



Health and Social Care Act 2008

2008 CHAPTER 14

PART 5

MISCELLANEOUS

Social care

145 Human Rights Act 1998: provision of certain social care to be public function

- (1) A person (“P”) who provides accommodation, together with nursing or personal care, in a care home for an individual under arrangements made with P under the relevant statutory provisions is to be taken for the purposes of subsection (3)(b) of section 6 of the Human Rights Act 1998 (c. 42) (acts of public authorities) to be exercising a function of a public nature in doing so.
- (2) The “relevant statutory provisions” are—
 - (a) in relation to England and Wales, sections 21(1)(a) and 26 of the National Assistance Act 1948 (c. 29),
 - (b) in relation to Scotland, section 12 or 13A of the Social Work (Scotland) Act 1968 (c. 49), and
 - (c) in relation to Northern Ireland, Articles 15 and 36 of the Health and Personal Social Services (Northern Ireland) Order 1972 (S.I. 1972/1265 (N.I. 14)).
- (3) In subsection (1) “care home”—
 - (a) in relation to England and Wales, has the same meaning as in the Care Standards Act 2000 (c. 14), and
 - (b) in relation to Northern Ireland, means a residential care home as defined by Article 10 of the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 (S.I. 2003/431 (N.I. 9)) or a nursing home as defined by Article 11 of that Order.
- (4) In relation to Scotland, the reference in subsection (1) to the provision of accommodation, together with nursing or personal care, in a care home is to be read as a reference to the provision of accommodation, together with nursing, personal care or

personal support, as a care home service as defined by section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8).

- (5) Subsection (1) does not apply to acts (within the meaning of section 6 of the Human Rights Act 1998 (c. 42)) taking place before the coming into force of this section.

146 Direct payments in lieu of provision of care services

- (1) Section 57 of the Health and Social Care Act 2001 (c. 15) (regulations may require or authorise direct payments to a person, with the person's consent, in respect of the person securing the provision to the person of certain care services) is amended as follows.

- (2) After subsection (1) insert—

“(1A) Regulations may make provision for and in connection with requiring or authorising the responsible authority in the case of a person (“P”) of a prescribed description—

- (a) who falls within subsection (2)(a), and
- (b) who falls within subsection (5A) or is reasonably believed by the authority to fall within that subsection,

to make, with the requisite consent, such payments as the authority may determine in accordance with the regulations to a suitable person other than P in respect of the other person's securing the provision for P of the service mentioned in subsection (2)(a).

(1B) In subsection (1A) “the requisite consent” means—

- (a) the consent of the other person; and
- (b) where the other person is not a surrogate of P but there is at least one person who is a surrogate of P, the consent also of a surrogate of P.

(1C) For the purposes of subsection (1A), a person (whether or not an individual) is “suitable” if—

- (a) that person is a representative of P;
- (b) that person is not a representative of P (or there is no-one who is a representative of P), but—
 - (i) a surrogate of P, and
 - (ii) the responsible authority,

consider that person to be a suitable person to receive the payments for the purpose of securing provision for P of the service concerned; or

- (c) that person is not a representative of P (or there is no-one who is a representative of P), and there is no-one who is a surrogate of P, but the responsible authority considers that person to be a suitable person to receive the payments for that purpose.”

- (3) In subsection (3) (provision which may be included in regulations under the section)—

- (a) in paragraph (a) (provision as to circumstances in which payments not to be made), after “to a person” insert “or in respect of a person”;
- (b) in paragraph (c)(i) (provision about determination of payee's means), after “the payee's means” insert “in the case of direct payments under subsection (1) or, in the case of direct payments under subsection (1A), the means of the

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- person (“the beneficiary”) in respect of whom the payments are required or authorised to be made”;
- (c) in each of paragraphs (d) and (e)(ii) (provision as to conditions to be complied with by payee, and provision as to repayments by payee or otherwise), after “payee” insert “in the case of direct payments under subsection (1), or by the payee or by the beneficiary in the case of direct payments under subsection (1A),” and
 - (d) after paragraph (h) insert—
 - “(j) as to matters to which the responsible authority must, or may, have regard when making a decision for the purposes of a provision of the regulations;
 - (k) as to steps which the responsible authority must, or may, take before, or after, the authority makes a decision for the purposes of a provision of the regulations;
 - (l) specifying circumstances in which a person who has fallen within subsection (5A) but no longer does so (whether because of fluctuating capacity, or regaining or gaining of capacity) is to be treated, or may be treated, as falling within subsection (5A) for purposes of this section or for purposes of regulations under this section.”
- (4) In subsection (4)(b) (gross payments: condition that payee pays amounts by way of reimbursement), after “payee” insert “in the case of direct payments under subsection (1), or the beneficiary in the case of direct payments under subsection (1A),”.
- (5) In subsection (5) (payments made net on basis that payee will contribute to cost of service)—
- (a) in paragraph (a), after “the payee will himself” insert “in the case of direct payments under subsection (1), or the beneficiary will in the case of direct payments under subsection (1A),” and
 - (b) in paragraph (b), after “payee” insert “or (as the case may be) the beneficiary”.
- (6) After subsection (5) insert—
- “(5A) A person falls within this subsection if the person lacks capacity, within the meaning of the Mental Capacity Act 2005, to consent to the making of direct payments.
 - (5B) In this section “representative”, in relation to a person, means such other person (whether or not an individual) as may be prescribed.
 - (5C) In this section “surrogate”, in relation to a person, means—
 - (a) a deputy appointed for the person by the Court of Protection under section 16(2)(b) of the Mental Capacity Act 2005, or
 - (b) a donee of a lasting power of attorney created by the person, whose powers, as deputy or donee, consist of or include such powers as may be prescribed.”
- (7) After subsection (7) insert—
- “(7A) For the purposes of subsection (3)(d), the conditions that are to be taken to be conditions in relation to direct payments include, in particular, conditions in relation to—

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- (a) the securing of the provision of the service concerned,
 - (b) the provider of the service,
 - (c) the person to whom payments are made in respect of the provision of the service, or
 - (d) the provision of the service.”
- (8) In section 64 of the Health and Social Care Act 2001 (c. 15) (regulations and orders), after subsection (4) insert—

“(4A) A statutory instrument containing—

- (a) regulations made by the Welsh Ministers under section 57, or
- (b) regulations made by the Welsh Ministers under section 65 that make provision for the purposes of, in consequence of or for giving full effect to section 57,

is subject to annulment in pursuance of a resolution of the National Assembly for Wales.”

147 Abolition of maintenance liability of relatives

- (1) The following provisions cease to have effect—
- (a) section 43 of the National Assistance Act 1948 (c. 29) (recovery from liable relative of local authority’s costs of assistance),
 - (b) in section 47(9) of that Act (liability of maintained person, or person’s relatives, for expenditure incurred under section 47(8)), the words “or from any person who for the purposes of this Act is liable to maintain that person”,
 - (c) in section 48(3) of that Act (liability of person in hospital etc., or person’s relatives, for costs of protecting person’s property), the words “, or from any person who for the purposes of this Act is liable to maintain him,”,
 - (d) in section 51(1) of that Act (offence where person fails to maintain himself or any person he is liable to maintain), the words “or any person whom he is liable to maintain for the purposes of this Act”,
 - (e) in paragraph 19(1) of Schedule 6 to that Act (which ended a saved liability to maintain a person where there was no liability to maintain that person for the purposes of that Act), the words “whom he is not liable to maintain for the purposes of this Act”,
 - (f) paragraph 19(2) of that Schedule (which gave continuing effect to certain saved liabilities not ended by paragraph 19(1)), and
 - (g) in section 46(5) of the Public Health (Control of Disease) Act 1984 (c. 22) (liability of person’s estate, or person’s relatives, for cost of burial or cremation under the section), the words “or from any person who for the purposes of the National Assistance Act 1948 was liable to maintain the deceased person immediately before his death”.
- (2) In section 29(4A)(c) of the National Assistance Act 1948 (c. 29) (which provides for section 43 to apply where accommodation in a hostel is provided under section 29(4) (c)), for “sections 32 and 43 of this Act shall apply as they apply” substitute “section 32 shall apply as it applies”.
- (3) In section 51(1) of that Act, for “, himself or any other person” substitute “him”.
- (4) In section 87(3) of the Social Work (Scotland) Act 1968 (c. 49) (provision of accommodation treated as being under Part 3 of the National Assistance Act 1948),

for the words from “(as amended”, where first occurring, to “etc.)” substitute “(as amended by any enactment within the meaning of the Scotland Act 1998 (c. 46)) of the said Act of 1948”.

- (5) In Schedule 1 to the Local Authority Social Services Act 1970 (c. 42) (definition of “social services functions” for purposes of the 1970 Act), in the entry relating to sections 43 to 45 of the National Assistance Act 1948, for “Sections 43 to” substitute “Section”.
- (6) The provisions of this section have effect subject to, and in accordance with, Schedule 13.

148 Ordinary residence for certain purposes of National Assistance Act 1948 etc.

- (1) In section 24 of the National Assistance Act 1948 (authority liable for provision of accommodation) for subsections (6) and (7) substitute—

“(6) For the purposes of the provision of residential accommodation under this Part, a patient (“P”) for whom NHS accommodation is provided shall be deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area.

(6A) In subsection (6) “NHS accommodation” means—

- (a) accommodation (at a hospital or elsewhere) provided under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, or
- (b) accommodation provided under section 117 of the Mental Health Act 1983 by a Primary Care Trust or Local Health Board, other than accommodation so provided jointly with a local authority.”

- (2) In section 32 of that Act (adjustments between authority providing accommodation, etc., and authority of area of residence) for subsection (3) substitute—

“(3) Any question arising under this Part as to a person’s ordinary residence shall be determined by the Secretary of State or by the Welsh Ministers.

(4) The Secretary of State and the Welsh Ministers shall make and publish arrangements for determining which cases are to be dealt with by the Secretary of State and which are to be dealt with by the Welsh Ministers.

(5) Those arrangements may include provision for the Secretary of State and the Welsh Ministers to agree, in relation to any question that has arisen, which of them is to deal with the case.”

- (3) In section 2 of the Chronically Sick and Disabled Persons Act 1970 (c. 44) (provision of welfare services) after subsection (1) insert—

“(1A) Subsections (3) to (5) of section 32 of the National Assistance Act 1948 (which relate to the determination of any question arising under Part 3 of that Act as to a person’s ordinary residence) apply in relation to any question arising under this section as to a person’s ordinary residence as they apply in relation to such a question arising under Part 3 of that Act.”