

EXPLANATORY MEMORANDUM TO
THE CARE AND SUPPORT (DEFERRED PAYMENT) REGULATIONS 2014

2014 No. 2671

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 Care and Support (Deferred Payment) Regulations 2014 set out the circumstances in which local authorities' may or must exercise the power in section 34 of the Care Act 2014 to enter into deferred payment agreements. They also make provision as to the operation and content of the agreement.
 - 2.2 Deferred payment agreements are agreements made between a local authority and an adult. Under the agreements the authority agrees to defer the payment of charges due to it from the adult, or the repayment of a loan made by it to the adult for the costs of meeting needs by the provision of accommodation in a care home or supported living accommodation.
 - 2.3. The purpose of the Regulations is to ensure that all local authorities who can obtain a first charge over land in respect of the amount deferred enter into a deferred payment agreement with an adult who is willing to agree to one, and who would otherwise be at of risk having to sell his or her home to pay for the costs of accommodation in a care home. But the regulations also confer discretion on a local authority to enter into a deferred payment agreement with an adult if it does not obtain such a charge or who does not have to sell their home to pay for accommodation in a care home or supported living accommodation.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Context**
 - 4.1 These Regulations are made under sections 34 and 35 of the Care Act 2014 ("the Act"). Section 55 of the Health and Social Care Act 2001("the 2001 Act") enables local authorities to enter into a deferred payment agreement with an adult for whom the authority provides accommodation under Part 3 of the National Assistance Act 1948. Local authorities have discretion to decide the circumstances in which they will enter into such an agreement with individuals by reason of the fact that the Secretary of State has not exercised the power in section 55(2) of the 2001 Act to make directions which require local authorities to enter into deferred payment agreements and which specify any conditions which must be satisfied in order for that requirement to apply. [However, paragraph 8 of the Annex to Local Authority Circular LAC (2001) 25 ("the Circular") states that they may agree to deferred

payment agreements only where the person has insufficient income or other assets (other than the value of their main or only home in which they have a beneficial interest) to meet the cost of their care.]

4.2 These regulations set out circumstances and conditions subject to which a local authority is required or permitted to enter into a deferred payment agreement with an adult to defer until the time specified in regulation 7 (“the specified time”) the costs of care and support which an adult is required to pay for meeting their needs in a care home or supported living accommodation.

4.3 By regulation 2 (subject to other provisions in the regulations) all local authorities are required to enter into a deferred payment agreement if the value of the adult’s interest in property which is his main or only home has been taken into account in the financial assessment carried out under section 17 of the Act and if the value of their capital excluding the value of their interest is less than £23,250.

4.4 By section 17 of the Act and regulation 12 of the Care and Support (Charging and Assessment of Resources) Regulations 2014 (“Charging Regulations”) an adult whose needs are met by the provision of accommodation in a care home (a permanent resident) must pay the full costs of that accommodation if he or she has capital assets of more than £23,250. By paragraph 6 of Schedule 2 to the Charging Regulations the value of the adult’s main or only home is disregarded for the purposes of calculating an adult’s capital resources if the adult is in receipt of care and support other than the provision of care and support in a care home. In cases where the home is also occupied by a qualifying relative of the adult (e.g. the adult’s partner) the value of the home is disregarded when a person receives care and support in a care home. But the effect of these provisions is that many people whose care needs are met in a care home have the value of their interest in their only or main home included in the assessment of their capital assets.

4.5 By section 55(3) of the 2001 Act the deferred payment agreement is an agreement which the local authority makes with a resident who will grant it a charge over land in which he or she has a beneficial interest for the purpose of securing payment to the authority of the total amount of the relevant contributions which under the agreement the resident is not required to pay the authority during the exempt period as set out in subsection (4). Regulation 2(1) of The National Assistance (Residential Accommodation) (Relevant Contributions) (England) Regulations 2001 (S.I. 2001/3069) provides that relevant contributions for this purpose shall be determined by calculating the difference between the payments the resident is liable to pay the local authority calculated in accordance with the National Assistance (Assessment of Resources) Regulations 1992 and (in effect) the payments he or she would be liable to pay if the value of his or her beneficial interest in his only or main home is not included in that assessment.

4.6 These Regulations make different provision as to the deferred amount (regulation 5) and prohibit a local authority from deferring the full amount due to it for the costs of care if the adult wishes to defer a lower amount or if to do so would exceed the equity limit (in paragraph 5). They also allow the

local authority to defer a lesser amount if the adult has income of more than £144 per week. They also make different provision as to the security which a local authority may or must obtain in respect of the deferred amount.

4.7 Section 55(6) of the 2001 Act prohibits a local authority from charging interest on the deferred amount until 56 days after the death of the adult and provides in that thereafter the sum shall bear interest at such reasonable rate as the relevant authority (ie Secretary of State) may direct or if no such directions are made as the local authority may determine. No directions have been made.

4.8 No provision is made in the 2001 Act to allow local authorities to charge administration costs. Paragraph 13 of the Circular provides that local authorities may require the resident to pay the costs of land registry searches and other such legal expenses but they must be paid up front and cannot be added to the deferred amount.

4.9 These regulations allow local authorities to charge interest on the balance of the deferred amount as it accrues during the life of the agreement (regulation 9) and for this to be added to the deferred amount if that adult chooses. They also allow a local authority to charge the adult all of the administration costs incurred in relation to the agreement and for those to be added to the deferred care costs, rather than to be paid up front (if the adult chooses) (regulation 10). In addition they make provision as to terms and conditions which must or may be included in the agreement. They retain the requirement which applies in the case of agreements under the 2001 Act, which is that the agreement cannot be terminated by the local authority before the death of the adult (unless the adult so wishes).

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 The Care Act 2014 contains a number of reforms to the ways in which people pay for their care and support, including making provision for a new universal deferred payment scheme.

7.2 The overarching policy objective of the scheme is to help avoid people being forced to sell their home within their lifetime to pay for their care. People may face this risk if they are 'cash poor' (having little in the way of savings) but 'asset rich' (perhaps owning a property). When a local authority assesses whether someone needs financial support in paying for their care home costs, it usually considers both the value of their interest in their home and savings in its calculation.; so consequently someone with a home but minimal savings would not be eligible for local authority support. This may be

problematic as the individual has little in the way of liquid assets (their savings) to pay for their care, and so may be forced into hurriedly selling their property.

7.3 Under the deferred payments scheme, local authorities enter into an agreement with an individual to agree to defer the payment of charges due to it from the adult, or the repayment of a loan made by it to the adult for the costs of meeting needs by the provision of accommodation in a care home or supported living accommodation. . The agreement is typically secured by the authority placing a legal charge on the individual's property, and the individual typically repays the local authority from the proceeds generated from the sale of said property (though these regulations give authorities power to accept other forms of security, and individuals freedom to repay the amount due from other sources).

7.4 As set out in section 4, local authorities have discretionary powers to enter into deferred payment agreement under section 55 of the 2001 Act, and the effect of this is that the scheme has not been universally available – as the independent Commission on Funding of Care and Support noted in its final report when it commented that “the availability and use of deferred payment schemes is patchy”.

7.5 The Government broadly accepted the Commission's recommendation for a “universal offer across the country” which was available to “anyone who would be unable to afford care charges without selling their home”. Starting from April 2015, there will be a new requirement for all local authorities to offer the scheme to anyone who meets the criteria [set out in draft regulations and guidance. This will ensure the scheme is universally available in all authorities, [and the eligibility criteria will ensure the scheme is targeted at] those most at risk of being unable to afford care charges without selling their home.

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

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

- 8.3 Around half of all responses received provided comments on deferred payments. The majority of respondents were highly supportive of the overall intention to extend the deferred payments scheme.
- 8.4 Consultees were highly supportive of the proposal to extend DPAs to extra care settings, recognising that this was a helpful flexibility and might be needed in specific situations. Consequently the regulations have been amended to give local authorities discretion to provide DPAs to people who want to retain their own property and rent an extra care property.
- 8.5. Whilst consultation responses were broadly supportive of the approach of having an equity limit to set out the maximum amount a person can defer, a number of consultees pointed out that there was the potential for confusion with the proposal set out in draft regulations and guidance (whereby local authorities were required to defer up to a limit of 70-80% of the property's value, but had discretion to defer beyond it). We have consequently amended the regulations to set out a single equity limit.
- 8.6. The consultation also sought views on the security a local authority should be required to accept. Consultees' responses to this question were mixed, but the majority were opposed to local authorities being required to accept any legal charge on a property, and in favour of authorities only being required to accept a first charge. The regulations and guidance consequently make clear that local authorities are only required to accept a first legal charge, but have discretion to accept other legal charges as well to allow authorities to assess levels of risk in individual cases and offer DPAs accordingly.
- 8.7. The regulations have also been amended to clarify how the interest rate will operate. In particular, following consultation, regulations and guidance make clear that only one interest rate will apply to the entire Scheme, as consultees were strongly opposed to having differential rates for DPAs formed under 'discretionary' and 'mandatory' powers. Their objections were primarily on the grounds of the complexity and confusion faced by both local authorities and people with care and support needs when administering a scheme with two rates.

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 these Regulations. These Regulations are part of a package of legislative measures and the relevant impact assessment can be requested via 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 In view of the new requirements these regulations place on local authorities to offer deferred payments, local authorities are being given £83.5m to implement the changes, reflective of the costs identified in the impact assessment. This will be distributed by a new funding formula specifically developed for deferred payments. The Department of Health recently consulted on proposals for this funding formula, and a response to this consultation will be published in due course.
- 10.3 The DPA scheme is designed to be broadly cost neutral to the government in the long term, as the future repayments on DPAs cover both the amount of payment deferred, administration charges, the risk of non-repayment and the interest the government pays on borrowing. Therefore any impact on public sector finances due to deferrals is offset by future repayments.

11. Regulating small business

- 11.1 The legislation does not apply to small business.

12. Monitoring & 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

Edmund Hair at the Department of Health [tel: 020 7210 5676 or email: edmund.hair@dh.gsi.gov.uk] can answer any queries regarding the instrument.