

CARE ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Care and Support

Imposing charges and assessing financial resources

Section 14 – Power of local authority to charge

117. This section gives local authorities a general power to charge for certain types of care and support, at their discretion.
118. If it does exercise this power, *subsection (4)* stipulates that a local authority may not charge a person more than what it costs it to provide or arrange the care and support. This general power replaces the existing duty on local authorities to charge for care home accommodation set out in section 22(1) of the National Assistance Act 1948, and powers to charge for other types of care and support (including those under section 17 of the Health and Social Services and Social Security Adjudications Act 1983, and section 8 of the Carers and Disabled Children Act 2000).
119. *Subsection (2)* provides that the power to charge is subject to section 15. Section 15(1) stipulates that the local authority cannot charge an adult for meeting needs if the adult has reached the cap on care costs; however section 15(7) makes clear that a local authority can still charge for daily living costs. Therefore, even when someone has reached the cap, they still can be charged if their care includes daily living costs.
120. *Subsection (3)* stipulates that where a local authority makes a charge under *subsection (1)* for meeting a carer's needs by providing care and support to an adult needing care it may not charge the carer.
121. The power to charge extends to all types of care and support, unless regulations state that the specific service must be provided free. Certain services or activities cannot be charged for: for example, needs assessments or carer's assessments. *Subsection (6)* gives examples of how regulations might define the provision of care and support to be provided free of charge. These regulations will replace those made under section 15 of the Community Care (Delayed Discharges etc.) Act 2003.
122. *Subsection (7)* ensures that a person's income does not fall below a certain amount as a result of charging. The amount will be specified in regulations, which could specify different amounts for different circumstances. For example, setting a personal expenses allowance for care home residents or specifying the amount below which the income of a person receiving care and support in their home may not fall.
123. *Subsection (8)* enables regulations to specify cases or circumstances where an adult can be treated as having income that would (or would not) fall below a certain amount as a result of charging. For example, in a case where a local authority would make a notional charge, regulations could ensure that a person who receives a certain welfare benefit is automatically exempt from that charge. This helps protect the person's income

while giving greater flexibility to the local authority not to have to carry out a financial assessment where the care package is of low value.

124. When a person has care and support needs but does not qualify for financial support from the local authority, they are still able to request that the local authority arrange the care and support that they require on their behalf. Where the local authority arranges the care and support necessary for that individual, subsection (1)(b) gives the local authority a power to charge a fee to cover the costs of arranging that care and support. However, the local authority may not charge such fees in relation to any types of care and support specified in the regulations under *subsection (6)*.

Section 15 – Cap on care costs

125. This section establishes a limit on the amount that adults can be required to pay towards eligible care costs over their lifetime. Eligible care costs are the costs of meeting eligible needs that a local authority would meet under section 18. These costs are either specified in a personal budget (under section 26) where the local authority is meeting the person's needs, or in an independent personal budget (under section 28) where the person has decided that they do not want the local authority to meet their needs. *Subsection (1)* restricts local authorities from charging for eligible care costs once the amount of a person's accrued care costs reach the level of the cap.
126. *Subsection (2)* defines what is meant by the costs accrued in meeting eligible needs as being those costs that the local authority would incur if it, or another local authority were to meet the person's needs itself, or, in the case of a person who has an independent personal budget under section 28, what the cost to the local authority of meeting the person's needs would be. *Subsection (3)* defines eligible needs as those that meet the eligibility criteria and are not being met by a carer. Adults must also be ordinary resident, or present in the local authority area to have eligible needs.
127. *Subsection (4)* provides for the level of the cap to be set in regulations, and includes power to set the cap at different amounts for people of different ages. This will allow the cap to be set at different levels for working age adults, and includes the possibility of setting the cap at zero for specified categories of person, for example people who have eligible needs for care and support when they turn 18.
128. When a person receives care and support in a care home, daily living costs such as food and lighting should not count towards an adult's accrued costs; *subsection (6)* ensures that where the costs of meeting a person's needs includes such daily living costs, these will be disregarded when measuring progress towards the cap. *Subsection (7)* allows a local authority to continue to charge for the daily living costs once the adult has reached the cap.
129. *Subsection (8)* provides a regulation making power to set the amount that will be considered as representing an adult's daily living costs.
130. The funding provisions are expected to be commenced in April 2016, and eligible care costs will only start counting towards the cap from the date of commencement of the sections.

Section 16 - Cap on care costs: annual adjustment

131. This section requires annual adjustments in order to ensure that the level of the cap and an adult's accrued costs keep pace with inflation.
132. *Subsection (2)* ensures that an adult's accrued costs are adjusted by the same measure as the cap, so that if someone was previously 50% of the way towards the cap, then they will remain so after adjustment. *Subsection (3)* specifies the meaning of "average earnings" for the purposes of this section and *subsection (4)* requires adjustment to be considered annually following commencement of the section.

133. *Subsection (5)* makes it clear that the power to set the level of the costs cap in section 15 is not restricted by the annual adjustment.

Section 17 – Assessment of financial resources

134. This section requires a local authority to carry out a financial assessment if they have chosen to charge for a particular service under the power in section 14. This is in order to determine the individual's contribution towards the cost of the care and support that they require. The rules about how a financial assessment is conducted ensure that such assessments are carried out on a consistent basis.
135. *Subsections (7) to (13)* allow regulations to set rules in relation to financial assessment, including setting the maximum amount of financial resource an adult may have, above which a local authority will not contribute towards an individual's care and support costs, and daily living costs. These provisions replace those in section 22 of the National Assistance Act 1948.
136. The regulations may set rules where the local authority need not carry out a full financial assessment and whether, in these circumstances, the individual needing care and support is entitled to local authority support. This would allow for less detailed financial assessments to be carried out in some situations, and could enable the local authority to meet the needs of people who do not wish to have a full financial assessment, if the authority considers this necessary.

Section 18 – Duty to meet needs for care and support

137. This section sets out the circumstances when a local authority is obliged to meet an adult's eligible needs for care and support and is the principal individual entitlement to care and support for adults with needs for care and support (the equivalent for carers is provided for in section 20). This replaces a number of duties to provide particular care and support services to adults: sections 21(1), 21(2) and 29(1) of the National Assistance Act 1948, section 2(1) of the Chronically Sick and Disabled Persons Act 1970, and section 45(1) of the Health Services and Public Health Act 1968.
138. *Subsections (1) and (2)* set out the circumstances in which an adult is entitled to care and support to meet their needs where the adult has been assessed by the local authority and has been determined to have "eligible" needs for care and support (this would be decided using the eligibility framework set out in regulations made under section 13).
139. *Subsection (1)* sets out the preconditions that trigger the local authority's duty to meet an adult's eligible needs for care and support in a case where the adult's accrued costs do not exceed the cap on care costs (see section 15). These are:
- that the adult is ordinarily resident in the local authority area (or has no settled residence in any area, but is living in the local authority area at that time), (provision about ordinary residence is made in section 39); and either:
 - a) that the local authority has either decided not to charge for a particular type of care and support, or is not able to charge. The circumstances in which the local authority does not or may not charge are set out in subsection (6); or
 - b) if it is not such a case, one of the following three conditions is met.
140. *Subsections (2) to (4)* set out the three conditions that trigger the duty to meet eligible needs:
- The first condition is that the adult's financial resources are assessed as being at or below the financial limit set in regulations under section 17. In other words, the adult does not have sufficient financial resources to be able to pay the charge which is assessed as due, although they may be required to make a contribution. The amount of resources required will depend on the type of care and support, and

will be calculated following a financial assessment carried out by the local authority (under section 17).

- However, the second condition provides that the adult may request that the local authority meet their needs, even if their resources are assessed as above the financial limit, so that they have to pay for their care in full. That request would trigger the duty on the local authority to meet their needs. Where the adult lacks capacity to make the request, it may be made by someone else acting on their behalf.
- The third condition is that the adult lacks the mental capacity to arrange care and support, and there is no other person willing or able to arrange that care and support on their behalf. In these circumstances, the duty applies, regardless of other factors such as finances.

141. *Subsection (5)* provides that the local authority is under a duty to meet an adult's needs for care and support which meet the eligibility criteria where the adult's accrued costs exceed the cap on care costs (see section 15) if the adult is ordinarily resident in the local authority area (or has no settled residence in any area, but is living in the local authority area at that time).
142. *Subsection (6)* sets out the circumstances in which there may be no charge for particular types of care and support, for the purposes of subsection (1)(c). These are that:
- regulations prohibit the local authority from charging for the type of care and support being provided by the local authority; or
 - the local authority decides not to charge for the care and support being provided.
143. *Subsection (7)* provides that the local authority is not under a duty to meet any of the adult's eligible needs which are being met at that time by a carer. When conducting the needs assessment and the eligibility determination, the local authority will assess the totality of the adult's needs, regardless of whether a carer is currently meeting any of them. This is sometimes referred to as the assessment being "carer-sighted".
144. However, the local authority is not under a duty to meet any eligible needs which are being met by a carer, because the carer is already doing so. If a carer were to cease providing care and to stop meeting any eligible needs, this would trigger a review of the adult's care and support plan, and may mean that the local authority is required to meet the needs. If the carer has needs for support, they should be entitled to an assessment in their own right, under section 10, and may receive support to meet their eligible needs.

Section 19 – Power to meet needs for care and support

145. This section provides broad powers to enable local authorities to meet the needs of adults whose needs they are not otherwise required to meet, for instance because the adult is not ordinarily resident, or does not have needs for care and support which meet the eligibility criteria. The local authority must have carried out an assessment in these cases to determine what needs the adult does have, if any.
146. In addition, *subsection (3)* gives a power for local authorities to meet needs in urgent cases, without having first carried out the required assessments. Sometimes, it will be necessary to put in place care and support urgently and there may not be time to undertake a full assessment. In such cases, the local authority must still carry out the assessments, but can do so in due course so as to not delay care and support being put in place.

Section 20 – Duty and power to meet a carer's needs for support

147. This section sets out the core duty of the local authority to meet a carer's eligible needs for support. This duty replaces the power to provide services to carers in section 2 of

the Carers and Disabled Children Act 2000, in respect of those carers who are adults and are providing care for another adult.

148. *Subsections (1) to (5)* set out the different circumstances that may trigger the local authority's duty to meet a carer's needs for support which meet the eligibility criteria. The common requirements are that the adult needing care is ordinarily resident in the local authority's area (or has no settled residence, but is living in the local authority's area at that time); and, that the carer has been assessed by the local authority and has been determined to have eligible needs for support.
149. The application of the remaining "trigger" conditions depend on whether or not the local authority charges for the support or care and support to be provided. The local authority has the power under section 14 to make a charge (unless prohibited by regulations made under that section from making such a charge). However, a local authority may decide (as is usually the case under the current law, in respect of carer's needs) not to exercise that power to make a charge.
150. If a local authority has decided not to charge for support (and, where the care and support is to be provided in the form of care and support to the adult needing care, the adult agrees to its provision), then there are no further conditions, and the duty to meet the carer's eligible needs for support will arise on the basis of the common requirements set out above only.
151. If the local authority does choose to charge for the support to be provided, then one of four additional conditions set out in the section must be met in order for the carer to be entitled to support.
152. These conditions are in turn linked to the question of whether meeting the carer's needs involves the provision of support direct to the carer or whether it involves the provision of care and support direct to the adult needing care. A carer's needs for support may be met by direct provision of support to the carer. Alternatively, as *subsection (7)* acknowledges, a carer's need for support may be met by providing care and support direct to the adult for whom they are caring, for example by providing replacement care to allow the carer to have a break from caring. It does not matter that there may be no duty to meet that adult's needs in their own right. Section 14 makes clear that where the needs are met by providing care and support direct to the adult needing care, the charge may not be imposed on the carer.
153. Where (i) the two common requirements as set out above are met; (ii) there is a charge for meeting the needs; and (iii) one of the relevant conditions, as set out below, is fulfilled, then the duty to meet the carer's eligible needs for support will arise.
154. The first and second conditions both apply where meeting the carer's needs involves the provision of support to the carer. The first condition is that the carer does not have sufficient financial resources to be able to pay any charge which is assessed as due. The second condition is that the carer has sufficient financial resources to pay any charge but nevertheless requests that the local authority meet their needs.
155. The third and fourth conditions both apply where meeting the carer's needs involves the provision of care and support to the adult needing care. The third condition is that the adult needing care does not have sufficient financial resources to be able to pay any charge which is assessed as due, and that the adult concerned agrees to receive such support. The fourth condition is that adult needing care has sufficient financial resources to pay any charge but nevertheless requests the local authority to meet the needs by providing care and support to them.
156. This section also provides a broad power to enable local authorities to meet the needs of carers who are not otherwise eligible, including the provision of care and support to the person needing care, as long as that person agrees. It also acknowledges the situation where a local authority might consider the best way of meeting a carer's needs for support is by providing care and support to the adult needing care but it is not possible to

do so (for example, if that adult does not agree to such provision). This section requires the local authority, as far as it is feasible, to identify some other way of supporting the carer.

Section 21 – Exception for persons subject to immigration control

157. This section applies in relation to adults who are subject to immigration control within the meaning of section 115 of the Immigration and Asylum Act 1999. As a result, a local authority may not meet the care and support needs of such an adult which arise solely because the adult is destitute, or because of the physical effects or anticipated physical effects, of being destitute. It replaces existing exclusions set out in: for example, sections 21(1A) and (1B) of the National Assistance Act 1948, section 45(4A) Health Services and Public Health Act 1968.

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.

Section 23 - Exception for provision of housing etc.

168. This section sets out the boundary in law between local authorities' care and support functions, and their housing functions. Together with section 22 it replaces provision in section 21(8) of the National Assistance Act 1948.
169. This section prevents local authorities from meeting needs for care and support by doing anything which they or another local authority are required to do under the Housing Act 1996 (to generally provide housing), or under any other enactment added in regulations.
170. This section does not prevent local authorities in their care and support role from providing more specific services (such as housing adaptations), or from working jointly with housing authorities.