

# COMMUNITY CARE AND HEALTH (SCOTLAND) ACT 2002

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## EXPLANATORY NOTES

### **Part 1 – Community Care**

#### **Charging and not charging for social care**

##### ***Section 1 - Regulations as respects charging and not charging for social care***

8. This section requires that those aspects of social care (defined in section 22) which are nursing, personal and other care shall not be charged for and gives the Scottish Ministers power to make orders and regulations which can adjust the detail and content of the social care which should be free. It also gives the Ministers power to make regulations to require local authorities to charge, or not to charge, for the remaining aspects of social care and to specify the factors which local authorities must take into account in determining the amount of any charge. The requirements of this section, and the use of the powers it provides, override other provisions relating to local authorities' charges for social care (in section 87 of the 1968 Act).
9. The section therefore provides the legislative means for the implementation of free nursing, personal and other care and provides power to regularise the remaining charges for non-residential care ('home care').
10. Subsection (1) precludes local authorities from charging for social care which is personal care and personal support (as defined in the 2001 Act), nursing care and the types of care listed in schedule 1 (Social care not ordinarily charged for). This includes help with washing and eating which forms part of "personal care" as defined in the 2001 Act. Subsection (2) enables the Scottish Ministers to make regulations to qualify this requirement not to charge and to make orders to amend schedule 1. Subsection (3) clarifies that "nursing care", which is not defined elsewhere in the Act, does not include care which is personal care or personal support or is mentioned in schedule 1.
11. Subsection (4) enables the Scottish Ministers to define in regulations which of those remaining aspects of social care (not covered by the requirement for free care in subsection (1)) are or are not to be charged for. It also provides the flexibility for the regulations to specify the amount that should be charged or the factors to be considered in determining the amount of the charge. Where regulations require that no charge is to be made, they may qualify that requirement in such ways as Scottish Ministers see fit.
12. Subsection (5) amplifies the flexibilities provided in subsection (4). It expands on those powers to make clear that regulations may require the capping of charges and may also specify how a person's means should be taken into account as part of the charging process.
13. Subsection (6) amends the 1968 Act to disapply section 87(1) and (1A) of that Act where charging for social care is regulated under section 1 of the Act. This ensures that charges for relevant aspects of social care are not levied under the 1968 Act where this

Act makes provision for charging or not charging. (Regulations under section 2 of the Act will clarify which of the two Acts will apply as respects the particular aspects of social care in residential care settings.)

14. Subsection (7) allows for regulations to make transitional provisions which modify the effect of subsections (1) and (2) of section 12A of the 1968 Act for people already in care homes when section 1 of the Act is commenced. (Section 12A of the 1968 Act sets out local authorities' responsibilities in assessing people's care needs).

## **Accommodation**

### ***Section 2 - Accommodation provided under 1968 Act etc.***

15. **Section 2** enables the Scottish Ministers by regulations to determine what is and what is not to be regarded as accommodation chargeable under the 1968 Act and hence under the 1948 Act. The definition also applies (by virtue of section 19) to the definition of social care, which applies to the charging provisions under section 1 of the Act.
16. Accommodation provided under the 1968 Act and section 7 of the 1984 Act comprises more than simply board and lodgings. In general, what is provided is a wider package of residential care which includes both the board and lodging element of accommodation and the social care aspect of accommodation. At present, the provision of the whole package is charged for under the 1968 Act, which applies the charging provisions of the 1948 Act. To enable implementation of free personal care, it is necessary to separate out the social care element from the board and lodging element in the provision of accommodation – and so in the provision of the residential care package.
17. **Section 2** of the Act enables the Scottish Ministers by regulations, therefore, to determine what elements of the package will remain subject to the charging provisions of the 1968 and 1948 Acts, and what elements will not, being subject instead to section 1 of the Act and regulations made under it. Those regulations can only affect charging and will not affect the definition of accommodation for the purposes of provision of services under the 1968 Act or section 7 of the 1984 Act.

### ***Section 3 - Disregarding of resources when determining whether to make available assistance by providing residential accommodation***

18. Currently, local authorities must disregard £18,500 of a person's capital when determining whether to provide (directly or by making arrangements with another provider) a care home place for that person. This is the effect of section 12(3A) and (3B) of the 1968 Act, which requires authorities to disregard capital equal to or below the capital limit of the residential care means test, currently £18,500. (These limits are set in the National Assistance (Assessment of Resources) Regulations 1992, as amended for Scotland). Thus local authorities are precluded from deciding not to provide residential accommodation to someone simply because he or she has a certain level of capital, if that is below £18,500. The effect of this is that where someone has capital over £18,500, a local authority may refuse to provide accommodation for him or her. (The implication is that the capital exceeding £18,500 could be used to meet care costs.)
19. **Section 3** of the Act replaces section 12(3A) and (3B) of the 1968 Act with new provisions which enable the Scottish Ministers to specify by order what resources of a person, and how much of those resources, should be disregarded when deciding whether to provide residential accommodation. The provision breaks the link with the capital limit and an order can make provisions that apply differently for different cases.
20. The power is wide and is needed as a consequence of the Act's provisions on free nursing and personal care and deferred payment agreements. Regulations under section 12 of the 1968 Act (as amended by this Act) will be needed to remove any question about local authorities' discretion to decide not to provide or arrange

accommodation, for example, because of the capital value of the homes of people who are to be eligible for free care or deferred payments.

***Section 4 - Accommodation more expensive than usually provided***

21. Currently, it is not clear whether people provided with accommodation by local authorities can themselves pay the extra required for them to receive more expensive accommodation than the local authority would usually expect to pay for. It has been accepted practice that a third party (such as a relative) can make up the difference in costs, but the legislation does not clearly grant that right, either to third parties or to individuals receiving care.
22. **Section 4** enables regulations to be made to specify how, and in what circumstances, top-up payments can be made, either by third parties or by residents themselves. Restrictions on the right of a resident to make top-up payments may be imposed – these might relate to his or her available resources, to ensure that the arrangement can be sustained and that the resident is not likely to be impoverished as a consequence.

***Section 5 - Local authority arrangements for residential accommodation outwith Scotland***

23. Currently, Scottish local authorities have no power themselves to arrange for residential accommodation with nursing anywhere other than in Scotland. It has been accepted practice that there is no similar restriction on arranging for residential accommodation without nursing but the legislation does not provide a clear power to arrange such placements outside Scotland.
24. Subsection (1) of section 5 enables the Scottish Ministers to permit or require, as appropriate, local authorities to make such arrangements for residential accommodation, both with and without nursing. These arrangements would be made in fulfilment of the local authority's duties under sections 12(1) and 13A(1) of the 1968 Act.
25. Subsection (2) enables the Scottish Ministers by regulations to modify the way in which any of the provisions of the 1968 Act would apply to a placement under this section. An example of the type of modification would be section 12A(3) of the 1968 Act. Under section 12A(3), a local authority notifies and liaises with a Health Authority in the place where accommodation is proposed to be provided, where it appears to the local authority that there might be a need for the provision of health services there to the person. Modification would be needed for the purposes of a placement under this section, to refer to the appropriate equivalent health body in the other parts of the UK.
26. Subsection (3) recognises that arrangements have already been made for residential accommodation outside Scotland, on the understanding that this was possible under section 12(1) of the 1968 Act. It makes sure that any such existing arrangements are on a sound legislative footing by bringing them under section 5.
27. For placements made under this section, subsection (4) removes the requirement under section 13A(2) of the 1968 Act for residential accommodation with nursing to be in care homes registered under Scottish legislation. Subsection (4) also removes the requirements of section 13A(3) of the 1968 Act from premises where someone is to be placed under this section. This serves to clarify that the inspection provisions of section 6 of the 1968 Act do not apply. The accommodation will not be in Scotland and inspection arrangements will be secured through the appropriate regime in the place where it is situated.
28. The accommodation which may be arranged in Scotland under sections 12 and 13A of the 1968 Act must meet certain requirements and, in the case of section 13A(1), must be of a certain type. Section 5(5) of the Act, read with section 5(6), defines what is an "appropriate establishment" in which residential accommodation outside

Scotland may be arranged. Paragraph (a) specifies the equivalent for England and Wales of residential accommodation without nursing and allows for such establishments in Northern Ireland, the Channel Islands and the Isle of Man to be specified in regulations under subsection (1). Paragraph (b) provides similar definitions for residential accommodation with nursing.

29. The same type of restrictions therefore apply for placements in England and Wales, and the Scottish Ministers, by regulations, are able to secure such restrictions where appropriate as regards Northern Ireland, any of the Channel Islands or the Isle of Man.

### ***Section 6 - Deferred payment of accommodation costs***

30. The effect of this section is to make it possible for a person already in or going into a care home to defer selling their home in order to pay for their care. In effect, where a deferred payment agreement is in place, the local authority will meet all or part of the resident's contribution to his or her care home fees. The authority will ultimately recover the money, either from the estate when the resident dies or from the resident if he or she decides to make a full repayment during his or her lifetime.
31. Subsection (1) gives local authorities the power, in accordance with regulations made by the Scottish Ministers, to enter into deferred payment agreements and it enables Ministers to require local authorities to enter into such agreements. Such an agreement may be made with someone for whom a local authority is already providing or securing the provision of residential accommodation under the 1968 Act or section 7 of the 1984 Act, or is proposing to do so, in circumstances where the person would be liable to make a financial contribution towards the cost. The power applies whether the financial contribution would be towards the cost which the local authority would usually expect to pay, or whether it would be a top up payment by the person by virtue of section 4 of the Act. A deferred payment agreement will have to comply with the provisions of the regulations, which may apply differently to top-up and normal payments.
32. Subsection (2) sets out the nature of the deferred payment arrangement. In essence it is an agreement whereby during a certain period of time a resident will not be required to make all or a portion of the payments that he or she would otherwise have to make under the means testing regime and/or an agreed top-up. Instead, the resident will grant the authority a standard security over his or her property.
33. Under the agreement, payments will be deferred from the date on which the agreement takes effect until the expiry of 56 days after the date of death of the person or the earlier date of termination of the agreement by the person. Interest will not become due on the amount secured until that amount becomes payable and is then due at such rate as the authority may determine in accordance with directions by the Scottish Ministers. A deferred payment agreement is competent only where the person grants a standard security in favour of the authority securing the authority's estimate of the total amount of the payments deferred and the amount of interest likely to be due from the date the payments become due. In essence, therefore, the person must have property of a value sufficient to secure the portion to be deferred of the amount that he or she would otherwise be liable to pay for his or her residential care during his or her lifetime.
34. Subsection (3) allows for the portion of the payment to be deferred to be specified in regulations. For example, the regulations may ensure that the agreement defers payment by a person of that part of his or her contribution which would come from the capital value of his or her home.

## **Direct payments**

### ***Section 7 - Direct payments***

35. **Section 7** and paragraph 1 of schedule 2 amend sections 12B and 12C of the 1968 Act. Those sections were inserted by section 4 of the Community Care (Direct Payments)

*These notes relate to the Community Care and Health (Scotland)  
Act 2002 (asp 5) which received Royal Assent on 12 March 2002*

Act 1996 and amended by section 70 of the 2001 Act. They give local authorities the power to make direct payments to people of a description specified in regulations under section 12B. These payments are to enable them to arrange and purchase their own community care services, including children's services available under section 22(1) of the 1995 Act.

36. The [Community Care \(Direct Payments\) \(Scotland\) Regulations 1997 \(S.I. 1997/693\)](#) , as amended by the [Community Care \(Direct Payments\) \(Scotland\) Amendment Regulations 2000 \(S.I. 2000/183\)](#) and the [Community Care \(Direct Payments\) \(Scotland\) Amendment Regulations 2001 \(S.I. 2001/447\)](#) specify the people to whom direct payments may be made under the 1968 Act. The regulations allow for direct payments to disabled people (aged 18 and over) for adult community care services and also for direct payments to both disabled people aged 16 and 17 and disabled parents to purchase children's services.
37. [Section 7](#) of the Act widens the availability of direct payments.
38. [Section 7\(a\)](#) amends section 12B(1) in three ways. Firstly, it removes the requirement that a person must be a "person in need" under section 94 of the 1968 Act to receive direct payments. Secondly, it reverses the present approach in section 12B(1) (b) whereby only persons of a description specified in regulations made under section 12B(1) of the 1968 Act are eligible to receive direct payments. All persons will now be eligible except those specified by such regulations. This enables the scope of the direct payments scheme to be widened, for example, to all community care client groups including people who are frail, require rehabilitation treatment following an accident or operation, are fleeing domestic abuse or are recovering from drug or alcohol addiction. Thirdly it converts what is presently a power on the part of local authorities to offer direct payments to a duty. A local authority will have a duty to offer direct payments as an alternative to arranging services itself.
39. Section 12B(2) of the 1968 Act details how local authorities can make payments on a net basis, i.e. assess the person's ability to contribute to the cost of the services required and deduct this charge before making the direct payments. However, the new subsection (1A), inserted into section 12B by section 7(b) of the Act, will enable local authorities also to make gross payments to recipients, i.e. without first deducting the amount a person is assessed as being able to contribute. This will give them equality of treatment with non-recipients of direct payments, who receive the full services required with recovery of their assessed contribution taking place later. While the 1968 Act does not preclude gross payments, section 7(b) (in inserting subsection (1A)) will put it beyond doubt that local authorities can make payments in this way.
40. Local authorities have a power (and will have a duty) to give direct payments only if that person gives his or her consent to the arrangement. No one can be forced to take such payments. At present if it appears to a local authority that a person is unable to consent to the arrangements, the local authority cannot offer that person direct payments. Section 7(b) inserts new subsection (1B) into section 12B, allowing for a person to consent to direct payments arrangements on behalf of a person whom the local authority is satisfied is unable to give consent. That person can then do anything that is required to secure the services needed on behalf of that person. Subsection (1B) also allows for regulations to be made to specify who can receive direct payments on behalf of the person needing the services. This will enable the Scottish Ministers to make regulations to specify that attorneys or guardians can receive direct payments on behalf of someone who may be unable to give consent, for example a person with dementia.
41. Presently recipients are unable to use their direct payments to purchase services from a local authority. Section 7(b) inserts new subsection (1C) to allow services to be bought from any person, including the local authority making the direct payments, provided that authority and the consenting person are in agreement or from any other local authority.

42. **Section 7(c)** inserts new paragraphs (b) to (e) into section 12B(4) and provides examples of what regulations may include. Paragraph (b) allows for regulations to impose conditions on an authority selling its services. Paragraph (c) enables provisions to specify circumstances, relating either to the person or the service or both, in which the authority is not required to make direct payments. Under paragraph (d) regulations can specify when local authorities must or may discontinue payments. Paragraph (e) enables regulations to authorise payments to be made to another on behalf of the person entitled to them, e.g. to the service provider.
43. An authority can assess a person's ability to contribute towards the cost of the services required. However, there is currently no mechanism in the 1968 Act to allow a local authority to recover that contribution if it has not provided or arranged the services itself. Section 7(b) above will give a local authority the power to make direct payments on a gross basis. Section 7(d) inserts new subsection (5A) to ensure that when direct payments are made on a gross basis, a local authority has a power to recover any amount which it considers appropriate. In recovering the contribution the local authority may require payment from the recipient of an appropriate sum in respect of such contribution as he or she has been assessed as being able to make, or if no assessment has been made, it shall make that assessment and then seek repayment.
44. Subsection (2) of section 12B of the 1968 Act gives a person who receives payments on a net basis the opportunity to seek to satisfy the local authority that he or she is unable reasonably to make up the balance between the amount the authority is willing to pay and the full cost of purchasing the services needed. The local authority may then adjust its payments accordingly. Section 7(d) inserts new subsection (5B) to give a person who receives gross payments the same recourse.

## **Carers**

### ***Section 8 – Amendment of 1968 Act: matters to be taken account of in assessment of needs***

45. **Section 8** replaces section 12A(1)(b) of the 1968 Act and adds two conditions into the existing process through which local authorities assess and provide services for adults in need of community care services. It requires local authorities after having assessed the needs of a person for community care services but before deciding what services to provide to the cared-for person to take into account, as far as is reasonable and practicable:
  - the care being provided by a carer; and
  - the views of both the carer and the cared-for person.

### ***Section 9 - Amendment of 1968 Act: assessment of ability to provide care etc.***

46. Under section 12A of the 1968 Act a local authority is required, if requested by a carer of an adult, to carry out an assessment of the carer's ability to care only if the authority at that time is also assessing the needs of the cared-for person for community care services. "Community care services" are defined in section 5A(4) of the 1968 Act.
47. **Section 9** of the Act amends and adds to these provisions, and gives carers of adults an independent right to request assessment that does not depend on whether the authority is also assessing the needs of the cared-for adult. This applies to all carers irrespective of their age.
48. At present, a local authority must have regard to the results of the assessment of a carer when deciding what services should be provided to the cared-for person. A local authority may also give a carer assistance directly in the form of information or advice, or by supporting organisations which help carers. Where carers have needs in their own right due to their own health or other circumstances, a local authority may assess the

carer for community care services under section 12A of the 1968 Act, and may provide any necessary support in the form of community care services. The changes made by section 9 which extend the circumstances in which carers may request an assessment do not affect the courses of action open to a local authority following that assessment, namely to provide support to carers directly, or through the services it provides to the cared-for person.

49. **Section 9** of the Act also introduces a new section 12AB to the 1968 Act, requiring local authorities to provide certain information to carers that the authorities are aware of who are providing, or intending to provide, a substantial amount of care on a regular basis for someone over 18. Local authorities should notify such carers that they may be entitled to an independent assessment of their ability to provide care, under section 12AA of the 1968 Act.

***Section 10 – Amendment of the 1995 Act: matters to be taken into account in assessment of needs of child affected by disability***

50. **Section 10** inserts a new subsection (4) into section 23 of the 1995 Act adding conditions similar to those mentioned at paragraph 45 above, in relation to section 8, into the existing process through which local authorities assess and provide services for children affected by disability.

***Section 11 - Amendment of 1995 Act: assessment of ability to provide care for disabled child etc.***

51. Similar to section 12A mentioned above, under section 24 of the 1995 Act a local authority's duty, if requested by a carer of a disabled child, to carry out an assessment of the carer's ability to care applies only where the authority at that time is assessing the needs of the cared-for child for children's services. Children's services are those provided under section 22 of the 1995 Act. The amendment made by section 11 gives carers an independent right to request an assessment that does not depend upon whether the authority is also assessing the needs of the cared-for child. Section 11 also introduces a similar obligation to that referred to in paragraph 49 above on local authorities in respect of carers of disabled children by inserting a new section 24A to the 1995 Act.

***Section 12 – Carer information strategies***

52. **Section 12** of the Act provides a power for the Scottish Ministers to require Health Boards to prepare and submit to Ministers a strategy for providing certain information to carers who appear to the Board to be providing or intending to provide a substantial amount of care on a regular basis. The strategy should be for informing such carers that they may be entitled to an independent assessment of their ability to care under section 12AA of the 1968 Act, or section 24 of the 1995 Act. Ministers may specify the form and extent of a Health Board's strategy. Section 12 also requires that a Health Board's carer information strategy should be available free of charge to any person who asks for it.

***Part 2 – Joint Working, Etc.***

53. The provisions of this Part of the Act provide for the expansion of joint resourcing and management of services relevant to health and community care between NHS Scotland and local authorities.

***Section 13 - Payments by NHS bodies towards certain local authority expenditure***

54. **Section 13** allows for an NHS body to make payments to a local authority towards certain of the local authority's functions. The payments must be in accordance with any conditions prescribed in regulations by the Scottish Ministers, such as requirements on accounting and auditing or requirements for associated outcome agreements. The relevant local authority functions are those which are prescribed in regulations and

which, in the opinion of the NHS body, fall into categories specified in paragraph (a), (b) or (c) of subsection (1). Such payments can be towards revenue or capital expenditure and can only be paid after consultation with the local authority. “NHS body” and “local authority” are defined in section 22.

55. The powers which section 13 provides to NHS bodies have some similarity to those under section 16A of the 1978 Act. That section also allows for payments by NHS bodies to local authorities for certain functions, but the new powers can potentially apply to a broader range of functions. The new section 13 is not intended to replace or supersede powers under section 16A of the 1978 Act. It is one element of a package of measures put forward in this Act to remove barriers to joint working between NHS Scotland and local authorities.

#### ***Section 14 - Payments by local authorities towards expenditure by NHS bodies on prescribed functions***

56. **Section 14** provides a reciprocal power to section 13. It allows for a local authority to make payments to an NHS body towards certain of the NHS body’s functions. The payments must be in accordance with any conditions prescribed in regulations by the Scottish Ministers, such as requirements on accounting and auditing or requirements for associated outcome agreements. Payments can be made only if, in the opinion of the local authority, they would improve the way in which the local authority’s functions are exercised. The NHS body functions towards which payment can be made are those functions which may be prescribed in regulations by the Scottish Ministers. Payments can be towards capital or revenue expenditure. “NHS body” and “local authority” are defined in section 22.

#### ***Section 15 - Delegation etc. between local authorities and NHS bodies***

57. **Section 15** allows NHS Scotland and local authorities to work together in new ways by enabling them to delegate functions and make payments to one another and to pool their resources so that a single body can provide both health and local authority services. In so doing, it removes legal barriers to joint working which currently exist. The measures set out in this section are intended to allow NHS bodies and local authorities to agree jointly who is best placed to carry out their functions and how resources might be used more efficiently.
58. **Section 15** removes some of the barriers to joint working by allowing:
- NHS bodies and local authorities to delegate functions to one another, to allow, for example, one of the partner bodies to provide all mental health or learning disability services locally. This will allow services to be more effective and efficient.
  - NHS bodies and local authorities to pool resources; enabling staff from either agency to develop packages of care suited to particular individuals irrespective of whether health or local authority money is used.
59. Subsection (1) allows both NHS bodies and local authorities to enter into arrangements to delegate some of their functions to the other partner (paragraph (a)) and to transfer resources in connection with the delegation arrangement (paragraph (b)). Paragraph (c) allows for the creation of a pooled budget in connection with these arrangements. Subsection (1) also provides for the Scottish Ministers to make regulations setting out how and in what circumstances these powers can be used. “NHS body” and “local authority” are defined in section 22.
60. Subsection (2) provides that only functions prescribed in regulations by the Scottish Ministers can be delegated.
61. Subsection (3) ensures that a NHS body or local authority may enter into such arrangements only if, in its opinion, doing so would lead to an improvement in the way



its functions (prescribed by regulations under subsection (2)) are exercised. It makes clear that “improvement” in this context includes better outcomes for users of services.

62. Subsection (4) gives examples of provisions which may be included in regulations which the Scottish Ministers can make under subsection (1), setting out how and in what circumstances these arrangements can be made.
63. Subsection (4)(c) allows for regulations to govern the staffing arrangements which partners can make under section 15, including the transfer and secondment of staff. Section 16 of the Act sets out the legal effect of staff transfers and provides employment protection for staff who transfer.
64. Subsection (4)(g) allows for regulations to make provision as to the monitoring and supervision of the joint arrangements. Regulations may, for example include requirements on accounting and auditing, associated outcome agreements or reporting lines and committees.
65. Subsection (5) ensures that delegation arrangements do not relieve a delegating NHS body or local authority from liability, e.g. for negligence, in relation to the exercise of the delegated functions by the delegate. It also provides that the NHS body or local authority which has delegated functions is not thereby prevented from exercising the functions itself. It may need to do so to protect itself from such potential liability. The subsection also ensures that although a joint service (hosted by one partner) may collect charges on behalf of one of the other partner organisations, those charges remain payable to the latter partner who must ultimately receive the funds.

### ***Section 16 - Transfer of staff***

66. **Section 16** sets out the legal effect of any transfer of staff to the employment of another body under a partnership arrangement allowed under section 15 and provides employment protection for staff who are transferred. (Section 15(4)(c) allows for regulations to govern the provision, transfer and secondment of staff in a joint arrangement).
67. Subsection (2) provides that a person’s contract of employment transfers with that person. Subsection (3) specifies that the rights, powers, duties and liabilities of the transferring authority transfer to the receiving authority. It also provides that any actions of the transferring authority in relation to the employee or his or her contract shall be deemed to be actions of the receiving authority. (The terms “transferring authority”, for the current employer, and “receiving authority”, for the new employer, are introduced by subsection (1)).
68. Subsection (4) qualifies subsections (2) and (3) to ensure that an employee’s right to terminate his or her contract are protected.
69. Subsection (5) ensures that section 16 applies to people who have entered into contracts with the transferring authority which have not yet come into effect on the date of transfer.
70. Subsections (2) to (5) therefore ensure that staff contracts, terms and conditions are not adversely affected by such a transfer.

### ***Section 17 - Scottish Ministers’ power to require delegation etc. between local authorities and NHS bodies***

71. **Section 17** provides power for the Scottish Ministers to direct a local authority or NHS body to enter into any of the joint arrangements set out in section 15 or other joint arrangements which may be prescribed in regulations made under section 17. “NHS body” and “local authority” are defined in section 22.

72. Subsection (1) provides that this power can be used by Ministers if, in their opinion (having consulted with the local organisation concerned):
- (a) any function of the local organisation, which is either prescribed under section 15(2) as being within the scope of the joint working arrangements of section 15 or prescribed under section 17(1)(a), is not being exercised adequately; and
  - (b) the direction to use joint arrangements (under section 15 or prescribed under this section) would be likely to lead to an improvement in the exercise of that function.
73. The ability to require models of joint working other than those under section 15 recognises that delegation under section 15 is not the only way of working jointly to improve service delivery. The additional joint working arrangements permitted by section 17 will need to be prescribed in regulations before any direction requiring them can be made. The power to prescribe functions by regulation under section 17(1)(a) (in addition to those prescribed under section 15(2)) allows a direction to be made for the improvement of functions which are not suitable for delegation under section 15, but which are suitable for the other joint arrangements that may be prescribed.
74. The directions under subsection (1) can apply to the function which is not being exercised adequately as well as other functions as described by subsection (2). This enables the directions to specify other functions to be included in the joint arrangement where, in the opinion of the Scottish Ministers, their inclusion would lead to an improvement in the way in which the original function (mentioned in subsection (1)) is exercised.
75. Subsection (3) allows the Scottish Ministers to make a direction to require a local authority to make a payment (under section 14) to an NHS body or to require an NHS body to make a payment (under section 13) to a local authority. They may only give such a direction to a local authority or NHS body if they have given them a direction for such arrangements as may be prescribed under section 17(1)(b)(ii).
76. A direction under subsection (3) may only be given to a local authority if, in the opinion of the Scottish Ministers, making the payment would lead to an improvement in the way the local authority's functions are exercised. Payments from a local authority to an NHS body under section 14, which are the subject of such a direction will be subject to conditions prescribed under section 14(b) and subject to the direction.
77. Similarly, a direction under subsection (3) may only be given to an NHS body if, in the opinion of the Scottish Ministers, the payment would satisfy the requirements of section 13(1)(a) to (c). Those requirements are that it has an effect in relation to the health of individuals, has an effect in relation to, or is affected by, any function of the NHS body or is connected with any function of the NHS body. Payments from an NHS body to a local authority under section 13, which are the subject of such a direction will be subject to conditions prescribed under section 13(1) and subject to the direction.
78. Subsection (4) ensures that the term "improvement" has the same meaning in this section as in section 15. That means that improvement of the exercise of a function in this context is taken to include better outcomes for users of services.
79. Subsection (5) allows the Scottish Ministers to make a "secondary direction" to another local authority or NHS body where they consider it appropriate to make the joint arrangement work.
80. Subsection (6) ensures that any joint arrangements which are entered into because of a direction must comply with all the requirements of that direction. It also ensures that any section 15 arrangements which follow a direction must also comply with all requirements of regulations made under section 15(4).

## **Part 3 – Health**

### **Health Boards' lists**

#### ***Section 18 - Services lists and supplementary lists***

81. This section gives the Scottish Ministers power to make regulations to extend the medical list system to cover all general practitioners (GPs) working in NHS Scotland. Prior to this the system only covered GP principals, the GPs who undertake to provide general medical services (GMS) in their area under a contract negotiated nationally with GP representatives. To join the medical list, a GP principal has to satisfy rules on suitability and once on the list a GP is subject to discipline procedures relating to statutory Discipline Committees and the NHS Tribunal. The lists system does not currently cover GPs who perform personal medical services (PMS) either as independent contractors under contracts developed locally between the Health Board (in practice, each Island Health Board and each NHS Trust with primary care functions) or as GPs employed directly by a PMS practice or a Board. Nor does it cover GPs who assist GMS GP principals. The section is linked with paragraph 2(4) to (11) of schedule 2, which amends sections 29, 29A, 29B, 30, 31, 32A, 32B and 32D of the 1978 Act to attach provisions on the NHS Tribunal to GPs on services lists and supplementary lists.
82. Subsection (1) of section 18 provides the power in relation to GPs performing PMS. Subsection (2) provides the power in relation to GPs who assist GP principals in the provision of GMS.
83. Subsection (1) inserts new sections 17EA and 17EB into the 1978 Act. These sections provide enabling powers so that regulations may be made concerning the establishment of services lists of medical practitioners approved to perform PMS; and ensure that equivalent rules on knowledge of English and suitable experience as apply to applicants to join the medical list apply to applicants to join the services list.
84. Subsection (1) of section 17EA is the enabling power and provides that regulations may make provision for the preparation and publication by each Health Board of one or more lists of medical practitioners approved by the Board to perform PMS. PMS is provided under permanent contracts under the 1978 Act or on a pilot scheme basis under the 1997 Act. Subsection (1)(a) relates to the permanency option (PMS provided in accordance with arrangements under section 17C of the 1978 Act); and subsection (1)(b) relates to pilot schemes (PMS provided in connection with the provision of PMS under a pilot scheme made in accordance with Part I of the 1997 Act).
85. Subsection (4) of section 17EA enables regulations made in connection with medical lists of GMS principals to be applied to PMS performers; and/or regulations to be made for PMS performers analogous to regulations in connection with medical lists.
86. Under paragraph (a) of that section, the regulations may make provision for the application (with such modifications as the Scottish Ministers think fit) to services lists or to persons who are, have been or seek to be included in a services list of any regulations made under the 1978 Act in relation to medical lists or to persons who are, have been or seek to be included in a medical list.
87. Further, under paragraph (b) of that section, the regulations may, in relation to such lists or persons, make provision analogous to any provision made by regulations under the 1978 Act in relation to medical lists or to persons who are, have been or seek to be included in a medical list.
88. The regulations under subsection (4) of section 17EA may make provision in terms of either or both paragraphs.
89. Thus, paragraphs (a) and (b) provide the Scottish Ministers with the power to apply to PMS performers, with modifications as necessary, the same requirements as apply from time to time to GP principals on the medical list. The Scottish Ministers will have two

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options to do this: by applying regulations which relate to medical lists also to services lists of PMS performers; and/or by making new regulations on service lists which are analogous to regulations which relate to medical lists.

90. Subsection (1) of section 17EB applies to GPs seeking entry to services lists similar tests on knowledge of English and on suitable experience as apply to GPs seeking to join the medical list.
91. Paragraph (a) of that subsection sets requirements about knowledge of English which a qualified medical practitioner from a member state of the European Union must meet before he or she can be included on a services list. The requirement is that the practitioner must satisfy the Board for the area concerned that he or she has the knowledge of English which, in the interests of both the practitioner and his or her patients, is necessary for the performance of PMS in the Board's area.
92. Under paragraph (b) of that subsection, a medical practitioner shall not be entitled to be included on a services list unless he or she is suitably experienced. Subsection (2)(a) of section 17EB enables Scottish Ministers to make regulations to prescribe what is meant by "suitably experienced"; and subsection (2)(b) enables the regulations to exempt a medical practitioner from the need to have acquired that experience.
93. Subsection (3) of section 17EB ensures that subsections (2) and (3) of section 22 in the 1978 Act apply in relation to regulations under subsection (2)(b) of section 17EB in a similar manner to the way in which they apply to applicants to join the medical list.
94. Subsection (2) of section 18 makes similar provision in connection with medical practitioners approved to assist in the provision of general medical services (GMS non-principals) as subsection (1) does in connection with medical practitioners approved to perform personal medical services.
95. Subsection (2) inserts new sections 24B and 24C into the 1978 Act. These sections provide enabling powers so that regulations may be made concerning the establishment of supplementary lists of medical practitioners approved to assist in the provision of general medical services; and ensure that equivalent rules on knowledge of English and suitable experience as apply to applicants to join the medical list apply to applicants to join the services list. Section 24B has four subsections and section 24C has three.
96. Subsection (1) of section 24B is the enabling power and provides that regulations may make provision for the preparation and publication by each Health Board of one or more lists of medical practitioners approved by the Board to assist in the provision of general medical services.
97. Subsection (4) of section 24B enables regulations made in connection with medical lists of GMS principals to be applied to GMS non-principals; and/or regulations to be made for GMS non-principals analogous to regulations in connection with medical lists.
98. Under paragraph (a) of that subsection, the regulations may make provision for the application (with such modifications as the Scottish Ministers think fit) to supplementary lists or to persons who are, have been or seek to be included in a supplementary list of any regulations made under the 1978 Act in relation to medical lists or to persons who are, have been or seek to be included in a medical list.
99. Further, under paragraph (b) of that subsection, the regulations may, in relation to such lists or persons, make provision analogous to any provision made by regulations under the 1978 Act in relation to medical lists or to persons who are, have been or seek to be included in a medical list.
100. The regulations under subsection (4) of section 24B may make provision in terms of either or both paragraphs.
101. Thus, paragraphs (a) and (b) of subsection (4) provide the Scottish Ministers with the power to apply to GMS non-principals, with modifications as necessary, the same

requirements as apply from time to time to GP principals on the medical list. The Scottish Ministers will have two options to do this: by applying regulations which relate to medical lists also to supplementary lists of GMS non-principals; and/or by making new regulations on supplementary lists which are analogous to regulations which relate to medical lists.

102. Subsection (1) of section 24C applies to GPs seeking entry to supplementary lists similar tests on knowledge of English and on suitable experience as apply to GPs seeking to join the medical list.
103. Paragraph (a) of that subsection sets requirements about knowledge of English which a qualified medical practitioner from a member state of the European Union must meet before he or she can be included on a supplementary list. The requirement is that the practitioner must satisfy the Board for the area concerned that he or she has the knowledge of English which, in the interests of the practitioner and his or her patients, is necessary for the practitioner to assist in the provision of general medical services in the Board's area.
104. Under paragraph (b) of that subsection, a medical practitioner shall not be entitled to be included on a supplementary list unless that person is suitably experienced. Subsection (2)(a) of section 24C enables Scottish Ministers to make regulations to prescribe what is meant by "suitably experienced"; and paragraph (b) of that subsection enables the regulations to exempt a medical practitioner from the need to have acquired that experience.
105. Subsection (3) of section 24C ensures that subsections (2) and (3) of section 22 of the 1978 Act apply in relation to regulations under subsection (2)(b) of section 24C in a similar manner to the way in which they apply to applicants to join the medical list.

### ***Section 19 - Representations against preferential treatment***

106. Paragraph 3(1) of Schedule 1 to the 1997 Act is amended to add "fraud" to the grounds on which a Health Board may refer to the NHS Tribunal a case involving a PMS provider who wishes to cease providing PMS under pilot arrangements and receive preferential consideration to return to the medical list.
107. Paragraph 4(1) of Schedule 1 to the 1997 Act is amended to add "fraud" to the grounds on which the NHS Tribunal may direct the disqualification from the medical list of a PMS provider who wishes to receive preferential consideration to return to that list on ceasing to provide personal medical services under pilot arrangements.

### **Miscellaneous**

#### ***Section 20 - Amendment of Road Traffic Act 1988 and Road Traffic (NHS Charges) Act 1999: payment for treatment of traffic casualties***

108. This amendment is consequential on a change in UK legislation that broadened the definition of "road" for statutory motor insurance purposes. It amends sections 157(1)(a) and 158(1)(a) of the Road Traffic Act 1988 and section 1(1)(a) of the Road Traffic (NHS Charges) Act 1999 to the same effect to cover accidents that happen in public places as well as on the open road.
109. The [Road Traffic \(NHS Charges\) Regulations 1999 \(S.I. 1999/785\)](#), which came into effect on 5 April 1999, provide a scheme that enables the NHS to recover the costs incurred as a result of the treatment of road traffic casualties. The charges, recoverable from insurers and certain other persons, are payable only following an agreed compensation settlement.

***Section 21 - Amendment of 1978 Act: schemes for meeting losses and liabilities etc. of certain health bodies***

110. The amendment adds the Mental Welfare Commission for Scotland to the list of bodies covered by section 85B(2) of the 1978 Act. Section 85B provides for the establishment of schemes to meet specified losses and liabilities of the duly listed health bodies.
111. The amendment will enable the Mental Welfare Commission to be covered by the Clinical Negligence and Other Risk Indemnity Scheme (CNORIS), which was introduced by the [National Health Service \(Clinical Negligence and Other Risks Indemnity Scheme\) \(Scotland\) Regulations 2000 \(SSI 2000/54\)](#) on 1 April 2000. The scheme provides financial risk sharing arrangements for specified health bodies in respect of their clinical and certain other liabilities.

**Part 4 – General**

***Section 22 – Interpretation***

112. This section clarifies the meaning of various expressions used in the Act. Of particular importance is the explanation that “social care” does not include the provision of accommodation (subsection (2)). The note on section 2 of the Act discusses how the provision of accommodation can include both board and lodging and other services. It is intended that such services can be excluded from the definition of accommodation so that they may constitute social care for the purposes of the Act. Regulations under section 2 will achieve this.

***Section 25 - Minor and consequential amendments and repeals***

113. [Section 25](#) brings into effect schedule 2, which makes a number of amendments to existing legislation, which are minor and consequential to the provisions of the Act. Schedule 2 also repeals a reference to section 29(b)(3) of the 1978 Act in paragraph 52(b) of Schedule 4 to the Health Act 1999 and repeals the definition of “medical list” at paragraph 57 of Schedule 2 to the 1997 Act.

***Section 26 - Guidance and directions***

114. This section allows the Scottish Ministers to issue guidance and directions to local authorities and NHS bodies as to how they should undertake their functions under the Act. The section does not affect the other relevant powers to issue guidance and directions listed at paragraphs (a), (b) and (c).

***Section 27 - Short title and commencement***

115. This section enables the Scottish Ministers to bring sections of the Act, except section 27 itself and section 23, into force by order. Such an order may appoint different days for different provisions and for different purposes.

***Schedule 1 - Social care not ordinarily charged for***

116. [Schedule 1](#) is based on the definition of personal care recommended by the Care Development Group in its September 2001 report, *Fair Care for Older People*. This schedule does not amend the definition of personal care which is referred to in the requirement for free care in section 1(1) of this Act and which appears in section 2(28) of the 2001 Act. The items in schedule 1 complement that definition, which is general in its terms, and therefore ensures that those items of care that the Care Development Group considered should be free will be included in the requirement for free care in section 1. In some cases the terminology has had to be changed from that used by the Care Development Group to achieve the necessary precision for legislation.

117. Also, in order to avoid duplication, help with washing and eating, which were included in the Care Development Group's recommended list, have not been included in schedule 1. This is because such care is already mentioned as a specific example in the definition of "personal care" in the 2001 Act and is therefore already attracted by paragraph (a) of subsection (1) of section 1 of the Act.

### ***Schedule 2 – Minor and consequential amendments and repeals***

#### ***Paragraph 1 – Social Work (Scotland) Act 1968 (c.49)***

118. Sub-paragraphs (2) and (3) make minor amendments to sections 12B(7) and 12C(2) of the 1968 Act. They are consequential to the direct payment provisions in section 7 of the Act.
119. Sub-paragraph (4) is to correct an error in the text of section 13A(2) of the 1968 Act.
120. Sub-paragraph (5) makes a minor amendment consequential to section 3 of the Act. It amends section 94(1) of the 1968 Act to ensure that prescription under the new section 12(3A) of that Act is by order.

#### ***Paragraph 2 – National Health Service (Scotland) Act 1978 (c.29)***

121. Paragraph 2(2) of schedule 2 amends section 16A of the 1978 Act, which allows Health Boards to make payments to certain organisations for certain purposes. The amendment makes it clear that section 16A is without prejudice to section 13 of the Act, which allows Health Boards to make payments to local authorities.
122. The amendments to the 1978 Act which are set out in paragraph 2(3) to (8) of schedule 2 are to that Act as amended by the Health Act 1999 (section 58 and Schedule 4 paragraph 49). These amendments will bring GMS non-principals and GPs performing personal medical services (PMS) within the jurisdiction of the NHS Tribunal which may direct the disqualification or conditional disqualification (either local or national) of a practitioner on grounds of fraud and efficiency and may direct his or her interim suspension on similar grounds. The Tribunal may additionally declare that the practitioner is not fit to be engaged in any capacity in the provision of the relevant services. The amendments will also enable interim suspension, disqualification and conditional disqualification provisions imposed by a Health Authority in England and Wales or an equivalent body in Northern Ireland to be applied to the same non-principal or PMS practitioner in Scotland. They also provide for a Health Authority in England and Wales or an equivalent body in Northern Ireland to seek review by the Scottish Tribunal of a conditional disqualification. Referrals to the Tribunal are made by the Health Board or Boards holding the list(s) on which is included the name of the practitioner who is the subject of the referral.
123. Section 29(6) of the 1978 Act is amended to extend to a GMS non-principal or GP performing personal medical services (PMS) the first condition for disqualification by the NHS Tribunal from inclusion on a list held by a Health Board. The condition is that the continued inclusion of the person on the relevant list(s) would be prejudicial to the efficiency of the services in question.
124. Section 29(8)(a) of the 1978 Act is amended to include supplementary lists in the lists held by a Health Board from which practitioners may be disqualified by direction of the NHS Tribunal.
125. A new paragraph (aa) is inserted into section 29(8) to include a services list of performers in pilot and permanent PMS schemes in the lists held by a Health Board from which practitioners may be disqualified by direction of the NHS Tribunal. Under section 29(8), as prospectively amended, the lists from which a GP may be disqualified now include those prepared under or by virtue of Part I of the 1978 Act.

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126. Section 29A(3) of the 1978 Act is amended to extend liability to PMS performers where a lack of diligence by the performer has resulted in a fraud being perpetrated by another member of staff.
127. A new subsection (3A) is inserted into section 29A to extend liability as described in section 29A(3), as amended, to GMS non-principals also.
128. Section 29B is amended to enable the NHS Tribunal to continue to direct local disqualification and national disqualification. Two new sub-paragraphs are inserted into sections 29B(2)(a) and 29B(2)(b).
129. Sub-paragraph (i) of section 29B(2)(a) provides for the Tribunal to direct the local disqualification of a medical practitioner, other than an ophthalmic medical practitioner, from the medical, supplementary and services list of the referring Health Board even where the case against the practitioner relates to medical activity within the Board's area associated with just one of those lists. Sub-paragraph (ii) of section 29B(2)(a) retains the existing power of the Tribunal to direct the local disqualification of a practitioner who is not a medical practitioner from the list to which the case referred to the Tribunal relates.
130. Sub-paragraph (i) of section 29B(2)(b) provides for the Tribunal to direct the national disqualification of a medical practitioner, other than an ophthalmic medical practitioner, from all medical, supplementary and services lists. Sub-paragraph (ii) of section 29B(2)(b) provides for the Tribunal to continue to direct the national disqualification of dental practitioners from dental lists, pharmacy contractors from pharmaceutical lists and optometrists and ophthalmic medical practitioners from ophthalmic lists.
131. Additionally, section 29B(3), as amended, provides for PMS performers to be included in the categories of person about whom the NHS Tribunal may make a declaration of unfitness when making a national disqualification. As amended, the NHS Tribunal may now declare that the person subject to national disqualification is unfit to be engaged in any capacity in the provision or performance of the services associated with the lists from which he or she has been disqualified.
132. Section 30(4) of the 1978 Act is amended to include performers of PMS in the categories of persons whose conditional disqualification a Health Authority in England and Wales or an equivalent body in Northern Ireland may request the NHS Tribunal in Scotland to review. The amended wording removes ambiguity as to the meaning of the reference to "provisions in force in England and Wales corresponding to this Part".
133. Section 31 of the 1978 Act relates to equivalent disqualification provisions in England and Wales or Northern Ireland. It provides that a person disqualified in England and Wales or Northern Ireland is disqualified for inclusion in lists in Scotland.
134. Subsection (1)(a) of section 31 is amended to extend to lists of GMS non-principals and PMS performers those lists in Scotland to which a disqualification from equivalent lists in England and Wales or Northern Ireland may relate.
135. Subsection (2) of section 31 is amended to enable Scottish Ministers to impose conditions on provision or performance of services by non-principals and PMS performers equivalent to those already imposed on practitioners who are conditionally disqualified under provisions in England and Wales or Northern Ireland.
136. Section 32A(6)(a) is amended to extend to lists of PMS performers and GMS non-principals those lists from which a person shall be deemed to be disqualified where a Health Board has applied for interim suspension of that person.
137. Section 32B is amended to correct two inaccurate cross references to other sections of the 1978 Act. The first cross reference – section 29(3)(b) - appeared in amendments to the 1978 Act by paragraph 52(b) of Schedule 4 to the Health Act 1999. The reference should have been to section 29(2)(b) and the amended wording reflects this fact. The



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second cross reference is to section 32(A)(3) which does not exist. This has been substituted by the correct cross reference which is to section 32A(3).

138. Section 32D of the 1978 Act is amended to extend to GMS non-principals and performers of PMS the provisions that suspend and disqualify a person who, under corresponding provisions in England and Wales or Northern Ireland, has been suspended and disqualified for inclusion in a list in England and Wales or Northern Ireland.
139. Section 108(1) of the 1978 Act is amended to insert appropriate definitions required as a result of the amendments made by this Act.

***Paragraph 3 – National Health Service (Primary Care) Act 1997 (c.46)***

140. The definition of “medical list” provided for in Schedule 2 to the 1997 Act, which was not commenced in relation to this term, is repealed as a result of the inclusion of the term in the amendment of section 108(1) referred to at paragraph 139 above.

***Paragraph 4 – Health Act 1999 (c.8)***

141. Uncommenced paragraph 52(b) of Schedule 4 to the Health Act 1999 is repealed because the wording of this was defective. It cross referred to section 29(3)(b) of the 1978 Act, rather than to section 29(2)(b).