

# HEALTH AND SOCIAL CARE ACT 2001

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 4 : Social Care**

238. This section of the Act is designed to improve the system of funding long term care, as set out in *The NHS Plan: The Government's Response to the Royal Commission on Long Term Care*. In addition, it will give local authorities powers to place people in residential care homes and nursing homes outside England and Wales, and it will allow regulations to make provision for direct payments so as to extend the scope of the existing direct payments scheme, allowing individuals more choice and control over the services they receive.

#### **Nursing care**

#### ***Section 49: Exclusion of nursing care from community care services***

239. Currently, people in nursing homes may be required to contribute towards the cost of their nursing care. There are two categories of such people. The first are those who make their own arrangements for nursing home accommodation; the second are those for whom local authorities make arrangements (under Part 3 of the National Assistance Act 1948 (“the 1948 Act”)) and who may be liable to make contributions under the means testing regime provided for by sections 22 and 26 of that Act . Those who receive nursing care from the NHS, however, receive their nursing care free of charge.
240. *Section 49* removes local authorities’ functions to purchase nursing care by a registered nurse under community care legislation. This is intended to strengthen the incentives for the NHS to ensure effective rehabilitation after acute illness or injury. It is estimated that around 35,000 people who are currently paying for their nursing care will receive free nursing care through the NHS.
241. *Subsection (1)* removes the right of a local authority to provide or arrange nursing care by a registered nurse. It is intended that the NHS in pursuance of its powers and duties under the 1977 Act will provide or arrange nursing care by a registered nurse and such care will (in accordance with the 1977 Act) be free of charge. The Department of Health is currently working with the Royal College of Nursing and other key stakeholders to develop a tool to be used across the country for assessing peoples needs as regards nursing care. NHS staff will be trained in the use of this tool in time for the introduction of free nursing care.
242. *Subsection (2)* defines “nursing care by a registered nurse” as services provided by a registered nurse and involving either the provision of care or the planning, supervision or delegation of the provision of care, other than services which do not need to be provided by a registered nurse. In deciding whether services need to be provided by a registered nurse, it is necessary to have regard to the nature of those services and the circumstances in which they are provided. “Registered” in relation to nurses means registered in the register maintained by the United Kingdom Central Council

for Nursing, Midwifery and Health Visiting by virtue of qualifications in nursing (see Schedule 1 to the Interpretation Act 1978).

### **Preserved rights**

243. *Sections 50 – 52* concern the abolition of preserved rights. Until 1 April 1993, when the community care reforms came into effect, residential care was paid for by the social security benefits that residents received. The community care reforms transferred the responsibility for paying for residential care to local authorities. However, people who were in residential care immediately before 1 April 1993, retained their right to the higher rate of income support that they had been receiving to pay for their care. Responsibility for paying for their care was not transferred to the local authority.
244. Over time, residential care costs have increased at a disproportionate rate to social security benefits, and in some cases social security benefits are not sufficient to cover the cost of the residential care. This has meant that sometimes people have had to leave the care home they have been living in and find alternative accommodation the cost of which is covered by the social security payment.
245. These sections provide for the removal of the entitlement to higher rates of income support or jobseeker's allowance and require local authorities to make appropriate accommodation arrangements, for those people who received those higher rates, in the same way as they are required to do for those who entered residential accommodation on or after 1 April 1993. They will require the Secretary of State for Social Security to ensure that the special provision made for those with preserved rights ceases. At the request of the Scottish Executive and by the approval of the Scottish Parliament, which was obtained on 17<sup>th</sup> January 2001, *section 50* operates on devolved legislation concerning Scotland so that preserved rights can cease across the whole of Great Britain on the same day.
246. These new arrangements will require local authorities to assess (under the 1948 Act or its Scottish equivalent) the care needs of those who have had preserved rights rates of benefits for community care services.

### ***Section 50: Preserved rights: transfer to local authorities of responsibilities as to accommodation***

247. *Section 50* provides for the transfer to local authorities of the responsibility for providing community care services for preserved rights recipients. *Subsection (1)(a)* will allow local authorities in England or Wales to provide residential accommodation for persons who were in such accommodation on 31 March 1993 by repealing section 26A of the 1948 Act. The corresponding provision for Scotland is repealed by *subsection (1)(b)*.
248. *Subsection (2)* provides that a “qualifying person” for the purposes of this section is a person to whom either of those provisions applies immediately before the appointed day (i.e. the day on which subsection (1) takes effect).
249. *Subsection (3)* requires a local authority to secure community care services for qualifying persons in relation to their accommodation from, or as soon as possible after, the appointed day. Community care services are defined for England and Wales by section 46 of the National Health Service and Community Care Act 1990.
250. *Subsection (4)* places an obligation on local authorities to actively identify people with preserved rights and to carry out appropriate care assessments. Authorities will do this by working with the Department of Social Security, who will be given power to disclose relevant information by *section 51*.
251. *Subsection (5)* provides that where a qualifying person is provided with community care services with respect to his accommodation (under subsection (3)), his private

arrangements with the residential home will terminate from the date from which he is provided with those community care services.

252. *Subsection (6)* provides that where a local authority has not been able to assess a person's need for community care services before the appointed day, the person's liability to pay for his accommodation becomes the liability of the local authority until the local authority makes the arrangements they consider necessary or where the person notifies the authority that he does not wish to be provided with community care services, the date of the notification. This is to ensure that *Subsection (7)* enables the local authority to recover from the person all or part of such a payment. It is intended that the Secretary of State will make regulations so that the liability of persons to pay during this period mirrors the means testing system provided for under sections 22 and 26 of the 1948 Act.
253. *Subsection (8)* enables regulations to be made so that the provisions of *section 50* do not apply in relation to any person of a prescribed description.
254. *Subsection (9)* allows regulations to be made to define the meaning of "ordinarily resident". It also allows regulations to be made governing the payment which a person is to make in respect of his accommodation before community care services are provided.

### ***Section 51: Preserved rights: disclosure of information***

255. This section is concerned with identifying and locating people with preserved rights by using records held by the Department of Social Security.
256. *Section 51* allows the disclosure of relevant information held by the Secretary of State for Social Security about preserved rights recipients to local authorities or to any person providing services to, or authorised to exercise functions of, such authorities. *Subsection (1)* specifies the persons this section applies to. *Subsections (2) to (4)* specify the type of information which may be supplied and for what purposes it may be used or disclosed. *Subsection (5)* provides that the restrictions imposed on the Secretary of State for Social Security relating to the unauthorised disclosure of information held by him (see section 123 of the Social Security Administration Act 1992) will apply to local authorities who receive information under this section as well as to the authorities' officers and employees .

### ***Section 52: Preserved rights: alignment of social security benefits***

257. This section provides for the termination of higher rates of income support and jobseeker's allowance. It requires the Secretary of State to exercise his powers under the Social Security Contributions and Benefits Act 1992 and the Jobseeker's Act 1995 so as to secure that the provisions relating to higher rates of income support or jobseeker's allowance payable to or in respect of persons with preserved rights cease to have effect from the appointed day .

## **Measures to increase availability of Part 3 accommodation**

### ***Section 53: Disregarding of resources when determining need for residential accommodation***

258. Currently local authorities can only support people in residential accommodation who are in need of care and attention which is '*not otherwise available to them*'. Local authorities may refuse to support a person who has capital in excess of £18,500, (the current amount of money councils are not allowed to take into account when carrying out a means test) and the capacity to make their own arrangements on the grounds that they have care and attention otherwise available to them (the implication is that the £18,500+ capital could be used to meet care costs).

259. *Section 53* enables the Secretary of State to specify in regulations certain capital that is to be ignored by local authorities in determining whether care and attention is ‘*otherwise available*’.
260. This section will allow regulations to be made in the future which break the link with the capital limit when determining whether care and attention is “otherwise available”, so that more people are able to take up the offer of a charge against their home to pay for their accommodation. Charges against homes are dealt with in *section 55*.

***Section 54: Funding by resident etc. of more expensive accommodation***

261. Currently, people provided with accommodation by local authorities cannot themselves pay the extra required for them to be provided with more expensive accommodation than the local authority will pay for. In other words, people cannot use any assets ignored by the means test to fund a care placement whose cost is greater than the level the local council would usually pay. This is because they will have been assessed for a fair contribution so should not have extra resources to utilise in this way. A third party (for example, a relative) can make up the difference if a more expensive home is chosen.
262. Under the new arrangements – the three month disregard (whereby for the first three months from admission to residential care, the value of the resident’s home is disregarded from the means test) and the deferred payments scheme (see *section 55*) – greater numbers of people will be effectively supported by the local authority and many of these people will have some additional resources available .
263. *Section 54* allows for the making of regulations to enable both residents and third parties to make additional payments so that a resident can enter more expensive accommodation than that which the authority would normally pay for in respect of a person with the same needs. *Subsection (2)* defines additional payments.

***Section 55: Power for local authorities to take charges on land instead of contributions***

264. The effect of this section is to make it possible for people going into care to defer selling their homes in order to pay for their care. In effect the local authority will make a loan to the resident and recover the money either from the estate when the resident dies or from the resident if he decides to make a full repayment during his lifetime.
265. *Subsection (1)* enables local authorities to enter into deferred payments agreements. *Subsection (2)* allows directions to be made setting out the circumstances in which an authority must enter into these arrangements. *Subsection (3)* sets out the nature of the deferred payment arrangement. In essence it is an agreement whereby during a certain period of time (the exempt period) a resident will not be required to make the payments, or the whole of the payments, he would otherwise have to make under the means testing regime. Instead the resident will grant the authority a charge over land in respect of such payments. *Subsection (4)* defines the exempt period. *Subsection (5)* allows the local authority to determine the provisions of the arrangement subject to any directions given by the Secretary of State or the National Assembly for Wales and provides that the arrangement must allow the resident to terminate the agreement at any time by giving notice and paying the full amount owing .
266. *Subsection (6)* provides that interest is not to be charged during the exempt period but that a local authority may charge interest after that period at a reasonable rate set out in directions given by the Secretary of State or the National Assembly for Wales or, if no such directions are given, at such a rate determined by the local authority .
267. *Subsection (7)* enables regulations to define how much of a resident’s contributions in respect of his accommodation is to be subject to a deferred payment agreement. It also ensures that additional payments under section 54 (that is, payments to cover the

cost of more expensive accommodation) are regarded as contributions in respect of his accommodation for the purposes of this section.

268. *Subsection (8)* provides that any directions given under the Section are to be given to local authorities generally.

### ***Section 56: Cross-Border Placements***

269. The existing legislation does not allow local authorities in England and Wales to make and pay for residential care placements in Scotland, Northern Ireland, the Channel Islands or the Isle of Man. This section will enable regulations to be made to allow this. It is intended to allow people needing residential care to have care closer to their families, for example, where their families have moved away.
270. *Subsection (1)* allows regulations to be made authorising local authorities to make arrangements for a person to be provided with residential accommodation in Scotland, Northern Ireland, the Channel Islands or the Isle of Man.
271. *Subsection (2)* provides that the regulations may, in particular, make provision specifying conditions to be satisfied before a local authority may make such arrangements, and may make provision applying the provisions of the 1948 Act with or without modifications.

### **Direct payments**

272. Direct payments are cash payments given to persons entitled to social services in lieu of services that would otherwise have been arranged for them by social services departments. Social services clients are then expected to arrange their own care.
273. *Sections 57 and 58* enable regulations to be made in connection with making direct payments in respect of services under section 47 of the 1990 Act, section 2(1) of the Carers and Disabled Children Act 2000 and in respect of children. *Section 57* deals with direct payments in respect of adults. *Section 58* deals with direct payments in respect of children.

### ***Section 57: Direct Payments***

274. *Section 57* deals with direct payments in respect of adults. Under the current system local authorities are permitted but not required to offer direct payments to people who meet the eligibility criteria. *Subsection (1)* allows regulations to make provision for and in connection with requiring or authorising a local authority to make direct payments to an individual who fulfils the requirements of the scheme and agrees to be part of it.
275. *Subsection (2)* specifies the persons to whom direct payments may be made. These are: a person who the local authority has decided under the 1948 Act needs a particular community care service; and a person for whom the local authority has decided to provide a service under the Carers and Disabled Children Act 2000.
276. *Subsection (3)* gives particular instances of what the regulations may provide. In particular, regulations may specify the situations in which a local authority is not required or authorised to make a direct payments. It does, however, allow for flexibility: for example, regulations could provide that an individual who has previously made mistakes or misspent may still be able to get a direct payments.
277. It also enables regulations to be made that concern: making direct payments either as gross or net payments; determining the payee's means and any contribution they will make; conditions that the local authority may impose in respect of the direct payment; circumstances when the payments may be terminated or required to be repaid ; and authorising direct payments to be paid to a third party on behalf of the payee.

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

278. The subsection also enables regulations to be made displacing, to such extent as may be prescribed, the functions and obligations of the local authority with respect to the provision of the service for which the direct payment is made. This will enable the effect of section 2 of the Community Care (Direct Payments) Act 1996 to be reproduced.
279. *Subsection (4)* defines gross payments as payments that are made at a rate that the local authority estimates is equivalent to the reasonable cost of securing the service concerned. It also specifies that they may be made subject to the condition that the recipient will reimburse the local authority in respect of part of that cost.
280. *Subsection (5)* defines a net payment as a payment that is made on the basis that the recipient will himself pay a contribution direct to the person providing the service. Thus the payment will be made at a rate below the equivalent to the reasonable cost of securing the provision of the services concerned in order to reflect the contribution made by the recipient.
281. *Subsection (6)* requires regulations to ensure that no contribution may be sought for services which are provided under section 117 of the Mental Health Act 1983 (after care). This is because local authorities are not able to charge for after-care services provided under that section, and therefore no financial contribution can be sought from the client.
282. *Subsection (7)* makes provision for regulations to limit the maximum period for which residential care may be purchased with a direct payment. It will be possible for direct payments to be used to purchase short-term rehabilitation care.

***Section 58: Direct payments in respect of children***

283. *Section 58* deals with direct payments in respect of children. It substitutes a new section 17A in the Children Act 1989.
284. Within the revised section 17A of the Children Act 1989:*subsection (1)* enables regulations to make provision for and in connection with requiring or authorising a local authority to make a direct payment to an individual who fulfils the requirements of the scheme and agrees to be part of it.
285. *Subsection (2)* specifies the persons to whom a direct payment may be made. These persons are: a person with parental responsibility for a disabled child; a disabled person with parental responsibility for a child; and a disabled 16 or 17 year old. It also specifies that the local authority must have decided for the purposes of section 17 of the Children Act 1989 that the needs of the child in question call for them to provide services.
286. *Subsection (3)* provides that section 57(3) to (5) and (7) of this Act apply in relation to regulations under the revised section 17A.
287. *Subsection (4)* provides that regulations under this section must specify that direct payments to the categories of people that this subsection applies to are to be gross payments with no contribution being required from them (see subsection (5)).
288. *Subsection (5)* specifies the persons from whom a contribution may not be required. They are: a person with parental responsibility for a disabled child, or a disabled person with parental responsibility for a child, where the child is aged 16 or 17; or a person who is in receipt of income support, working families' tax credit or a disabled person's tax credit under Part 7 of the Social Security Contributions and Benefits Act 1992 or of an income-based jobseeker's allowance.
289. *Subsection (6)* defines "disabled" in relation to an adult by reference to the meaning given by section 17(11) of the Children Act 1989 in relation to a child.

***Section 59: Interpretation of Part 4***

290. *Section 59* defines the terms used throughout Part 4 (sections 49 to 59).