stanley Burnton J in B adopted the reasoning of the Court of
Appeal in R(W) v Doncaster [2004] EWCA 378, namely: (a) the detaining
authority had not acted unlawfully and (b) it could not be right that the
claimant could not proceed against the detaining authority but could
nonetheless get damages against a third party: see also the judgment of
Crane J in R(A) v SSHD [2003] 1 WLR 330, in which a similar analysis
was applied.

Duty to provide services under s.117 and s.47

23. The second topic to be considered in this paper is the nature and extent of
the authorities’ duty to provide after care services following release and, in
particular, the relationship between the duties imposed on local authorities
by s.117 of the Mental Health Act and s.47 of the Community Care Act.
24. It would be difficult to make good the suggestion that the practical interpretation of the duty to provide aftercare services was, in legal terms, the most fascinating aspect of this subject. There is some law, but is neither conceptually complicated or particularly fast-moving.

25. In fact, where the Courts have sought to clarify or explain the nature and extent of the obligations of health authorities and local authorities in this area they have, for the most part restricted themselves to a series of general statements of the obvious. What it comes down to, in legal terms, is essentially this: local authorities and health authorities have to work together and do their best to ensure that those who cease to be detained under the Act get the services that they need for as long as they need them.

26. The difficulties in this area relate not so much to the interpretation of the law but its application to the particular factual circumstances with which one is faced in a particular case. The general approach may be straightforwardly defined but in cases like these the facts are never straightforward and the application of the general approach in an individual case often throws up a series of difficult practical questions. What follows is an attempt at some practical guidance as to how best to approach some of the particular problems that emerge when seeking to apply s.117 and/or s.47 to the facts of a particular case.

27. Many of the practical problems of interpretation that arise in this area are attributable to the fact that, although heavy with significance for the authorities to which it applies, s.117 is a provision which is very light on definition. In particular the section fails to give any clear indication as to:

(i) What “aftercare services” consist of for the purposes of this section.

(ii) How, and when, the need of services should be assessed.
Whether authorities can charge for services provided pursuant to their s.117 duty.

How far an authority’s obligations extend when the provision of services becomes, in practical terms, extremely difficult or even impossible.

How an authority should go about identifying the point at which the obligation to provide services no longer exists.

28. Fortunately, however, the fairly limited body of caselaw on s.117 provides at least partial answers to most of these questions.

29. First, the definition of aftercare services that the Court’s consistently adopt when dealing with Article 17 is the one given by Beldam LJ in *Clunis v Camden and Islington Health Authority* [1998] 3 All ER 180 in the following terms: “After-care services are not defined in the Act. They would normally include social work, support in helping the ex-patient with problems of employment, accommodation or family relationships, the provision of domiciliary services and the use of day centre and residential facilities.”

30. That definition was approved by the House of Lords in *R v Manchester City Council ex p. Stennett* [2002] 4 All ER 124 and is of assistance in so far as it goes. In practice, the services required are usually successfully identified within the framework of the Care Programme Approach and the multi-disciplinary meetings that take place within that framework. For a list of people who should have an input into this decision see paragraph 27.8 of the Code of Practice.

31. In addition to the obligations imposed by s.117 there is also a duty on a local authority, imposed by s.47 of the National Health Service and Community Care Act 1990 to assess the needs of any individual who “may
be in need” of community care services. Once the assessment has been undertaken the local authority is required to determine whether his or her needs as assessed call for the provision of services.

32. Given that the local authority is under a duty to provide services under s.117 for as long as it considers those services to be needed, there is a risk of a degree of circularity entering the process. The sensible approach in practice would appear to be that the local authority will be obliged to provide (under a combination of s.47 and s.117) whatever services are identified as necessary in the course of the s.47 assessment.

33. Again as a matter of practice, it would seem to make sense for the local authority to involve the relevant health authority in the s.47 process (or at least keep it informed) as although the duty to assess is on the local authority alone, the subsequent duty to provide the services (under s.117) is on both of them. The local authority will wish to avoid being brought in as second defendant to a judicial review of allegedly insufficient services resulting from an inadequate assessment.

34. It is also important to bear section 47 in mind when dealing with individuals who are still detained under the Act but who face the prospect of imminent release. The question whether a local authority was obliged under section 47 to carry out an assessment of detained persons and, further, to decide whether those persons’ needs were such that they called for the provision of services by the local authority was addressed in the case of B, discussed in detail above.

35. Having again focussed closely no the wording of section 47(1), Stanley Burnton J reached the following conclusions on this issue (see especially paras. 65-67 and 72):

(i) Section 47(1) applies to persons who ‘may be in need of such [community care] services’;
(ii) Accordingly, it applies not only to persons who are in need but also to persons who may be about to be in need;

(iii) A person who is detained but who is subject to a deferred conditional discharge decision by a tribunal, a decision which envisages that discharge will be permitted once section 117 after-care services are in place, is a person who “may be in need of such services”;

(iv) However, the duty under section 47 does not arise until it ‘appears’ to the local authority that a person may be in need and it cannot appear to the authority that a person may be in need unless it knows of the possible need;

(v) it follows that there is no duty under section 47 to monitor a detained person in case they may show themselves to be in need of after-care services;

36. In practice the effect of this decision would seem to be that when a local authority is informed of a decision by the MHRT to order the conditional release of an individual detained under the Act an obligation will arise under s.47 to carry out an assessment of that individual’s needs.

37. Authorities are not allowed to charge for accommodation provided in accordance with s.117 - see Stennett [2002] – or, by implication, for any of the other services provide in accordance with s.117. This much is confirmed by Health Service Circular/Local Authority Circular HSC 2000/003: LAC (2000).

38. There can sometimes be a doubt as to which local or health authority has to pay for the s.117 services, and accommodation in particular. There may be a case, like B for example, where an individual’s release by the MHRT is made conditional upon him living in a different location to the one he
lived in before his detention. In those circumstances it is the local authority in which he lived prior to his detention that will be responsible for providing the accommodation. If he had no residence prior to detention it is the local authority for the area in which he must reside under the terms of his conditional discharge: see *R v Mental Health Tribunal ex p. Hall* [1999] 3 All ER 131.

39. The Health Service Circular suggests, and this seems to be sensible that Local Authorities and Health Authorities should establish jointly agreed local policies which set out which services fall under s.117, the criteria for their provision and who should meet the cost of providing them. The quality and scope of these policies varies. Of those I have had cause to look at recently the one formulated by the Cambridgeshire and Peterborough Mental Health Partnership NHS Trust is a good example and can be found on their website.

40. Even if a thorough assessment has been carried out, the individuals needs have been carefully and correctly identified, and there is no dispute as to who is to fund the necessary services, there can still be significant problems encountered in providing the services identified.

41. For example, in one case in which I was recently involved, the critical issue concerned the provision of suitable accommodation. The individual concerned was offered one suitable flat, which she refused to live in because she did not wish to live in a different town to her boyfriend. She was subsequently provided with alternative accommodation through NACRO which lasted for as long as it took to sell all the furniture. Disappearing, breaking rules etc are all common features of cases such as this, which significantly complicate the task of finding accommodation.

42. When considering how to approach such a case the authority concerned is entitled to keep in mind that the obligations imposed by s.117, whilst important and onerous, are not absolute. In *R(IH) v Secretary of State*
[2002] 3 WLR 967 the authorities’ duty was characterised as one to “use best endeavours to put in place the necessary aftercare.” In R(W) v Doncaster MBC [2004] EWCA Civ 378 the phrase “reasonable endeavours” was used (see para.50).

43. In determining the nature and extent of the aftercare services to be provided under s.117 authorities are also entitled to have regard to the other demands on their budgets and to prioritise accordingly: see R v Camden & Islington Health Authority, ex parte K [2002] QB 198 (at 228, para 29), and in the context of s.47 of the 1990 Act, R v Gloucestershire CC ex parte Barry [1997] 2 All ER 1.