

COMMUNITY CARE AND HEALTH (SCOTLAND) ACT 2002

EXPLANATORY NOTES

Part 1 – Community Care

Charging and not charging for social care

Section 1 - Regulations as respects charging and not charging for social care

8. This section requires that those aspects of social care (defined in section 22) which are nursing, personal and other care shall not be charged for and gives the Scottish Ministers power to make orders and regulations which can adjust the detail and content of the social care which should be free. It also gives the Ministers power to make regulations to require local authorities to charge, or not to charge, for the remaining aspects of social care and to specify the factors which local authorities must take into account in determining the amount of any charge. The requirements of this section, and the use of the powers it provides, override other provisions relating to local authorities' charges for social care (in section 87 of the 1968 Act).
9. The section therefore provides the legislative means for the implementation of free nursing, personal and other care and provides power to regularise the remaining charges for non-residential care ('home care').
10. Subsection (1) precludes local authorities from charging for social care which is personal care and personal support (as defined in the 2001 Act), nursing care and the types of care listed in schedule 1 (Social care not ordinarily charged for). This includes help with washing and eating which forms part of "personal care" as defined in the 2001 Act. Subsection (2) enables the Scottish Ministers to make regulations to qualify this requirement not to charge and to make orders to amend schedule 1. Subsection (3) clarifies that "nursing care", which is not defined elsewhere in the Act, does not include care which is personal care or personal support or is mentioned in schedule 1.
11. Subsection (4) enables the Scottish Ministers to define in regulations which of those remaining aspects of social care (not covered by the requirement for free care in subsection (1)) are or are not to be charged for. It also provides the flexibility for the regulations to specify the amount that should be charged or the factors to be considered in determining the amount of the charge. Where regulations require that no charge is to be made, they may qualify that requirement in such ways as Scottish Ministers see fit.
12. Subsection (5) amplifies the flexibilities provided in subsection (4). It expands on those powers to make clear that regulations may require the capping of charges and may also specify how a person's means should be taken into account as part of the charging process.
13. Subsection (6) amends the 1968 Act to disapply section 87(1) and (1A) of that Act where charging for social care is regulated under section 1 of the Act. This ensures that charges for relevant aspects of social care are not levied under the 1968 Act where this

Act makes provision for charging or not charging. (Regulations under section 2 of the Act will clarify which of the two Acts will apply as respects the particular aspects of social care in residential care settings.)

14. Subsection (7) allows for regulations to make transitional provisions which modify the effect of subsections (1) and (2) of section 12A of the 1968 Act for people already in care homes when section 1 of the Act is commenced. (Section 12A of the 1968 Act sets out local authorities' responsibilities in assessing people's care needs).

Accommodation

Section 2 - Accommodation provided under 1968 Act etc.

15. **Section 2** enables the Scottish Ministers by regulations to determine what is and what is not to be regarded as accommodation chargeable under the 1968 Act and hence under the 1948 Act. The definition also applies (by virtue of section 19) to the definition of social care, which applies to the charging provisions under section 1 of the Act.
16. Accommodation provided under the 1968 Act and section 7 of the 1984 Act comprises more than simply board and lodgings. In general, what is provided is a wider package of residential care which includes both the board and lodging element of accommodation and the social care aspect of accommodation. At present, the provision of the whole package is charged for under the 1968 Act, which applies the charging provisions of the 1948 Act. To enable implementation of free personal care, it is necessary to separate out the social care element from the board and lodging element in the provision of accommodation – and so in the provision of the residential care package.
17. **Section 2** of the Act enables the Scottish Ministers by regulations, therefore, to determine what elements of the package will remain subject to the charging provisions of the 1968 and 1948 Acts, and what elements will not, being subject instead to section 1 of the Act and regulations made under it. Those regulations can only affect charging and will not affect the definition of accommodation for the purposes of provision of services under the 1968 Act or section 7 of the 1984 Act.

Section 3 - Disregarding of resources when determining whether to make available assistance by providing residential accommodation

18. Currently, local authorities must disregard £18,500 of a person's capital when determining whether to provide (directly or by making arrangements with another provider) a care home place for that person. This is the effect of section 12(3A) and (3B) of the 1968 Act, which requires authorities to disregard capital equal to or below the capital limit of the residential care means test, currently £18,500. (These limits are set in the National Assistance (Assessment of Resources) Regulations 1992, as amended for Scotland). Thus local authorities are precluded from deciding not to provide residential accommodation to someone simply because he or she has a certain level of capital, if that is below £18,500. The effect of this is that where someone has capital over £18,500, a local authority may refuse to provide accommodation for him or her. (The implication is that the capital exceeding £18,500 could be used to meet care costs.)
19. **Section 3** of the Act replaces section 12(3A) and (3B) of the 1968 Act with new provisions which enable the Scottish Ministers to specify by order what resources of a person, and how much of those resources, should be disregarded when deciding whether to provide residential accommodation. The provision breaks the link with the capital limit and an order can make provisions that apply differently for different cases.
20. The power is wide and is needed as a consequence of the Act's provisions on free nursing and personal care and deferred payment agreements. Regulations under section 12 of the 1968 Act (as amended by this Act) will be needed to remove any question about local authorities' discretion to decide not to provide or arrange

accommodation, for example, because of the capital value of the homes of people who are to be eligible for free care or deferred payments.

Section 4 - Accommodation more expensive than usually provided

21. Currently, it is not clear whether people provided with accommodation by local authorities can themselves pay the extra required for them to receive more expensive accommodation than the local authority would usually expect to pay for. It has been accepted practice that a third party (such as a relative) can make up the difference in costs, but the legislation does not clearly grant that right, either to third parties or to individuals receiving care.
22. **Section 4** enables regulations to be made to specify how, and in what circumstances, top-up payments can be made, either by third parties or by residents themselves. Restrictions on the right of a resident to make top-up payments may be imposed – these might relate to his or her available resources, to ensure that the arrangement can be sustained and that the resident is not likely to be impoverished as a consequence.

Section 5 - Local authority arrangements for residential accommodation outwith Scotland

23. Currently, Scottish local authorities have no power themselves to arrange for residential accommodation with nursing anywhere other than in Scotland. It has been accepted practice that there is no similar restriction on arranging for residential accommodation without nursing but the legislation does not provide a clear power to arrange such placements outside Scotland.
24. Subsection (1) of section 5 enables the Scottish Ministers to permit or require, as appropriate, local authorities to make such arrangements for residential accommodation, both with and without nursing. These arrangements would be made in fulfilment of the local authority's duties under sections 12(1) and 13A(1) of the 1968 Act.
25. Subsection (2) enables the Scottish Ministers by regulations to modify the way in which any of the provisions of the 1968 Act would apply to a placement under this section. An example of the type of modification would be section 12A(3) of the 1968 Act. Under section 12A(3), a local authority notifies and liaises with a Health Authority in the place where accommodation is proposed to be provided, where it appears to the local authority that there might be a need for the provision of health services there to the person. Modification would be needed for the purposes of a placement under this section, to refer to the appropriate equivalent health body in the other parts of the UK.
26. Subsection (3) recognises that arrangements have already been made for residential accommodation outside Scotland, on the understanding that this was possible under section 12(1) of the 1968 Act. It makes sure that any such existing arrangements are on a sound legislative footing by bringing them under section 5.
27. For placements made under this section, subsection (4) removes the requirement under section 13A(2) of the 1968 Act for residential accommodation with nursing to be in care homes registered under Scottish legislation. Subsection (4) also removes the requirements of section 13A(3) of the 1968 Act from premises where someone is to be placed under this section. This serves to clarify that the inspection provisions of section 6 of the 1968 Act do not apply. The accommodation will not be in Scotland and inspection arrangements will be secured through the appropriate regime in the place where it is situated.
28. The accommodation which may be arranged in Scotland under sections 12 and 13A of the 1968 Act must meet certain requirements and, in the case of section 13A(1), must be of a certain type. Section 5(5) of the Act, read with section 5(6), defines what is an "appropriate establishment" in which residential accommodation outside

Scotland may be arranged. Paragraph (a) specifies the equivalent for England and Wales of residential accommodation without nursing and allows for such establishments in Northern Ireland, the Channel Islands and the Isle of Man to be specified in regulations under subsection (1). Paragraph (b) provides similar definitions for residential accommodation with nursing.

29. The same type of restrictions therefore apply for placements in England and Wales, and the Scottish Ministers, by regulations, are able to secure such restrictions where appropriate as regards Northern Ireland, any of the Channel Islands or the Isle of Man.

Section 6 - Deferred payment of accommodation costs

30. The effect of this section is to make it possible for a person already in or going into a care home to defer selling their home in order to pay for their care. In effect, where a deferred payment agreement is in place, the local authority will meet all or part of the resident's contribution to his or her care home fees. The authority will ultimately recover the money, either from the estate when the resident dies or from the resident if he or she decides to make a full repayment during his or her lifetime.
31. Subsection (1) gives local authorities the power, in accordance with regulations made by the Scottish Ministers, to enter into deferred payment agreements and it enables Ministers to require local authorities to enter into such agreements. Such an agreement may be made with someone for whom a local authority is already providing or securing the provision of residential accommodation under the 1968 Act or section 7 of the 1984 Act, or is proposing to do so, in circumstances where the person would be liable to make a financial contribution towards the cost. The power applies whether the financial contribution would be towards the cost which the local authority would usually expect to pay, or whether it would be a top up payment by the person by virtue of section 4 of the Act. A deferred payment agreement will have to comply with the provisions of the regulations, which may apply differently to top-up and normal payments.
32. Subsection (2) sets out the nature of the deferred payment arrangement. In essence it is an agreement whereby during a certain period of time a resident will not be required to make all or a portion of the payments that he or she would otherwise have to make under the means testing regime and/or an agreed top-up. Instead, the resident will grant the authority a standard security over his or her property.
33. Under the agreement, payments will be deferred from the date on which the agreement takes effect until the expiry of 56 days after the date of death of the person or the earlier date of termination of the agreement by the person. Interest will not become due on the amount secured until that amount becomes payable and is then due at such rate as the authority may determine in accordance with directions by the Scottish Ministers. A deferred payment agreement is competent only where the person grants a standard security in favour of the authority securing the authority's estimate of the total amount of the payments deferred and the amount of interest likely to be due from the date the payments become due. In essence, therefore, the person must have property of a value sufficient to secure the portion to be deferred of the amount that he or she would otherwise be liable to pay for his or her residential care during his or her lifetime.
34. Subsection (3) allows for the portion of the payment to be deferred to be specified in regulations. For example, the regulations may ensure that the agreement defers payment by a person of that part of his or her contribution which would come from the capital value of his or her home.

Direct payments

Section 7 - Direct payments

35. [Section 7](#) and paragraph 1 of schedule 2 amend sections 12B and 12C of the 1968 Act. Those sections were inserted by section 4 of the Community Care (Direct Payments)

Act 1996 and amended by section 70 of the 2001 Act. They give local authorities the power to make direct payments to people of a description specified in regulations under section 12B. These payments are to enable them to arrange and purchase their own community care services, including children's services available under section 22(1) of the 1995 Act.

36. The [Community Care \(Direct Payments\) \(Scotland\) Regulations 1997 \(S.I. 1997/693\)](#), as amended by the [Community Care \(Direct Payments\) \(Scotland\) Amendment Regulations 2000 \(S.I. 2000/183\)](#) and the [Community Care \(Direct Payments\) \(Scotland\) Amendment Regulations 2001 \(S.I. 2001/447\)](#) specify the people to whom direct payments may be made under the 1968 Act. The regulations allow for direct payments to disabled people (aged 18 and over) for adult community care services and also for direct payments to both disabled people aged 16 and 17 and disabled parents to purchase children's services.
37. [Section 7](#) of the Act widens the availability of direct payments.
38. [Section 7\(a\)](#) amends section 12B(1) in three ways. Firstly, it removes the requirement that a person must be a "person in need" under section 94 of the 1968 Act to receive direct payments. Secondly, it reverses the present approach in section 12B(1) (b) whereby only persons of a description specified in regulations made under section 12B(1) of the 1968 Act are eligible to receive direct payments. All persons will now be eligible except those specified by such regulations. This enables the scope of the direct payments scheme to be widened, for example, to all community care client groups including people who are frail, require rehabilitation treatment following an accident or operation, are fleeing domestic abuse or are recovering from drug or alcohol addiction. Thirdly it converts what is presently a power on the part of local authorities to offer direct payments to a duty. A local authority will have a duty to offer direct payments as an alternative to arranging services itself.
39. Section 12B(2) of the 1968 Act details how local authorities can make payments on a net basis, i.e. assess the person's ability to contribute to the cost of the services required and deduct this charge before making the direct payments. However, the new subsection (1A), inserted into section 12B by section 7(b) of the Act, will enable local authorities also to make gross payments to recipients, i.e. without first deducting the amount a person is assessed as being able to contribute. This will give them equality of treatment with non-recipients of direct payments, who receive the full services required with recovery of their assessed contribution taking place later. While the 1968 Act does not preclude gross payments, section 7(b) (in inserting subsection (1A)) will put it beyond doubt that local authorities can make payments in this way.
40. Local authorities have a power (and will have a duty) to give direct payments only if that person gives his or her consent to the arrangement. No one can be forced to take such payments. At present if it appears to a local authority that a person is unable to consent to the arrangements, the local authority cannot offer that person direct payments. Section 7(b) inserts new subsection (1B) into section 12B, allowing for a person to consent to direct payments arrangements on behalf of a person whom the local authority is satisfied is unable to give consent. That person can then do anything that is required to secure the services needed on behalf of that person. Subsection (1B) also allows for regulations to be made to specify who can receive direct payments on behalf of the person needing the services. This will enable the Scottish Ministers to make regulations to specify that attorneys or guardians can receive direct payments on behalf of someone who may be unable to give consent, for example a person with dementia.
41. Presently recipients are unable to use their direct payments to purchase services from a local authority. Section 7(b) inserts new subsection (1C) to allow services to be bought from any person, including the local authority making the direct payments, provided that authority and the consenting person are in agreement or from any other local authority.

42. **Section 7(c)** inserts new paragraphs (b) to (e) into section 12B(4) and provides examples of what regulations may include. Paragraph (b) allows for regulations to impose conditions on an authority selling its services. Paragraph (c) enables provisions to specify circumstances, relating either to the person or the service or both, in which the authority is not required to make direct payments. Under paragraph (d) regulations can specify when local authorities must or may discontinue payments. Paragraph (e) enables regulations to authorise payments to be made to another on behalf of the person entitled to them, e.g. to the service provider.
43. An authority can assess a person's ability to contribute towards the cost of the services required. However, there is currently no mechanism in the 1968 Act to allow a local authority to recover that contribution if it has not provided or arranged the services itself. Section 7(b) above will give a local authority the power to make direct payments on a gross basis. Section 7(d) inserts new subsection (5A) to ensure that when direct payments are made on a gross basis, a local authority has a power to recover any amount which it considers appropriate. In recovering the contribution the local authority may require payment from the recipient of an appropriate sum in respect of such contribution as he or she has been assessed as being able to make, or if no assessment has been made, it shall make that assessment and then seek repayment.
44. Subsection (2) of section 12B of the 1968 Act gives a person who receives payments on a net basis the opportunity to seek to satisfy the local authority that he or she is unable reasonably to make up the balance between the amount the authority is willing to pay and the full cost of purchasing the services needed. The local authority may then adjust its payments accordingly. Section 7(d) inserts new subsection (5B) to give a person who receives gross payments the same recourse.

Carers

Section 8 – Amendment of 1968 Act: matters to be taken account of in assessment of needs

45. **Section 8** replaces section 12A(1)(b) of the 1968 Act and adds two conditions into the existing process through which local authorities assess and provide services for adults in need of community care services. It requires local authorities after having assessed the needs of a person for community care services but before deciding what services to provide to the cared-for person to take into account, as far as is reasonable and practicable:
- the care being provided by a carer; and
 - the views of both the carer and the cared-for person.

Section 9 - Amendment of 1968 Act: assessment of ability to provide care etc.

46. Under section 12A of the 1968 Act a local authority is required, if requested by a carer of an adult, to carry out an assessment of the carer's ability to care only if the authority at that time is also assessing the needs of the cared-for person for community care services. "Community care services" are defined in section 5A(4) of the 1968 Act.
47. **Section 9** of the Act amends and adds to these provisions, and gives carers of adults an independent right to request assessment that does not depend on whether the authority is also assessing the needs of the cared-for adult. This applies to all carers irrespective of their age.
48. At present, a local authority must have regard to the results of the assessment of a carer when deciding what services should be provided to the cared-for person. A local authority may also give a carer assistance directly in the form of information or advice, or by supporting organisations which help carers. Where carers have needs in their own right due to their own health or other circumstances, a local authority may assess the

carer for community care services under section 12A of the 1968 Act, and may provide any necessary support in the form of community care services. The changes made by section 9 which extend the circumstances in which carers may request an assessment do not affect the courses of action open to a local authority following that assessment, namely to provide support to carers directly, or through the services it provides to the cared-for person.

49. **Section 9** of the Act also introduces a new section 12AB to the 1968 Act, requiring local authorities to provide certain information to carers that the authorities are aware of who are providing, or intending to provide, a substantial amount of care on a regular basis for someone over 18. Local authorities should notify such carers that they may be entitled to an independent assessment of their ability to provide care, under section 12AA of the 1968 Act.

Section 10 – Amendment of the 1995 Act: matters to be taken into account in assessment of needs of child affected by disability

50. **Section 10** inserts a new subsection (4) into section 23 of the 1995 Act adding conditions similar to those mentioned at paragraph 45 above, in relation to section 8, into the existing process through which local authorities assess and provide services for children affected by disability.

Section 11 - Amendment of 1995 Act: assessment of ability to provide care for disabled child etc.

51. Similar to section 12A mentioned above, under section 24 of the 1995 Act a local authority's duty, if requested by a carer of a disabled child, to carry out an assessment of the carer's ability to care applies only where the authority at that time is assessing the needs of the cared-for child for children's services. Children's services are those provided under section 22 of the 1995 Act. The amendment made by section 11 gives carers an independent right to request an assessment that does not depend upon whether the authority is also assessing the needs of the cared-for child. Section 11 also introduces a similar obligation to that referred to in paragraph 49 above on local authorities in respect of carers of disabled children by inserting a new section 24A to the 1995 Act.

Section 12 – Carer information strategies

52. **Section 12** of the Act provides a power for the Scottish Ministers to require Health Boards to prepare and submit to Ministers a strategy for providing certain information to carers who appear to the Board to be providing or intending to provide a substantial amount of care on a regular basis. The strategy should be for informing such carers that they may be entitled to an independent assessment of their ability to care under section 12AA of the 1968 Act, or section 24 of the 1995 Act. Ministers may specify the form and extent of a Health Board's strategy. Section 12 also requires that a Health Board's carer information strategy should be available free of charge to any person who asks for it.