

*These notes refer to the Health and Social Care Act 2001
(c.15) which received Royal Assent on 11 May 2001*

HEALTH AND SOCIAL CARE ACT 2001

EXPLANATORY NOTES

ANNEX B: EXISTING LEGISLATION ABOUT SOCIAL CARE

393. A key concept in the legislation relating to social care is that of “community care services”. This term is defined in section 46 of the National Health and Community Care Act 1990. Community care services are services which a local authority may provide or arrange under:

Part 3 of the National Assistance Act 1948,

Section 45 of the Health Services and Public Health Act (promotion by local authorities of the welfare of old people),

Section 21 of and Schedule 8 to the National Health Service Act 1977; and

Section 117 of the Mental Health Act 1983 (after-care).

394. Local Authorities are under given by section 47 of the 1990 Act a duty to assess a person’s needs for community care services.

NATIONAL ASSISTANCE ACT 1948

395. Part 3 of this Act deals with local authorities’ responsibilities with regard to arranging and charging for residential and nursing care placements.

396. In particular the Act gives powers to and imposes duties on local authorities in respect of accommodation. Section 21 of the 1948 Act enables local authorities (with the approval of the Secretary of State) to provide residential care for people over the age of 18 where they need residential care and care and attention is not otherwise available. Where the Secretary of State directs a local authority to provide such care, a local authority has a duty to provide it. The Secretary of State’s approvals and directions are set out in Department of Health Circular LAC (93) 10. Section 26 of the 1948 Act enables local authorities to discharge their responsibility under section 21 by entering into arrangements with certain private and voluntary sector care homes.

397. A local authority may be required under section 21 of the 1948 Act to provide nursing care incidental or ancillary to the provision of accommodation. The Court of Appeal so decided in the case of *R v North Devon Health Authority ex parte Coughlan* [2000] 3 All E R 850, [2000] 2 WLR 622.

398. Sections 22 and 26 of the 1948 Act set out the system whereby a charge may be made for the provision of accommodation under sections 21 and 26. The charge is determined in accordance with a means test. This means testing system is set out in regulations, namely the [National Assistance \(Assessment of Resources\) Regulations \(S.I. 1992/2977\)](#). It follows that where a local authority provides nursing care incidental or ancillary to the Part 3 accommodation such services fall within the means testing system

399. Where a person is required to make a contribution towards his care under the means testing regime, but falls behind with the payments, the local authority may take a charge over any interest in land that the person has in the circumstances set out in section 22 of the Health and Social Services and Social Security Adjudication’s Act 1983 .

THE 1977 ACT

400. The 1977 Act places a duty on the Secretary of State to continue to promote a comprehensive health service in England and Wales. It provides that NHS services are in general to be free. The Secretary of State is required by section 3 of the 1977 Act to provide such health services as he considers necessary to meet all reasonable requirements in England and Wales. Section 3(d) specifically mentions nursing services. As mentioned above, however, the NHS is not currently solely responsible for providing nursing care. Nursing services which are incidental and/

or ancillary to the provision of accommodation provided by local authorities can be provided by those local authorities.

THE NHS AND COMMUNITY CARE ACT 1990

401. This Act introduced community care. It requires a local authority to assess a person's need for community care services (see sections 46 and 47 of the 1990 Act). Where a local authority considers that a person needs NHS or housing authority services, it is required to involve those authorities in the assessment.
402. When the community care provisions were brought into effect (on 1 April 1993) those already in residential accommodation on 31 March 1993 were excluded from the obligation on local authorities to provide residential accommodation under section 21 of the 1948 Act (except in circumstances set out in regulations) (see section 26A of the 1990 Act). Instead, those people already in residential accommodation on 1 April 1993, retained the right to higher rate benefits (the relevant benefits are now income support and jobseeker's allowance). These higher rate benefits were intended to enable people to continue to make their own arrangements for residential accommodation.

THE COMMUNITY CARE (DIRECT PAYMENTS) ACT 1996

403. This Act enables (but does not require) local authorities to make cash payments to adults specified in regulations as an alternative directly to providing or arranging community care services. The Act provides that where an authority makes a direct payment the authority ceases to be under a duty with respect to the provision of the service to which the direct payment relates, provided that they are satisfied that the person's need will be met by the person's own arrangements. The Act also enables regulations to set out a category of person from whom services may not be secured by means of a direct payment and also the maximum period of residential accommodation which may be secured by means of a direct payment (see the Community Care (Direct Payments) Regulations 1997). The Carers and Disabled Children Act 2000 makes amendments to the 1996 Act to enable local authorities to make direct payment to carers in lieu of services under section 2(1) of the 2000 Act. Under the provisions persons who are to be provided with carers services are eligible for direct payments in respect of those services *unless* they are of a description specified in regulations. The 2000 Act also inserts section 17A into the Children Act 1989 to enable local authorities to make direct payments to persons having parental responsibility for a disabled child and also to make direct payments to disabled children aged 16 or 17. Regulations under section 17A may prescribe categories of person from whom a person may not secure services with a direct payment.