

CARE ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Care and Support

Miscellaneous

Section 73 – Human Rights Act 1998: provision of regulated care or support etc to be public function

425. *Section 73* makes explicit that registered care providers, when providing adults with either personal care in their home or accommodation with nursing or personal care, which has been arranged or funded by a public authority pursuant to specific duties and powers, are exercising a function of a public nature for the purposes of the Human Rights Act 1998. It extends to the whole of the UK.
426. A registered care provider in England is a person registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008. A registered care provider in Wales is a person registered under Part 2 of the Care Standards Act 2000. In Scotland, the equivalent to a registered care provider is someone who provides a care service which is registered under section 59 of the Public Services Reform (Scotland) Act 2010. A registered care provider in Northern Ireland is a person registered under Part 3 of the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003.

Section 74 – Discharge of hospital patients with care and support needs

427. This section introduces the provisions about delayed discharges which are set out in Schedule 3 (see below).

Schedule 3 – Discharge of hospital patients with care and support needs

428. *Schedule 3* re-enacts the effect of the delayed discharges provisions of the Community Care (Delayed Discharges etc) Act 2003 (the 2003 Act) and relevant regulations, subject to simplification and amendments to fit the new NHS architecture. The Schedule deals with the planning of safe discharge of patients in England from NHS hospital care, or hospital care arranged for by the NHS, to local authority care and support to ensure that patients are not delayed in hospital despite being fit, safe and ready to be discharged.

Cases where hospital patient is likely to have care and support needs after discharge

429. *Paragraph 1* places responsibility on the NHS body to inform the relevant local authority of a patient's likely need for care and support. This is known as an 'assessment notice' and is necessary when the patient is unlikely to be safely discharged from hospital without arrangements for care and support being put into place first. The relevant local authority who the NHS body must notify is the one in which the patient is ordinarily resident or, if it is not possible to determine ordinary residence, the local authority area in which the hospital is situated.

430. The paragraph sets out a number of requirements for the assessment notice:
- The notice must state that it is given under this provision. This is so that the local authority is aware of the consequences that could flow from the assessment notice, such as the liability to pay the NHS body for the costs of delayed discharge arising under *paragraph 4* of this schedule.
 - The notice should not be issued more than 7 days before the patient is expected to be admitted into hospital. This is so the notice is not provided too far in advance of admission to avoid the risk of wasting preliminary planning in the event the patient's condition changes.
 - The responsible NHS body must consult with the patient and, where appropriate, the carer before issuing the assessment notification. This is to avoid unnecessary assessments where, for example, the patient wishes to make private arrangements for care and support.
431. These requirements replicate provisions set out in sections 2 and 3 of the 2003 Act and regulation 4(4) and (5) of the [Delayed Discharges \(England\) Regulations 2003 \(S.I. 2003/2277\)](#).

Assessment notice given by responsible NHS body to local authority

432. *Paragraph 2* sets out the process that the responsible NHS body and relevant local authority must follow to ensure a patient with care and support needs can be safely discharged from hospital.
433. There are certain legal obligations that are activated by the discharge of the patient from NHS care. When such a decision has been made and the patient has (or may have) care and support needs, then a safe discharge cannot occur until the NHS and local authority are satisfied that, as sub-paragraph (1) sets out, the patient is ready for discharge and that it is safe for them to be discharged. The NHS body has to give the local authority notice of when it intends to discharge the patient. This is known as a discharge notice.
434. Sub-paragraph (3) provides that the discharge notice must specify whether or not the patient will receive any further health care services upon discharge, and if so, what those services will be.
435. Sub-paragraph (5) sets out the definition of the 'relevant day' until which a discharge notice remains in force. This is relevant to defining any delayed discharge period in the event that the local authority is held to be liable under paragraph 4 to pay the NHS body for the cost of accommodation or personal care caused by the delayed discharge from hospital. The 'relevant day' would either be the day specified in the discharge notice or the end of a period which regulations may set out.
436. This replicates the provisions set out in section 5 of the 2003 Act and regulation 5 of the [Delayed Discharges \(England\) Regulations 2003 \(S.I. 2003/2277\)](#).
437. *Paragraph 3* sets out the responsibilities of the local authority who received an assessment notice. The local authority must carry out an assessment of the patient's need and, where applicable, the carer's need, with a view to identifying the care and support that is necessary for them to be safely discharged. The local authority must inform the NHS of the outcome of the assessment.
438. This replicates the provisions in section 4 of the 2003 Act.

Cases where the discharge of the patient is delayed

439. *Paragraph 4* sets out what is to happen if the discharge of the patient is delayed because the local authority has not carried out the relevant care and support assessments or put the required package of care and support in place.

440. Sub-paragraph (2) provides that the local authority is liable to make payments to the responsible NHS body for each day that a patient is unable to be discharged.
441. Regulations will be introduced to set out:
- how the delayed discharge period is to be calculated; and
 - the amount to be paid.
442. This section replicates provisions set out in sections 6 and 7 of the 2003 Act.

Delegation to management of independent hospital

443. *Paragraph 5*(1) provides that an NHS body may make arrangements with others for the person to do anything which is required or authorised to be done by the NHS body under this Schedule. Sub-paragraphs (2) and (3) set out the effect of such an arrangement. This replicates sections 1(3), (4) and (5) of the 2003 Act.

Adjustments between local authorities

444. *Paragraph 6* allows for regulations to be made to modify the provisions relating to delayed hospital discharges where it appears to the NHS body that the patient is ordinarily resident in the area of another local authority. This might require the local authority to accept assessment notices even in cases where it may wish to dispute that it is the relevant local authority. The regulations may also enable the local authority to recover relevant expenditure that it incurs. This re-enacts section 10 of the 2003 Act.

Meaning of “hospital patient”, “NHS hospital”, “NHS body”, etc.

445. *Paragraph 7* sets out the meaning of a number of terms relating to the delayed discharges regime in Schedule 3.

Section 75 – After-care under the Mental Health Act 1983

446. *Section 75* clarifies the meaning of after-care and makes minor amendments to section 117 of the Mental Health Act 1983 (the 1983 Act). The changes remove anomalies in determining the responsible local authority in relation to the provision of after-care services under the 1983 Act to people who have been detained in hospital for treatment of mental disorder and the provision of care and support services to which the Act applies. This section also inserts new section 117A into the 1983 Act. This allows regulations to be made which enable a person to express a preference for particular accommodation to be provided under section 117. Schedule 4 makes a number of modifications to the application of certain provisions of the Act to enable direct payments to continue to be made in respect of section 117 services.
447. *Subsection (1)* of section 75 clarifies that local authorities may commission as well as provide section 117 services. Consequent upon the amendments made by subsection (1), *subsection (2)* preserves the effect of section 117(2D) that a clinical commissioning group is under a duty to commission rather than provide section 117 services.
448. *Subsections (3) and (4)* apply the ordinary residence rules to section 117 in order to avoid anomalies which can currently arise where one local authority is responsible for commissioning section 117 services whilst another commissions any other services a person may need. They apply consistent after-care ordinary residence rules in England and Wales, in particular, in relation to which health body and local authority are responsible for commissioning after-care services. One benefit of this will be to empower the Secretary of State to resolve disputes as to which authority is liable to commission section 117 services, which can currently only be resolved through the courts. The Secretary of State and the Welsh Ministers will publish arrangements for determining cross-border disputes.

449. *Subsection (5)* inserts a definition of “after-care services” for the purposes of section 117. It makes clear that section 117 services must meet a need arising from or related to the person’s mental disorder. Additionally, the purpose of these services must be to reduce the risk of deterioration in the person’s mental condition and, accordingly, to reduce the risk of the person’s re-admission to hospital for treatment for mental disorder.
450. The definition of after-care services is nevertheless broad. For example, after-care can encompass health, social care and employment services, supported accommodation and services to meet the person’s wider social, cultural and spiritual needs, if these services meet a need that arises directly from or is related to the particular patient’s mental disorder, and help to reduce the risk of a deterioration in the patient’s mental condition.
451. *Subsection (6)* inserts a new section 117A into the 1983 Act. This empowers the Secretary of State to make regulations to place a duty on a local authority to enable a person who qualifies for accommodation under section 117 to live in accommodation of their choice, provided that conditions specified in the regulations are met. This may involve the person themselves or another person paying some or all of the additional cost.
452. *Subsection (7)* provides that a local authority may exercise its duty under section 117 by making direct payments, and for that purpose Part 1 of Schedule 4 has effect.
453. As a consequence of the amendments to section 117 as it applies to Wales, *subsections (8), (9) and (10)* amend the Social Services and Well-being (Wales) Act 2014 (“the Wales Act”). *Subsection (8)* inserts a new section 53(11) in the Wales Act to provide that a local authority in Wales may discharge its duty under section 117 by making direct payments, and *subsection (9)* inserts a new Schedule A1 to the Wales Act for that purpose. *Subsection (10)* inserts a new section 194(4A) in the Wales Act to provide that an adult will be treated as ordinarily resident in the area of the local authority in England or Wales in which that person is being provided with accommodation under section 117 of the Mental Health Act 1983. *Subsection (11)* updates the references to legislation in section 117(2C) under which direct payments for mental health after-care services may be made.
454. *Subsection (12)* provides that the changes to the commissioning responsibility made by subsections (3) and (4) will not apply where a person is already in receipt of section 117 services when these changes come into force. The current authority will remain responsible for commissioning those services for as long as the person concerned continues to need them.

Schedule 4 – After-care under the Mental Health Act 1983: direct payments

455. **Part 1** of Schedule 4 modifies the application of certain direct payments provisions of the Act (sections 31, 32 and 33) to make sure they also apply to services provided or commissioned under section 117 by local authorities in England. **Part 2** inserts Schedule A1 (direct payments: after-care under the Mental Health Act 1983) into the Social Services and Well-being (Wales) Act 2014, which modifies the application of certain direct payments provisions of that Act (sections 50, 51 and 53) to apply to services provided or commissioned under section 117 by local authorities in Wales.

Section 76 - Prisoners and persons in approved premises etc.

456. This section sets out the responsibilities for provision of care and support for adult prisoners and people residing in approved premises (which includes bail accommodation). Where it appears to a local authority that adults in prison or approved premises may have needs for care and support, the local authority will be under a duty to assess their needs under section 9 and where they have needs which meet the eligibility criteria, may be under a duty to meet those needs. This will provide consistency of

approach between institutions and ensure prisoners and residents in approved premises receive services equivalent to people with similar needs in the community.

457. *Subsections (1) and (2)* of section 75 make clear that the local authority in whose area a prison, or approved premises, is located will be responsible for providing assessments and meeting care and support needs for the residents of those custodial settings. A detainee's previous ordinary residence will not be a consideration while they are in these settings, and responsibility will fall to the local authority in whose area the prison or approved premises are located without reference to the general ordinary residence criteria.
458. *Subsection (3)* applies the same principle where an adult is required to reside in any other premises as a condition of bail, so that responsibility will fall to the local authority in whose area the premises are located.
459. *Subsection (4)* makes clear that prisoners and those in approved premises will not be able to express a preference for particular accommodation except where the individual is being released into the community. The duty for local authorities to protect property will not apply to the property of adult prisoners and residents in approved premises with care and support needs whilst in custody.
460. *Subsection (5)* makes clear that sections 31 to 33 on the provision of direct payments do not apply to prisoners or residents in approved premises, except those who have not been convicted of an offence, for example some people in bail accommodation. Prisoners and residents in approved premises who have been convicted of an offence will not be eligible to receive direct payments for the costs of their care and support.
461. *Subsection (6)* covers continuity of care for prisoners and those in approved premises whose needs for care and support are being met by a local authority. The continuity provisions in sections 37 and 38 will apply to prisoners and residents in approved premises being moved between different custodial settings and on release to the community.
462. *Subsection (7)* also makes clear that the duties for local authorities to carry out adult safeguarding enquiries and to protect property do not apply to people in prison or approved premises.
463. *Subsection (10)* makes clear that governors and officers of a prison will not be required by regulations to become members of Safeguarding Adult Boards. However, it does not prevent a Safeguarding Adult Board from inviting governors and officers of a prison to become members by virtue of Schedule 2 paragraph 1(2)). By virtue of *subsection (11)*, this also extends to young offender's institutions, secure training centres and secure children's homes.
464. The eligibility framework will apply to prisoners and residents in approved premises.
465. Youth offenders with care and support needs should receive the same transition procedures to adult care and support as young people in the community. A request for an assessment can be made on the youth offender's behalf by the professional responsible for their care in the Young Offenders' Institution, Secure Children's Home or Secure Training Centre.
466. Charging arrangements for care and support services received by prisoners will be the same as for people in the community.
467. *Subsection (14)* makes clear that someone who is temporarily away from their prison or approved premises, such as for visits to hospital, is deemed to be still detained in that prison or residing in those approved premises whilst away. This means, for example, that if someone is receiving care or support from the local authority in which their prison is based and they are temporarily in hospital in the area of a different local authority, the responsibility for providing the support does not change local authorities.

Section 77 – Registers of sight impaired adults, disabled adults, etc.

468. *Subsection (1)* sets out the requirement on local authorities to establish and maintain a register of people who are ordinarily resident in their area and are sight impaired. This replaces the requirement on local authorities to maintain registers of disabled people under section 29(4)(g) of the National Assistance Act 1948.
469. There is no legal definition of “sight impairment”, but clinical guidelines make it clear that someone can be certified as sight impaired if they are “substantially and permanently handicapped by defective vision caused by congenital defect or illness or injury”.
470. *Subsection (2)* allows for regulations to describe what “sight impairment” and “severe sight impairment” mean for the purposes of compiling a local authority register.
- Subsection (3)* gives local authorities the option to establish and maintain registers of people living in their area who require care and support or who might in the future. This section will allow those people whose needs may change over time to be accurately recorded – for instance, to take account of an individual with a progressive neurological condition who may need care and support at some point in the future.
471. *Subsection (4)* defines the categories of people who might be included in these voluntary general registers.

Section 78 – Guidance, etc.

472. This section provides a power for the Secretary of State to issue guidance to local authorities about how they exercise their functions under this Part of the Act. It has been drafted with the intention that this guidance will have the same legal effect as guidance issued under section 7 of the Local Authority Social Services Act 1970. Like section 7, the provision requires local authorities to “act under the general guidance of the Secretary of State”. The Courts have interpreted this to mean that local authorities must “follow the path charted by the Secretary of State’s guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course” (R v Islington LBC ex parte Rixon [1997] 1 CCLR 119 at 123).
473. **Section 7** continues to apply in relation to guidance about the exercise of all other social services functions.
474. *Subsection (2)* requires the Secretary of State to consult relevant persons including stakeholders before issuing guidance under this section. *Subsection (3)* requires the Secretary of State when issuing guidance or making regulations under this Part to have regard to the general duty of local authorities to promote individual well-being.

Section 79 – Delegation of local authority functions

475. This section provides a power for local authorities to authorise a third party to carry out certain care and support functions.
476. However, certain functions are excluded from this power. *Subsection (2)* sets out the functions which are excluded, and which therefore may not be delegated to a third party.
477. *Subsection (4)* provides that that the local authority may determine the extent to which it delegates the function in any particular case. For example, a local authority may delegate the carrying out of all needs assessments to a third party organisation, or it may choose to delegate assessments only for certain groups of people, but carry out other assessments itself. When delegating any function, the local authority may impose conditions on the way the third party may exercise the function.
478. *Subsection (5)* provides that any authorisation is only for the period specified in the authorisation and the local authority may revoke the authorisation at any time during

that period. Delegating the function does not prevent the local authority from being able to carry out the function itself.

479. *Subsection (6)* makes clear that anything done (or failed to be done) by the third party in carrying out any function delegated to them is treated as done (or not done) by the local authority itself (though as *subsection (7)* makes clear this does not mean that the third party can avoid liability for any criminal actions nor for any disputes between it and the local authority arising out of any contractual relationship between them). This means that the delegation of any function does not absolve the local authority from ultimate responsibility for ensuring the function is carried out properly and in accordance with all relevant statutory obligations.
480. *Subsection (8)* makes provision permitting the disclosure of information between the local authority and anyone to whom it has delegated a function under this provision (even where such disclosure would otherwise be unlawful) where such disclosure is necessary for the exercise of that function. It does this by applying the provisions of Schedule 15 of the Deregulation and Contracting Out Act 1994 to any delegation made under this provision. Schedule 15 of the 1994 Act contains detailed provisions governing the disclosure of information in cases such as this (where a function is delegated to a third party). The effect is that the third party may be given information by the local authority where it is necessary for the exercise of the delegated function but the third party is then subject to the same kind of confidentiality requirements in respect of that information as was the local authority.
481. This section includes an order-making power to enable the Secretary of State to change the list of functions to which this power applies, and also to impose conditions and limitations on the exercising of the power.