

EXPLANATORY MEMORANDUM TO
THE CARE AND SUPPORT (CROSS-BORDER PLACEMENTS) (BUSINESS
FAILURE DUTIES OF SCOTTISH LOCAL AUTHORITIES) REGULATIONS 2014

2014 No. 2839

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 instrument specifies circumstances in which, in a case where arrangements for the provision of residential accommodation in Scotland have been made by a local authority in England or Wales or a Health and Social Care trust (“a trust”) in Northern Ireland, specified duties of Scottish local authorities under the Social Work (Scotland) Act 1968 (“the 1968 Act”) apply in the case of the adult concerned notwithstanding that, by virtue of Schedule 1 to the Care Act 2014 (“the Act”), those duties would not otherwise apply.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None
4. **Legislative Context**
 - 4.1 Local authorities in England, Wales and Scotland and trusts in Northern Ireland are able or in some cases will be able, as a result of legislative changes, to make arrangements (“cross-border arrangements”) for the provision of residential accommodation in another of those countries to meet care and support needs of persons. In the paragraphs below, the country in which the placing authority or trust is situated is referred to as “the first country” and the country in which the person is placed is referred to as “the second country”.
 - 4.2 Cross-border arrangements may result in a person acquiring ordinary residence in the second country or in the local authority or trust in that country otherwise becoming responsible for that person.
 - 4.3 Schedule 1 to the Act makes provision to ensure that in these circumstances, in general, an authority or trust’s responsibility for a person does not transfer to an authority or trust in the second country. This is achieved by treating a person as ordinarily resident in the first country and not in the second country or by disapplying duties which would otherwise have arisen on the part of the authority or trust in the second country. The relevant provisions are to be found in paragraphs 1 to 4 of Schedule 1.
 - 4.4 The instrument makes provision to ensure that, notwithstanding the provisions of Schedule 1 to the Act, in certain circumstances relating to the inability of a care provider to carry on providing services because of specified events relating to insolvency, specified duties of Scottish local authorities under section 12 or 13A of the 1968 Act nonetheless apply in a case where the second country is Scotland.

4.5 As regards cases where the second country is England, Wales or Northern Ireland, sections 48 to 52 of the Act impose duties on local authorities and trusts to ensure that care and support needs of adults (and support needs of carers) continue to be met in circumstances where care providers become unable to carry on because of business failure.

5. Territorial Extent and Application

5.1 This instrument extends to the UK. Whilst it imposes duties on Scottish local authorities, those duties relate to cross-border situations.

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 People in need of residential accommodation may wish to move to a different territory of the UK from that in which they reside, for example, to be near their friends and family. Such a move may improve their well-being.

7.2 Schedule 1 to the Act sets out certain principles which seek to support the notion of cross-border residential placements by ensuring that, generally, where a local authority, or a trust in Northern Ireland, places someone in residential accommodation cross-border within the UK, this does not result in transfer of the authority's responsibility for the individual concerned.

7.3 At the same time, there is a diverse market for care and support services in the UK. Public, private and voluntary sector organisations can all provide these services. As in any market, some providers leave whilst new providers join it. Most exits from the market are handled responsibly by providers who ensure that those receiving care services continue to receive them in line with contractual liabilities. This process is normally managed in an orderly way that does not cause interruption of services for the people receiving care.

7.4 Occasionally however, care providers do exit the market in a way that adversely impacts on their ability to manage the closure of the service in a planned way.

7.5 It is unacceptable for care users to be left without the services they need. The interruption of care services, or the worry that this might happen, can affect the wellbeing of care users. It can place stress on them, their families, friends and carers.

7.6 The Act therefore imposes clear legal duties ("temporary duties") on local authorities in England and Wales and on trusts in Northern Ireland in order to ensure that people are not left without the care they need if their care provider becomes unable to carry on providing care because of business failure.

7.7 Scottish local authorities already have duties under the 1968 Act to meet the needs of people which would generally extend to situations where a provider of residential accommodation in their area can no longer carry on following certain

insolvency proceedings. The Act therefore does not impose temporary duties on local authorities in Scotland. The policy is to continue with the status quo as governed by the 1968 Act. The policy was agreed by the Devolved Administrations and reflects the general principle of reciprocity between the four countries.

- 7.8 Schedule 1 to the Act generally disapplies the duties outlined above of Scottish local authorities in cases where individuals have been placed in residential accommodation in Scotland by an authority in another UK country. Therefore, to ensure the needs of individuals from across the UK continue to be met should a provider of residential accommodation be unable to carry on following certain insolvency proceedings, it was necessary to make regulations that re-apply those duties in specific cases.
- 7.9 This approach was welcomed by all four Devolved Administrations. Insofar as the duties under the 1968 Act which are re-applied by the instrument are existing duties, the instrument does not place any new responsibilities or burdens on Scottish local authorities.

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 The Scottish Government launched a parallel consultation inviting a wide range of stakeholders to comment on the instrument. A wide range of responses have been received from independent community organisations, independent regulatory bodies, local authorities and voluntary sector organisations.
- 8.4 A number of respondents felt that in line with the general principle of reciprocity between the four countries of the United Kingdom, certain duties on local authorities in Scotland to step in to meet care needs in respect of cross-border placements should be additionally triggered when a provider set up as a partnership can no longer carry on following entry into administration. The regulations have therefore been amended to make provision for the administration of partnerships.

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.
- 9.2 Scottish local authorities will need to refer to existing guidance issued by the Convention of Scottish Local Authorities (COSLA): the “Good Practice Guidance on the Closure of a Care Home”.

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 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 Insofar as the instrument reinstates existing duties of Scottish local authorities that are disapplied by Schedule 1 to the Act, it is not expected to represent an additional costs burden for either the public or private sector.

11. Regulating small business

- 11.1 The legislation does not apply to small businesses.

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

Stephen Airey at the Department of Health Tel: 0207 210 5717 or email: Stephen.airey@dh.gsi.gov.uk can answer any queries regarding the instrument.