

COMMUNITY CARE (DELAYED DISCHARGES ETC.) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Delayed Discharge Payments

8. In “Delivering the NHS Plan”, published on 17 April 2002, the Government announced its intention of reducing the number of people who are ready and safe to leave hospital, but are unable to do so because their care needs have not been assessed or their package of onward care has not been put together, by introducing a system of reimbursement for delayed hospital discharge. This Act gives effect to that policy intention.
9. The liability to pay for delayed discharges which is established in Part 1 will only arise in situations where the local authority has not put in place the community care services, or services provided to an individual’s carer, which the authority has assessed the patient as needing in order to be safely discharged. Community care services are social services provided to adults, including care delivered in the individual’s home, residential care and respite care. The intention is to provide an incentive for local authorities to use the period before admission (e.g. in the case of elective treatment), or following admission but before discharge, to assess a patient’s or carer’s needs and arrange the appropriate services.

Preliminary

Section 1: Meaning of “NHS body” and “qualifying hospital patient”

10. *Section 1* identifies the kinds of patients with whom the Act is concerned by giving a definition of “qualifying hospital patient”. A qualifying hospital patient is an NHS patient at a health service hospital or an independent hospital who is receiving care of a prescribed description. It is intended that this should be acute care. The types of care may later be extended to other sectors, such as mental health or intermediate care, as appropriate. *Subsection (3)* provides that an NHS body may make arrangements with others for them to do anything which is required or authorised to be done by the NHS body under Part 1. *Subsections (4)* and *(5)* set out the effect of such an arrangement.

Determination of need for community care services on discharge

Section 2: Notice of patient’s likely need for services on discharge

11. Under *subsections (1)* and *(2)*, NHS bodies with responsibility for patients are required to inform local authorities with social services responsibilities (in Part 1 referred to as “social services authorities”) of patients who are likely to need community care services in order to be safely discharged.
12. Under *subsection (2)(a)*, the social services authority to be notified is the one which appears to the NHS body to be the one in which the patient is ordinarily resident

when the notice of likely need is given. The NHS is not required to undertake lengthy investigations to establish with certainty which authority this is, as the notice will be effective even if the NHS notifies an authority other than the one in which the patient is ordinarily resident. Provided the NHS body has made reasonable efforts to identify which authority is responsible, then it must serve notice to that authority. *Subsection (2)(b)* provides for cases where a patient appears to have no settled residence, e.g. in the case of a homeless person.

13. *Subsection (3)(a)* requires the NHS body to make explicit that it is giving notice under section 2. This is to ensure that the recipient social services authority can recognise this notice as the formal start of the process provided for under this Act. *Subsection (3)(b)* requires that notice is not given earlier than eight days before the day of expected admission. The admission day is itself to be counted in this eight day period. This ensures that a section 2 notice is not provided too far in advance of admission. Otherwise there is a risk that preliminary planning would be wasted if the patient's condition changed.
14. *Subsection (4)* places a duty upon the NHS to consult the patient, and where appropriate his carer, before issuing a notice to the social services authority of the patient's likely need for community care services upon discharge under section 2. This is to prevent the NHS from initiating assessments which are not required, because, for example, the patient will make his own arrangements. It also means that a patient will know that the process in the Act applies. The NHS body only has to consult the carer if they know who the carer is, and if it is reasonably practicable to do so.
15. *Subsection (5)* defines "the responsible NHS body" which is required to give notice of possible need. This can be either the NHS body which is providing the care, (usually the NHS trust which manages the hospital that the patient is in) or, in the case of NHS patients whose treatment is provided by an independent hospital, the NHS body which made arrangements for this non-NHS treatment.

Section 3: Notices under section 2: supplementary

16. *Section 3* sets out the administrative procedures for issuing and withdrawing a section 2 notice, and deals with issues such as what the notice must contain. *Subsections (1) to (3)* provide for how long a section 2 notice remains in force. *Subsection (3)* allows for regulations to provide when the notice ceases to have effect (if the notice has not previously been withdrawn by the responsible NHS body under *subsection (2)*). The intention is that the notice ceases to have effect if the patient dies.
17. *Subsection (4)* then provides that if a notice ceases to have effect, the social services authority is no longer liable to make delayed discharge payments, but that any existing liability to pay remains. The NHS body may issue a fresh section 2 notice to the social services authority if the patient's circumstances make this necessary. Re-notification of this kind restarts the process, meaning that the social services authority must reassess the patient and, after consulting the NHS body, decide what services to provide.
18. *Subsection (5)* allows for regulations to set out the contents of the notice and the notification process. The NHS body may be required to withdraw the section 2 notice in prescribed circumstances. This is to make sure that the social services authority do not continue needlessly to carry out duties arising after a section 2 notice has been issued, such as arranging a care package, when the NHS is aware that the patient has made arrangements of his own, or may now need services of a very different nature than had originally been expected due to a change in circumstances. This could be because an admission which is elective (rather than emergency) has been postponed due to a significant deterioration in the patient's condition. *Subsection (5)(c)* allows regulations to be made to define the day on which it will be considered that the NHS body has issued a notice to the social services authority.

Section 4: Duties of responsible authority when section 2 has been given

19. This section applies when notice of likely need has been given under section 2 of the Act. The social services authority must then assess, and after consultation with the NHS body, determine what services they will provide for a patient or carer. Statutory requirements under this section, if not complied with, form part of the trigger for payment (see [Section 6](#)).
20. *Subsection (2)* requires that, following notification under section 2 from an NHS body, the social services authority must carry out an assessment in order to determine what community care services a patient will need in order for him to be safely discharged.
21. *Subsection (3)(a)* then provides that, in prescribed circumstances, the social services authority must also assess the needs of any carer of the patient for services necessary to make the patient's discharge safe. *Subsection (3)(b)* provides that, having done this, the social services authority must consult the responsible NHS body before deciding what services to provide.
22. *Subsection (4)* provides that the circumstances mentioned in subsection 3 are that the carer requests an assessment or has had an assessment in the previous year.
23. *Subsection (5)* provides that the duty to assess and decide under subsection (2) or (3) applies whether or not the person's need for community care services, or the carer's need for services, has previously been assessed. This is to prevent provision of care services being based only on an existing assessment which may not have taken account of possible changes in the patient or carer's circumstances and needs, although existing and unchanged information can still be used.
24. *Subsection (6)* requires the social services authority to keep under review the needs of patient and carer and the services they have decided to provide. *Subsection (7)* then allows the authority to change their decision about what services to provide to enable a safe discharge, so as to cover situations where the patient's condition changes. This means that if a patient recovers more quickly than expected, the social services authority would not have to provide all the services they originally said they would, even though some of them were no longer needed. However, the authority will not be able to make such a change without first consulting the NHS body (*subsection (8)*).
25. *Subsection (9)* provides that any assessment carried out under subsection (2) is to be treated as assessment under section 47(1) of the National Health Service and Community Care Act 1990, although this assessment does not necessarily fulfil everything which needs to be done under section 47. Section 47 is the provision under which social services authorities assess a person's need for community care services, and decide whether or not those needs call for the provision by the social services authority of any such services. Assessment under this Act is carried out for the purposes of determining what a patient needs in order to be discharged from hospital safely. The person may well need other community care services in the longer term, determination of which will require completion of a full section 47 assessment.
26. *Subsection (10)* provides that carers' assessments carried out under subsection (3) are regarded as being carried out under the provisions of section 1 or 2 of the Carers and Disabled Children Act 2000. The carers' assessment under this section is carried out only for the purposes of determining what a carer needs in order for the patient to be discharged from hospital safely and further, fuller assessment may be required later.

Section 5: Duties of responsible NHS body when section 2 has been given

27. This section applies where a section 2 notice has been given. *Subsection (2)* ensures that the NHS body responsible for issuing the section 2 notice to the social services authority, and any other NHS body which may need to provide services to the patient upon discharge, must consult the social services authority before deciding which services it will make available upon discharge. This is to ensure that a complete package

of care can be put in place smoothly and without duplication or omission of any particular service. The responsible NHS body will in the first instance normally be a hospital but the majority of NHS services upon discharge are likely to be provided by the patient's Primary Care Trust. The social services authority must be consulted about *all* NHS services that are to be provided.

28. *Subsection (3)* provides that the NHS body must notify the social services authority of the day on which it is proposed that the patient will be discharged.
29. *Subsections (4) and (5)* deal with when a notice issued under subsection (3) is in force and when it may be withdrawn. The intention is that the social services authority should be informed as soon as possible by the NHS body of circumstances which change the proposed discharge date, so that the social services authority can make corresponding changes to their arrangements to provide services. This ensures clarity of communication between the NHS and social services authority leading to better joint planning.
30. *Subsection (6)* defines "the relevant day" for the purposes of charging under Part 1. This day is the later of the proposed date of discharge as communicated to the social services authority, or the last day of a minimum interval provided for the authority to carry out their duties under section 4 which starts after notice under section 2 has been given.
31. *Subsection (7)* provides for this minimum interval to be prescribed in regulations but places limits on what the regulations may prescribe. The minimum interval starts on the day after the social services authority has received notification under section 2 that a patient is likely to require community care services, and must be at least two days. This in effect means that a social services authority will always have at least some of the day of notification under section 2, plus two more days to assess the patient's community care needs and put in place sufficient services to allow for discharge from hospital. Furthermore, Sundays and public holidays cannot be counted towards the two day period prescribed at *subsection (7)(b)* until 31 March 2005 at the earliest (*subsection (8)*). In England and Wales, public holidays are Christmas Day, Good Friday and bank holidays.
32. If the notice under subsection (3) is withdrawn, *subsection (9)* provides that the NHS body is under a duty to issue a fresh notice when a new discharge date has been identified, and that a new relevant day is identified.
33. *Subsection (10)* provides for regulations to define the form, content and manner of issuing of discharge notices under subsection (3) and withdrawal notices under subsection (5). The aim is to ensure that the social services authority receives fair warning of the intention to discharge or of changes to this decision. The subsection also aims to prevent disputes about when such notices can be regarded as given or received. *Subsection (10)(d)* allows regulations to be made to define the day on which it will be considered that the NHS body has issued or withdrawn a notice to the social services authority.

Delayed discharge payments

Section 6: Liability to make delayed discharge payments

34. *Section 6* requires a social services authority, in certain circumstances, to make payments to an NHS body in respect of delayed discharges. It applies where the NHS body has notified the social services authority of the patient's likely need for community care services upon discharge and has given notification to the authority of the proposed discharge date, and both notices are in force at that time.
35. *Subsections (2) and (3)* set out when the liability to make a payment is triggered. This can be firstly that a social services authority has not started or completed an assessment of the patient's needs as required under section 4(2). Secondly, payment

can be triggered where discharge is not possible because, and only because, the social services authority have not provided a service they decided to provide to the patient or to his carer. The delay must be the sole responsibility of the authority. Thus, for example, if an NHS service required for safe discharge has also not been made available, the liability to make a payment will not arise.

36. *Subsection (2)* also provides for regulations to prescribe the amount of the charge which will apply per day of the delayed discharge period, if the social services authority do not carry out their duties. When making regulations the Minister must have regard to the cost to NHS bodies of providing accommodation and personal care to patients who are ready to be discharged and to the cost to social services authorities of providing services to those who have been discharged (see *section 7*).
37. *Subsection (4)* defines the “delayed discharge period”. This period, subject to *subsections (5)* and *(7)*, begins the day after the relevant day (as defined in *section 5(6)*), and ends on the day on which the patient is discharged.
38. *Subsection (5)* makes provision for when the delayed discharge period will end. This is when the social services authority have notified the NHS body that they have assessed the patient and any carer and determined what services they will provide and have made those services available. If the patient is not discharged at this point for some reason connected with the NHS, then the social services authority are not liable to make any further payment, as they are not responsible for the further delay.
39. *Subsection (6)* provides that, in a case where the social services authority have made changes to the services they intend to provide to a patient or carer and have informed the NHS body of this change, it is the revised services which are to be provided to the patient or carer if the social services authority are not to be liable to make a delayed discharge payment.
40. *Subsection (7)(a)* allows regulations to provide for days that may be disregarded as part of the delayed discharge period. *Subsection (7)(b)* allows for other circumstances to end the delayed discharge period.
41. *Subsection (7)(c)* provides for regulations to define the day on which discharge can be regarded as occurring.

Section 7: Delayed discharge payments

42. *Subsection (1)* sets out matters to which the Minister must have regard when exercising the power in *section 6(2)* to make regulations setting the amount of the payment. *Subsection (1)(a)* provides that the level of the charge is to be set with regard to the cost of providing accommodation and personal care in a hospital to a patient is ready for discharge. *Subsection (1)(b)* provides that the charge must also be set with regard to the costs borne by social services authorities in providing community care services, with which the charge needs to compare unfavourably if it is to be an incentive.
43. *Subsections (2)* and *(3)* provide that payments for delayed discharges are to be made to the responsible NHS body, or in cases prescribed in regulations to a person other than the responsible NHS body prescribed in those regulations.

Disputes

Section 8: Ordinary residence

44. This section provides for disputes on the question of ordinary residence to be determined by the Secretary of State, or National Assembly for Wales, as appropriate. It also requires the Secretary of State and the Assembly to make and publish arrangements dealing with questions as to which of them is to deal with particular types of case.

Section 9: Dispute resolution

45. *Section 9* provides for dispute resolution where there is disagreement between NHS bodies and social services authorities about readiness for discharge or the responsibility for the delay. It therefore contains a regulation-making power to require Strategic Health Authorities in England, and Local Health Boards in Wales, to set up dispute panels. If those involved in the discharge process cannot reach agreement in a particular case, they may refer the matter to the relevant panel to assist in reaching agreement. *Subsections (2)* and *(3)* allow for regulations to require the Strategic Health Authority or Local Health Board to keep lists of potential panel members for the dispute resolution panel and require that each social services authority is consulted about the names of the people on those lists. The panel's role is advisory and its recommendations are not formally binding, although it is hoped that the recommendations will be accepted in most cases.

Supplemental

Section 10: Adjustments between social services authorities

46. There may be cases where there are disputes about where a patient is ordinarily resident and therefore which social services authority is responsible for determining a patient's needs under section 4, or making any payments in respect of that patient should his discharge be delayed. This section confers regulation-making powers in order to make provision for such cases. *Subsection (1)* provides that regulations may be made to deal with cases where it appears to the social services authority which has been given notice of a patient under section 2 that the patient is not in fact ordinarily resident in their area.
47. *Subsection (2)(a)* provides that those regulations may require a social services authority to accept a notice under section 2, even though they may dispute being the responsible authority. This is to ensure that one authority is always responsible for an individual and that the individual receives the services he needs as soon as possible, even where there is uncertainty as to which authority should bear responsibility. It may be that another authority is subsequently found to be responsible for the patient. In this case, regulations made under *subsection (2)(b)* may require the authority later found to be responsible to take over responsibility from the authority that was previously believed to have been responsible.
48. Under *subsection (2)(c)* regulations may be made to authorise the social services authority originally thought to have been the responsible authority for a patient to recover any expenditure from the authority finally found to be responsible. This could be expenditure incurred in determining the patient's needs or providing any community care services to the patient for which they should not have been responsible.

Section 11: Regulations

49. This section provides for how the various regulations in Part 1 are to be made. *Subsection (3)* provides that mental health care (as prescribed by order) may not be one of the types of care used to define a qualifying hospital patient unless the relevant regulations have been approved by Parliament. All other regulations under Part 1 are subject to the negative procedure.

Section 13: Application of Local Authority Social Services Act 1970

50. *Section 13* makes an amendment to the above Act, providing that the functions under Part 1 of this Act are social services functions. Under other provisions of the Local Authority Social Services Act 1970, the Secretary of State is empowered to give guidance or directions to local authorities about the carrying out of their social services functions. This amendment allows the Secretary of State to give such guidance or directions on the carrying out of functions under Part 1 of this Act.

Section 14: Power to extend the application of Part 1 to NHS patients in care homes

51. Sections 1 to 13 of the Act concern hospital patients. The order-making power in *section 14* allows similar provision to be made in respect of certain patients in care homes. To be a “qualifying care home patient”, a patient will have to be receiving care of a prescribed description. *Subsection (4)* limits this prescribed care to types of care prescribed under section 1 (i.e. care received in hospital).
52. The intention of this section is to ensure that, if the Act is extended to include patients receiving intermediate care, patients receiving intermediate care in a care home setting are within the scope of Part 1, as well as those receiving intermediate care in a hospital. An individual will not come within the scope of an order made under section 11 if they are receiving services which are only provided in a care home.