

# HEALTH AND SOCIAL CARE ACT 2008

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## EXPLANATORY NOTES

### TERRITORIAL EXTENT

#### *Social care*

#### ***Section 145: Human Rights Act 1998: provision of certain social care to be public function***

497. **Section 145** provides that where a private or voluntary sector care home provider provides accommodation together with nursing or personal care to a person under arrangements made with a local authority or, in Northern Ireland, DHSSPSNI, under certain statutory provisions the provider is taken to be exercising a function of a public nature under section 6(3)(b) of the Human Rights Act 1998. This means that such providers are required not to act incompatibly with rights under the Convention in providing these services. It also means that the person receiving such accommodation and care can take proceedings against the provider under the Human Rights Act 1998 if the provider breaches his or her rights under the Convention. Section 145 does not affect the question of whether persons in the private or voluntary sector who provide other forms of publicly-funded social care or health care are to be regarded as exercising a public function.

#### ***Section 146: Direct payments in lieu of provision of care services***

498. **Subsection (2)** of section 146 inserts new subsections (1A) to (1C) into section 57 of the Health and Social Care Act 2001.

499. New subsection (1A) enables regulations to be made which allow a designated person (a “suitable person”) to receive a direct payment on behalf of another person (“P”). In order for the suitable person to receive a payment, P must be assessed as needing community care services and must lack the capacity to consent to the making of direct payments, within the meaning of the Mental Capacity Act 2005. This subsection also enables regulations to be made that set out the conditions that must be satisfied by local authorities in determining who is a suitable person.

500. New subsection (1B) describes the consent that is necessary in order for such payments to be made. The suitable person must give his or her consent. If P has either a deputy appointed by the Court of Protection under the Mental Capacity Act 2005, or a donee of a lasting power of attorney (‘LPA’) created by P, and the deputy or donee qualifies as a surrogate of P but the suitable person does not qualify as a surrogate of P, then the deputy or donee must also give his or her consent. Regulations under new subsection (5C) will set out the authority that a person must have as a deputy or donee in order to qualify as a surrogate of P for the purposes of section 57 of the Health and Social Care Act 2001.

501. New subsection (1C) sets out what is meant by a “suitable person”: a person is suitable if he or she fulfils one of the following criteria:

- he or she is a representative of P. The term ‘representative’ will be defined in regulations made under section 57 as amended by **subsection (6)** of this section. It

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is envisaged that the regulations will initially apply this term to at least some of the people who are donees of LPAs or deputies appointed by the Court of Protection. Additionally, these powers would allow the category of ‘representatives’ to be extended more widely in the future, for example to include donees of Enduring Powers of Attorney;

- he or she is not a representative of P, but there is a donee or deputy in place who qualifies as a surrogate of P and who, along with the local authority, considers this person suitable to receive and manage the direct payment on P’s behalf;
- he or she is not a representative of P, and there is no donee or deputy in place who qualifies as a surrogate of P, but the local authority considers this person suitable to receive and manage the direct payment.

502. However, simply being considered to be a suitable person who could potentially manage a direct payment on behalf of someone else, does not automatically mean that a direct payment will be made to that person. Powers taken in subsection (1A) and amended subsection (3) of section 57 of the Health and Social Care Act 2001, enable regulations to impose conditions that must be met: for example the local authority must, where appropriate, consult with family members or friends already involved in the care of the person who lacks capacity, before a payment is made to the suitable person.
503. *Subsection (3)(a) to (c) and subsections (4) and (5)* amend the regulation-making powers that already exist under section 57 of the Health and Social Care Act 2001 to ensure that they can cover direct payments made to a suitable person in respect of P, as well as covering direct payments made directly to P.
504. *Subsection (3)(d)* amends section 57 of the Health and Social Care Act 2001 to enable regulations to be made that specify matters that the local authority must or may have regard to when taking any decision about who will administer the direct payment. Regulations under that section will be able to specify the steps that local authorities must or may take before or after making such a decision. For example, regulations might specify that a local authority must consult certain family members of P before making a direct payment. They might also specify that the local authority must keep these family members informed of how P’s needs are being met once the payment has been made.
505. Subsection (3)(d) also amends section 57 of the Health and Social Care Act 2001 to enable regulations to specify that where a person has fluctuating capacity (e.g., in the early stages of dementia or when the use of medication affects the person’s capacity), arrangements for managing their direct payment do not have to be continually revisited. For example, should P, who is receiving direct payments via a suitable person, temporarily gain capacity, then these regulations may provide for mechanisms to allow the suitable person to continue managing the processes around the payment but in accordance with P himself deciding how those payments are spent for the period of time for which they have capacity. Without the ability to make such provision, arrangements for the suitable person to manage the payment would immediately cease and payments would have to be made under the legislation governing payments directly to individuals rather than that governing payments to third parties. This would mean that the individual would continually fluctuate between two different regimes in section 57 of the Health and Social Care Act 2001 under which direct payments may be provided. This would have the potential to cause difficulties for P, the suitable person and the local authority involved.
506. Section 57(3)(d) of the Health and Social Care Act 2001 currently allows regulations to set out conditions to be complied with by the recipient of a direct payment which may or must be imposed by local authorities in relation to the direct payment. *Subsection (7)* of section 146 amends section 57 of the Health and Social Care Act 2001 so that these can include conditions relating to securing the provision of the service concerned, the provider of the service, the person to whom payments are made in respect of the provision of the service or the provision of the service itself. Such conditions could be

imposed to ensure that ‘suitable persons’ act in the best interests of the person whose direct payment they are receiving and managing when making decisions about their care.

507. *Subsection (8)* amends section 64 of the Health and Social Care Act 2001 to provide that any regulations made under section 57 of that Act by the Welsh Ministers will be subject to annulment by a resolution of the National Assembly for Wales.
508. *Paragraphs 1 and 8* of Schedule 14 make amendments to other legislation in consequence of the extension of the direct payments scheme by section 146. Paragraph 1 provides that the existing legislation relating to direct payments for disabled children or parents under section 17A of the Children Act 1989 is not affected by section 146 (as explained in the Background and Summary section). Paragraph 8 amends section 6 of the Safeguarding Vulnerable Groups Act 2006. A person for whom a direct payment is received under the new section 57(1A) of the Health and Social Care Act 2001 is a vulnerable adult for the purposes of the 2006 Act. This paragraph excludes local authorities when exercising functions under section 57 of the 2001 Act, and surrogates when acting under new section 57(1B)(b) or (1C)(b) of the 2001 Act, from being a regulated activity provider and therefore required to undertake the vetting and barring checks required by virtue of the 2006 Act. Regulations made under new section 57(3)(k) of the 2001 Act could however require local authorities to carry out vetting and barring checks before making direct payments to a person on behalf of a vulnerable adult.

#### ***Section 147 and Schedule 13: Abolition of maintenance liability of relatives***

509. This section removes local authorities’ powers to seek liable relatives payments under the National Assistance Act 1948. This will bring the operating principles for the charging policy for social care in line with those that are used in the rest of the health and social care system. The ‘liable relatives rule’ will come to an end in particular cases in accordance with Schedule 13.

#### ***Section 148: Ordinary residence for certain purposes of National Assistance Act 1948 etc.***

510. Section 24 of the National Assistance Act 1948 provides that a patient in an NHS hospital is to be treated for the purposes of the provision of residential accommodation under Part 3 of that Act as being ordinarily resident in the area where he was ordinarily resident before he was admitted to hospital. *Subsection (1)* extends this rule to apply also to accommodation provided by the NHS in places other than NHS hospitals.
511. *Subsection (2)* requires the Secretary of State and the Welsh Ministers to make and publish arrangements for determining which ordinary residence disputes arising under part 3 of the National Assistance Act 1948 are to be dealt with by the Secretary of State and which are to be dealt with by the Welsh Ministers. The arrangements can include provision for the determination of cross-border ordinary residence disputes between English and Welsh local authorities.
512. The Chronically Sick and Disabled Persons Act 1970 gives local authorities a statutory duty to make arrangements for individuals who are ordinarily resident in their area, if the local authority considers the arrangements necessary to meet certain specified needs of that person, as listed in section 2 of that Act. These needs might include, for example, the provision of assistance to participate in recreational or learning activities, the provision of meals at home or elsewhere, or the provision of assistance in obtaining telephone or any other special equipment. The Chronically Sick and Disabled Persons Act 1970 does not state explicitly whom local authorities should approach to resolve ordinary residence disputes under section 2. *Subsection (3)* brings provisions relating to determinations of ordinary residence disputes under section 2 of the Chronically Sick and Disabled Persons Act 1970 in line with the National Assistance Act 1948 by providing that any ordinary residence disputes are referred to the Secretary of State or

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the Welsh Ministers for a determination (in accordance with the arrangements made and published under the National Assistance Act 1948).