

EXPLANATORY MEMORANDUM TO
THE CARE AND SUPPORT (INDEPENDENT ADVOCACY SUPPORT)
(No. 2) REGULATIONS 2014

2014 No. 2889

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 details the duty on local authorities to provide independent advocacy to support a person's involvement in their care and support needs assessment, care and support and support planning, and in any review of their care and support needs. It sets out the considerations that the authority will have to make on deciding if a person would experience substantial difficulty in that involvement. The instrument also establishes the requirements and attributes that must be met by an advocate for them to be used by a local authority and the manner in which advocates should carry out their functions.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 The instrument revokes the Care and Support (Independent Advocacy Support) Regulations 2014 (S.I. 2014/2824) which contained an error insofar as it required local authorities to make arrangements for independent advocacy support in circumstances where the exercise of certain functions might result in a deprivation of individuals' liberty despite the existence of appropriate persons to represent and support those individuals. This requirement ("the relevant requirement") represented a departure from the general policy approach to independent advocacy arrangements which was to achieve overall harmony with existing duties to provide advocacy support under the Mental Capacity Act 2005. At the time, this was believed to be justified on the basis of the potential benefits of advocacy for the individuals concerned. On reflection/reconsideration, however, the Department considers this approach to have been wrong, potentially resulting in confusion and disproportionate burdens on local authorities. The Department considers the public interest in achieving parity between the two systems to be of crucial importance. The instrument therefore omits the relevant requirement. Although this results in slightly reduced right of access to independent advocates, viewed in the context of the requirement for an appropriate person to be available to represent and support the individual, the Department considers there to be adequate safeguards and accordingly does not consider the impact on individuals to be significant. The Department has commissioned the Law Commission to undertake a full review of the legislation and processes related to the deprivation of liberty, and the policy will be revisited in light of the outcome of the review.

4. Legislative Context

4.1 The Care Act 2014 requires local authorities to involve adults in certain care and support processes (for example, needs assessment, care and support and care planning and review of their needs). Most people will be able to do this on their own. Many others will have someone, usually a carer, friend or family, who is able to act to support their involvement. However, some people may require further support to facilitate this involvement.

4.2 Sections 67 and 68 of the Care Act set out the circumstances in which a person is determined to require the support of an independent advocate to enable their involvement in these processes. The provisions target such advocacy support at those in most need; the test being applied in relation to those who have substantial difficulty in understanding, weighing, retaining, using or communicating the relevant information), and who would have nobody else (an appropriate person) available to facilitate their involvement on their behalf who is not otherwise involved in their care or treatment.

4.3 The instrument sets out further requirements and detail in relation to the duty to provide an independent advocate in the prescribed circumstances.

4.4 The duty within the Act is a new one for local authorities and extends the consideration of access to independent advocacy to support a person's involvement in their needs assessment, planning, and in any review of their needs. Some people, in specific circumstances and subject to certain decisions already have access to independent advocacy under the Mental Capacity Act and the Mental Health Act. The Care Act broadens potential access to all people to support their involvement in care and support processes, targeted at those who would have substantial difficulty in being involved, and who have no appropriate person (a carer, relative or friend) who can support their involvement.

5. Territorial Extent and Application

5.1 This instrument applies to England only.

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

7.1 It is a core principle of the care and support system that a person should be involved in decision made about them and their care. The Care Act 2014 requires local authorities to involve adults in certain care and support processes (needs assessment, care and support and care planning and review of their needs), but recognises that in some cases, the person may face difficulty in being involved without further support.

7.2 Sections 67 and 68 of the Care Act set out the circumstances in which a local authority is required to provide the support of an independent advocate

to enable a person's involvement in these processes. This applies to those adults who have contact with the local authority who are identified as potentially having care and support needs and therefore require an assessment of those needs, the care and support planning process to meet those needs identified in the assessment process, and to any subsequent review of needs. Similarly it applies to carers' assessments, support plans and reviews. It also applies where a child's needs, a child's carer's needs or a young carers needs are being assessed as part of the transitional plans towards adult provision.

7.3 The instrument sets out further requirements in relation to the role of the independent advocate to support the operation of the new entitlement. This includes requirements for a person to be an independent advocate, how independent advocates are to carry out their role, and how local authorities should work with independent advocates. The instrument also provides further detail on what local authorities should take into account when deciding whether someone would have "substantial difficulty" in their involvement, and therefore whether the duty to provide the advocate would arise. In cases where assessments for more than one service, or of more than one individual, are combined, the instrument further sets out when it might be appropriate for the same advocate to be used.

7.4 Section 67(5) of the Act sets out that the duty to make arrangements for an independent advocate does not apply if local authorities are satisfied that there are certain appropriate persons to represent and support individuals. Regulation 4 of the instrument sets out circumstances in which this exception does not apply (and hence the duty to make arrangements for an independent advocate does apply).

The circumstances are;

- i) where the assessment or planning may result in an NHS body making arrangements for the provision to that individual of accommodation in a hospital for 28 days or more, or in a care home for a period of 8 weeks or more. This provides for a consistent policy approach to existing provision of advocacy under the Mental Capacity Act;
- ii) there is a material disagreement between the authority and appropriate person and both agree that it would be in the individual's best interests for an advocate to be provided.

7.5 Through providing independent advocacy to those who need it most, this provision supports the wider policy ambitions of personalisation of care and support provision and the individual's choice and control.

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 policy development, coverage and text of the instrument have been undertaken within a collaborative approach with a range of interested parties including the voluntary sector and advocacy providers, Association of Directors of Adult Social Services, Local Government Association, local authorities, users of care and support services and carers. On independent advocacy this has directly involved Voiceability (acting as the lead for the Care and Support Alliance), Mind, Mencap, Carers Trust, the Equality and Human Rights Commission and local authorities, All have had a direct input into the content and detail of the Instrument prior to its publication for consultation. In general, responses to the consultation on the instrument have been positive. Where respondents made specific comments they have focused on small amendments to assist with understanding, which were taken into account.

8.3 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>

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 Additional practice guidance to assist local authorities in the commissioning of independent advocacy services will be developed to further support the sector and the providers of advocacy services, and will be published from October 2014 through to early 2015.

10. Impact

10.1A separate impact assessment has not been prepared for the 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 The instrument will act to increase the level of independent advocacy available to those who are involved in care and support, and support, processes under Part I of the Care Act. In estimating the impact, a number

of assumptions have been made on the number of people who would have substantial difficulty in being involved in care and support needs assessments, carers assessments, children's transitions assessments, care and support and support planning and reviews, and who would have no appropriate person to support their involvement. This takes account of increases in the number of assessments that local authorities will have to undertake under the care capping arrangements being introduced from April 2016. This anticipates independent advocacy being available to a growing number of people over the four years from 2015/16 (32,300 in 2015/16; 77,300 in 2016/17; 113,600 in 2017/18; and 153,500 in 2018/19)¹. This will have a cost implication for local authorities who are required to commission independent advocacy services to meet this increase. This has been costed at £14.5m in 2015/16 £34.6m in 2016/17; £49.5m in 2017/18 and £67.1m in 2018/19¹.

10.3 The impact assessment references a range of evidence on the benefits from past and current advocacy services. It does not attach a monetary value to benefits expected from the increased advocacy service provided for under the instrument, but the evidence available suggests significant welfare gains and reductions in administrative costs required to resolve complex cases.

10.4 There is not expected to be any substantive impact on business. Impact on charities and voluntary bodies as providers of independent advocacy services will generally be positive, in that local authorities will need to commission services locally. There is an identified risk related to the availability of suitably qualified and experienced independent advocates to meet demand. This is being addressed through the development of training for independent advocates that is expected to form a module that will be added to the current City and Guilds qualification, the Certificate in Independent Advocacy and Diploma in Independent Mental Capacity Advocacy-Deprivation of Liberty Safeguards.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The instrument is expected to support equality of access, and ensure that all people can be fully involved in the key processes to which their input is essential – needs assessment, care and support and care planning and any subsequent review of their care and support needs.

12.2 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.

¹ These figures from the Impact Assessment include estimates and costings for independent advocacy related to Safeguarding under Section 68 of the Care Act

13. Contact

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carl.evans@dh.gsi.gov.uk can answer any queries regarding the instrument.