

**EXPLANATORY MEMORANDUM TO  
THE CARE AND SUPPORT AND AFTERCARE (CHOICE OF ACCOMODATION)  
REGULATIONS 2014**

**2014 No. 2670**

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1. The purpose of The Care and Support and Aftercare (Choice of Accommodation) Regulations 2014 is to set out the rights and responsibilities regarding the choice of placement in residential care and the right to choose a more expensive setting than the local authority would fund.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1. None.

**4. Legislative Context**

4.1. Where the care and support planning process has identified that a person's needs are best met in a residential setting, and the local authority is meeting that person's needs under sections 18 to 20 of the Care Act 2014, section 30 of the Care Act 2014 allows regulations to provide for the local authority to meet the person's preferred choice of accommodation. It also allows regulations to provide for the person or a third party to meet the additional cost where the person chooses a more expensive setting than the local authority would normally provide.

4.2. Section 30 also provides powers for the regulations to specify conditions that need to be met when choice is expressed, and in particular when choice for a more expensive setting is expressed.

4.3. This is primarily a continuation of existing practice which existed under the National Assistance Act 1948 (Choice of Accommodation) Directions 1992 and the National Assistance (Residential Accommodation) (Additional Payments and Assessment of Resources) (Amendment) (England) Regulations 2001<sup>1</sup> but expands the provision to apply to shared lives and supported living settings..

4.4. Similarly, section 117A of the Mental Health Act 1983 provides that if a local authority is, in discharging its duty under section 117 of that Act, providing or arranging for the provision of accommodation, the Secretary of State can make regulations which allow the person concerned to express a preference for particular accommodation, subject to any prescribed conditions.

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<sup>1</sup> S.I. 2001/3441.

## **5. Territorial Extent and Application**

5.1. This instrument applies to England only.

## **6. European Convention on Human Rights**

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

### 7.1. Choice of Accommodation

7.1.1. A person's ability to make an informed choice is a key element of the care and support system. This must extend to where the care and support planning process has determined that a person needs to live in a specific type of accommodation to meet their care and support needs and to circumstances where a local authority is providing or arranging accommodation in discharge of its duty under section 117 of the Mental Health Act 1983 ("section 117 duty").

7.1.2. The care setting will ultimately become the person's home, the person must therefore have a say in where this is, provided that the prescribed conditions are met, which include that the chosen setting is suitable in relation to the person's needs; to do so would not cost the local authority more than the amount specified in the person's personal budget for accommodation of that type (or in relation to the section 117 duty, greater than the amount the local authority would expect to be the usual cost of providing or arranging the provision of accommodation of that kind); the accommodation is available; and the provider is willing to enter into a contract with the local authority.

7.1.3. This choice must not be limited, for example to those providers a local authority usually contracts with, but the local authority must provide clear information and advice to ensure that the person understands the implications and consequences of their choice.

7.1.4. There are some differences where someone is receiving aftercare under section 117A of the Mental Health Act 1983 as this is not chargeable.

### 7.2. Additional cost

7.2.1. In some cases a person may wish to choose a setting that is more expensive than the amount identified for the provision of accommodation in their personal budget. (The personal budget must be prepared by the local authority as part of the person's care and support plan, and sets out the costs of meeting the person's needs.) In such cases, the person (in limited circumstances) or a third party will need to enter into an agreement to meet the additional cost. In relation to the section 117 duty, the person may wish to choose accommodation which costs more than the amount the local authority would expect to be the usual cost of providing or arranging the provision of accommodation of that kind, in which case the person or a third party will

need to enter into an agreement to meet the additional cost. This is also known as a 'top-up' payment.

7.2.2. When arranging a 'top-up' payment, the person meeting this cost must be willing and able to do so for the likely duration of the arrangement, be aware of the consequences should they no longer be able to make the payment, and enter into a written agreement with the local authority setting out the detail of the payment. The purpose of the written agreement is to ensure that all parties clearly understand their rights and responsibilities.

7.2.3. Ultimately, the local authority will be responsible for paying the full amount to the provider should the arrangement break down for any reason. However if such a breakdown occurs, the authority would need to review the person's care and support arrangements and it may become necessary for the person to move to alternative accommodation.

7.3. These provisions are currently set out in directions and are being moved into regulations following a recommendation from the Law Commission<sup>2</sup>. Placing the requirements on a more significant footing increases transparency and certainty, in addition to ensuring that the provisions benefit from Parliamentary scrutiny. This has also provided the opportunity to update the policy in line with current practice by extending this to other types of accommodation.

## **8. Consultation outcome**

8.1. The consultation on the package of regulations relating to Part One of the Care Act was published on 5 June 2014, and ran for ten weeks to 15 August. In order to reach a comprehensive and varied pool of experience and expertise, the consultation contained a mix of digital and face-to-face meetings and events with the full spectrum of stakeholders, including: people receiving care and support and their carers; social workers and other frontline practitioners; local authority finance managers, commissioners and elected members; voluntary and private social care providers; national representative groups and other charities and trusts; and NHS agencies, housing departments, DWP Job Centre Plus and other key partners involved in the reforms. In total, the consultation drew over 4,000 responses from many different sources. Responses were carefully analysed and, where appropriate, changes were made to regulations.

8.2. The consultation on draft regulations and guidance over the summer of 2014 welcomed the improvements made, and in particular the requirement for written agreements to be in place that clearly set out both the person and the local authority's roles and responsibilities. The general view was that this was a welcome improvement that would help improve local practice and ensure consistent practice around top up fees.

8.3 The Government response to the consultation was published on 23 October and can be found here:

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<sup>2</sup> Law Commission (2011). *Adult Social Care*. (Law Com 326) London: The Stationary Office. Paragraph 8.78. Available at [http://lawcommission.justice.gov.uk/docs/lc326\\_adult\\_social\\_care.pdf](http://lawcommission.justice.gov.uk/docs/lc326_adult_social_care.pdf)

<https://www.gov.uk/government/consultations/updating-our-care-and-support-system-draft-regulations-and-guidance>

## **9. Guidance**

9.1 Statutory guidance to support implementation of Part One of the Care Act was subject to public consultation as part of the consultation on regulations under that part. The guidance was published at <https://www.gov.uk/government/publications/care-act-2014-statutory-guidance-for-implementation> on 23 October. This guidance is not itself the subject of parliamentary scrutiny.

## **10. Impact**

10.1. A separate impact assessment has not been prepared for this instrument. The instrument is part of a package of legislative measures and the relevant impact assessment can be requested via [careactconsultation@dh.gsi.gov.uk](mailto:careactconsultation@dh.gsi.gov.uk) or Department of Health, Richmond House, 79 Whitehall, London SW1A 2NS and is available online at <http://www.legislation.gov.uk/ukpga/2014/23/resources>.

10.2. The instrument does not substantially change the current position as regards the matter of choice but provides for a more significant footing for the framework of choice by placing this in regulations instead of directions. As the impact assessment sets out, the instrument is not expected to represent an additional cost burden for either the private or public sector as it largely reflects current practice.

## **11. Regulating small business**

11.1. This will have no bearing on the regulation of existing small businesses.

## **12. Monitoring and review**

12.1. The Government has committed to keeping the impact of the package of regulations under review. We will monitor the impacts of implementation of the policies contained within the Act and regulations under it on an ongoing basis. This will include continuing to work closely with local government to understand the impact of implementation of the reforms.

## **13. Contact**

Sara Mason or Alan Probett at the Department of Health can answer any queries regarding the instrument. Sara Mason: Tel: 020 7276 5616 or e-mail: [sara.mason@dh.gsi.gov.uk](mailto:sara.mason@dh.gsi.gov.uk) Alan Probett : Tel: 020 7276 5593 or email [alan.probett@dh.gsi.gov.uk](mailto:alan.probett@dh.gsi.gov.uk)