

EXPLANATORY MEMORANDUM TO
THE CARE AND SUPPORT (DEFERRED PAYMENT) (AMENDMENT)
REGULATIONS 2017

2017 No. 1318

1. Introduction

- 1.1 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 Deferred payment agreements (DPAs) are made between a local authority (LA) and an adult. Under the agreements the authority agrees to defer either the payment of charges due to it from the adult, or a loan made to an adult to pay, for the costs of meeting needs by the provision of accommodation in a care home or supported living accommodation.
- 2.2 The purpose of this instrument is to amend the Care and Support (Deferred Payment) Regulations 2014 (“the Principal Regulations”) so that in the circumstances and subject to the conditions in the Principal Regulations, a LA is required, or permitted, to enter into a DPA with an adult who has finances above the financial limit (currently £23,250), if the authority considers that, it would have a duty to meet the adult’s needs under section 18 of the Care Act 2014 by the provision of accommodation in a care home if the adult had financial resources at or below the financial limit.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 This entire instrument applies only to England.
- 3.3 This instrument applies only to LAs in England.
- 3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament and the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

4. Legislative Context

- 4.1 Under section 9 of the Care Act 2014 (“the Act”) a LA must carry out an assessment of an adult’s needs if it appears to the LA that the adult may have needs for care and support. If after having carried out the assessment the LA considers that the adult has needs for care and support the LA has a duty under section 13 of the Act to decide

whether any of those needs meet the eligibility criteria set out in regulations made under section 13(7) of the Act.

- 4.2 Section 14 of the Act gives a LA a power to charge the adult for meeting needs. Section 17(2) provides that a LA who is going to charge an adult must carry out an assessment of the adult's resources ("the financial assessment") and the amount (if any) which the adult would be likely to pay towards the costs of meeting their care and support needs.
- 4.3 Section 17(8) provides that regulations made for the purpose of the financial assessment must make provision as to cases and circumstances in which, if the financial resources of an adult who has needs for care and support exceed a specified level, a local authority is not permitted to or may (but need not) pay towards the provision of care and support for the adult. The Care and Support (Charging and Assessment of Resources) Regulations 2014 (S.I. 2014/2672) specifies the financial limit for the purposes of section 17 and prohibits a LA from paying towards the cost of the provision of accommodation in a care home if the adult's financial resources exceed £23,250 ("the financial limit").
- 4.4 By section 18 of the Act a LA has a duty to meet needs which meet the eligibility criteria if the adult is ordinarily resident in their area, or is present in their area but of no settled residence, and there is no charge for meeting needs or if there is a charge, condition 1, 2, or 3 in that section is met. Condition 2 is in section 18(3) of the Act. Its effect when read with the rest of the section is that where there is a charge for meeting needs a LA must meet the eligible needs of an adult with capacity whose resources are above the financial limit only if the adult asks it to do so.
- 4.5 Section 18 of the Act has not been fully commenced. The Care Act 2014 (Commencement No. 4) Order 2015 (S.I. 2015/993) ("Commencement Order") provides in Article 3 that section 18(1) (a) and (c),(2)-(4) and (7) come into force on 1st April 2015 except insofar as the section imposes a duty on a local authority to meet an adult's needs by the provision of accommodation in a care home in a case where condition 2 in section 18 is met. The effect is that a LA who charges for doing so does not have any duty to and must not meet the needs of a competent adult by the provision of accommodation in a care home under section 18 if that adult has financial resources which are above the financial limit. In other words section 18 does not allow such an LA to meet the needs of an adult whose finances are above the financial limit by the provision of accommodation in a care home.
- 4.6 Where the LA does not have a duty to meet the adult's needs under section 18 (e.g. because the adult does not have needs which meet the eligibility criteria or has financial resources above the financial limit and has not asked the LA to meet their needs) the LA has a power under section 19 of the Act to meet the needs of an adult who is ordinarily resident in its area or present there but of no settled residence. So, a LA who by reason of the fact that section 18 has not been fully commenced, is not allowed to meet the needs of an adult under section 18 by the provision of accommodation in a care home, may exercise discretion to do so under section 19. Section 19 also confers a power on an LA to meet the eligible needs of an adult who is ordinarily resident in the area of another local authority, provided amongst other things, that it informs the other local authority of its intention to do so.
- 4.7 Sections 35 – 36 of the Act enable regulations to be made to specify cases and circumstances in which and conditions upon which a LA is required or permitted to

enter into a deferred payment agreement (DPA) with an adult. A DPA is an agreement under which the LA agrees to defer the payment of charges due to it from the adult or to defer the repayment of a loan made by it to an adult for the purpose of assisting the adult to obtain the provision of care and support.

- 4.8 The Principal Regulations are made under these sections. They set out the circumstances in which a LA is required to enter into a DPA with an adult and when it is permitted to.
- 4.9 Regulation 2 sets out the circumstances in which a LA must enter into a DPA with an adult. They are that; the LA is meeting or is going to meet the adult's needs under section 18 or 19 by the provision of accommodation in a care home or it considers that it would do so if asked by the adult; that the value of the adult's interest in their main or only home is included in the financial assessment, the adult has £23,250 or less in assets other than their main or only home, the LA can secure the DPA according to the terms set out in regulation 4 (a first charge on a property) and they agree to the terms of the contract. Regulation 3 sets out the conditions and circumstances in which a LA may enter into a DPA with an adult. These differ from regulation 2 in that there are no limits to the assets an adult may have, they can be provided to adults whose needs are being or will be met in supported living accommodation and regulation 4 allows LAs to accept different forms of security.
- 4.10 As set out in 4.5 above because section 18 is not fully commenced it does not impose a duty on a LA who charges for doing so to meet the needs of an adult by the provision of accommodation in a care home where that adult's financial resources are above the financial limit. Consequently the Principal Regulations do not require a LA to enter into a DPA with a competent adult whose needs it is not required to meet under section 18 because they have assets above the financial limit. Such an adult's eligibility for a DPA depends on whether the LA exercises its discretion to meet their needs under section 19 of the Act. This is not the effect the Regulations were intended to have at the time they were made.
- 4.11 This instrument amends regulation 2 of the Principal Regulations to provide that a LA must enter into a DPA with an adult where it is not meeting or going to meet the adult's needs under section 18 if it considers that it would have been required to meet those needs under section 18 but for the fact that the adult's financial resources are above the financial limit. Regulation 3 is similarly amended to give LAs a power to enter into DPAs for such an adult. The instrument does not amend any of the conditions and circumstances in the Principal Regulations and does not require or permit a LA to enter into a DPA with such an adult unless the other relevant conditions in and circumstances in the Principal Regulations apply.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England only.
- 5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

- 7.1 The overarching policy objective of the scheme is to help people avoid having 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’ (e.g. owning a property). When a LA 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 the amount of their savings in its calculation. Consequently someone with a home but minimal savings would not be eligible for LA support, unless a spouse or other qualifying relative was living in the main home, and may, without DPAs, come under pressure to sell their home to pay for their care in a care home. The DPA scheme enables individuals to access the equity in their home without having to sell it. LAs will either defer charges owed to it by an adult or will loan money to an adult for the costs of care. The Impact Assessment which supported the regulations estimated that up to 25,000 adults a year would be eligible for a DPA and could benefit from one.
- 7.2 The policy intention of the Principal Regulations was that adults should not be forced to sell their homes in their lifetime to pay for their care in a care home.
- 7.3 The Principal Regulations gave effect to this policy intention by, amongst other things, requiring a LA to enter into a DPA with an adult whose needs the LA is meeting or going to meet or if asked to do so would meet an under section 18 or section 19 of the Care Act. This terminology would have given effect to the policy intention if section 18 had been fully commenced. However, the requirement in section 18 of the Care Act for LAs to meet the eligible needs, if asked, of adults with assets above the financial limit has not been commenced in relation to needs which are to be met in care homes. This means that LAs are only required to enter into a DPA with a competent adult with assets over the financial limit if they choose to meet the needs of the adult under section 19 of the Care Act, or consider they would choose to meet the adult’s needs under section 19 if asked. In effect, this means that LAs can decide whether or not to enter into a DPA with a competent adult as virtually all adults eligible for a DPA will have assets (including their main or only home) above the financial limit. This was not the original intention of the Principal Regulations.
- 7.4 These regulations amend regulation 2 of the Principle Regulations so that (provided the conditions and circumstances in regulation 2 are met) LAs are required to offer a DPA to an adult whose needs they are not required to meet under section 18 only because it has been partially commenced (as set out in 4.1.5 above) . They also amend regulation 3 of the Principal Regulations to enable LAs to enter into a DPA with such an adult. In effect these regulations will amend the Principal Regulations to place a duty on LAs to enter into a DPA with an adult whose needs it is not meeting where the other circumstances and conditions are met. The other circumstances and conditions are set out above and include that the value of the adult’s interest in their main or only home is included in the financial assessment, the adult has £23,250 or less in assets other than their main or only home, the LA can secure the DPA according to the terms set out in regulation 4 (a first charge on a property) and they agree to the terms of the contract.
- 7.5 As LAs already have a duty (where the other conditions and circumstances are met) to enter into a DPA with an adult whose needs they are meeting this amendment will

extend the right to a DPA to the adults originally envisaged when the Principal Regulations were made. The DPA agreed could be either in the form of a loan to the adult receiving care in a care home or the LA contracting with and paying the care home directly.

- 7.6 The Principal Regulations will not be amended either to require LAs to meet needs or to require an adult to agree to their needs being met in order to receive a DPA.

Consolidation

- 7.7 There are no current intentions to consolidate the legislation.

8. Consultation outcome

- 8.1 The consultation on the package of regulations relating to Part One of the 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; LA 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 2014 and can be found here:

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

- 8.3 Around half of all responses received provided comments on DPAs. The majority of respondents were highly supportive of the overall intention to extend the DPA scheme. Changes were made to the regulations to reflect the consultation responses. This instrument does not make any amendments to these aspects of the regulations.

- 8.4 These regulations amend the Principal Regulations so that the DPA scheme works as consulted on in that DPAs will be universally available to adults where the circumstances and conditions are met and there has been no further formal consultation on them. The regulations have been discussed with LA representatives.

9. Guidance

- 9.1 We have amended statutory guidance to explain more clearly the position in relation to DPAs. This guidance is not itself the subject of parliamentary scrutiny.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 The legislative change we are making to the DPA scheme is not expected to have an impact on its current operation and therefore there is no impact on the public sector.
- 10.3 An Impact Assessment was prepared for the Principal Regulations based on the understanding that they would require LAs to offer DPAs to adults whose needs the authority was required to meet by the provision of care home accommodation (subject

to compliance with the conditions and circumstances – see paragraph 4.1.2). LAs were provided with additional funding on the basis of the impact assessment. As explained above, the purpose of these regulations is to amend the Principal Regulations so they have the effect intended at the time they were made which was that DPAs should be universally available where the circumstances and conditions were met. Therefore the Impact Assessment undertaken when the scheme was first introduced still stands and a further assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Government is committed to monitoring the operation of the DPA scheme.

13. Contact

13.1 Katy Lindfield at the Department of Health Telephone: 01132546166 or email: katy.lindfield@dh.gsi.gov.uk.