

# CARE ACT 2014

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1 – Care and Support

#### Imposing charges and assessing financial resources

#### *Section 22 – Exception for provision of healthcare services*

158. In meeting an adult’s needs for care and support, or a carer’s needs for support, a local authority may not provide healthcare services which are the responsibility of the NHS. This section sets out the limits on what a local authority may provide by way of healthcare and so, in effect, sets the boundary between the responsibilities of local authorities for the provision of care and support, and those of the NHS for the provision of health care. This replaces provisions in sections 21(8) and 29(6) of the National Assistance Act 1948 and section 49 of the Health and Social Care Act 2001.
159. *Subsection (1)* stipulates that a local authority cannot meet care and support needs by providing services of a type which is required to be provided under the NHS Act 2006. Schedule 1, which deals with cross-border placements, provides that this also applies where a local authority is meeting needs by arranging for the provision of accommodation in Wales, Scotland or Northern Ireland. This includes all healthcare services which the NHS is required to provide, for instance primary medical, dental and ophthalmic services, by clinical commissioning groups, the NHS Commissioning Board (known as NHS England), or any other NHS body.
160. However, subsection (1) provides that a local authority may provide some healthcare services in certain circumstances, that is, where the service provided is minor and accompanies some other care and support service which the local authority is permitted to provide and is of a nature that a local authority would be expected to provide. This reflects what has become known as the “quantity and quality test”, arising out of the case of *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 (“Coughlan”).
161. In the Coughlan case, which related particularly to the provision of nursing services, the court considered the effect of the prohibition, in section 21(8) of the National Assistance Act 1948, on a local authority providing health services. As part of its consideration of the question of where the line between local authority services and health services was to be drawn (a line the court concluded was difficult to draw precisely) the court suggested that, as a very general indication, if the nursing services were (i) merely incidental or ancillary to the provision of the service the local authority was under a duty to provide, and (ii) of a nature which a local authority might be expected to provide, then such nursing services could be provided by the local authority. This test, looking at (i) the quantity of the service provided and (ii) the quality of the service provided, has been adopted and developed by the courts as a helpful indicator of the distinction between health and social care provision and it continues to form a fundamental part of the current policy framework underpinning the provision of NHS continuing healthcare.

162. *Subsection (2)* confers power to make provision in regulations about the types of services which may, or may not, be provided by local authorities, and in which circumstances.
163. *Subsection (3)* provides a further restriction, which is that a local authority cannot provide or arrange the provision of nursing care by a registered nurse. This kind of nursing care is something that may only be provided by the NHS.
164. However, *subsections (4) and (5)* provide that the local authority may arrange the provision of accommodation which includes the provision of nursing care by a registered nurse (a term that is defined in *subsection (8)*), provided it has first obtained the agreement of the relevant NHS body (being the body that would be responsible for meeting the cost of that nursing element) or, where it has to arrange the provision of such accommodation as a matter of urgency, provided it obtains the agreement of the relevant NHS body as soon as possible afterwards. The relevant body will usually be a clinical commissioning group. However, as *subsection (9)* acknowledges, it may in certain circumstances be the NHS Commissioning Board (known as NHS England).
165. *Subsection (6)* sets out other matters which may be provided for in regulations. These include detailing the steps which the local authority must take to contribute to an assessment as to whether an adult requires healthcare services and requiring the establishment of a process for dealing with disputes between local authorities and NHS bodies, should there be a disagreement over the responsibility for providing a particular service in an individual case.
166. As this section makes clear, local authorities generally may not provide healthcare services (which are for the NHS to provide under the NHS Act 2006). However, *subsection (7)* clarifies that this section does not prohibit local authorities from doing anything that they, as local authorities, have the power to do under the NHS Act 2006. This includes, in particular, entering into partnership arrangements with NHS bodies under section 75 of the NHS Act 2006.
167. The restrictions imposed by this section also apply where a local authority is doing anything in discharge of its duty under section 2 aimed at preventing, delaying or reducing needs.