

**EXPLANATORY MEMORANDUM TO
THE CARE AND SUPPORT (DISCHARGE OF HOSPITAL PATIENTS)
REGULATIONS 2014**

2014 No. 2823

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 purpose of these provisions is to make provision for the details of the scheme for the discharge of hospital patients with care and support needs set out in section 74 and Schedule 3 to the Care Act 2014 (“the Act”).
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None
4. **Legislative Context**
 - 4.1 The Act re-enacts and updates the provisions that relate to delayed discharges from acute hospitals. Section 74 enacts Schedule 3 to the Act, which makes provisions for promoting co-operative working to secure the safe discharge of patients in England from NHS, or NHS-arranged, hospital care to local authority care and support. The provisions set out the process for notification of discharge when an adult has care needs and the requirement for assessment. They also amend the mandatory system of reimbursement to a discretionary one; these enable the relevant NHS body to seek reimbursement from the local authority where there has been a delay in the patient’s discharge from hospital because of a failure of the local authority either to arrange for relevant assessments or to meet a patient’s or (where applicable) that patient’s carer’s, needs that it proposes to meet.
 - 4.2 The provisions replicate the existing arrangements under the Community Care (Delayed Discharges) Act 2003, with minor amendments to update the current law and the new legal framework. Paragraph 7.6 of the Explanatory Memorandum sets out the extent to which the Regulations replicate existing provisions; paragraphs 7.7 to 7.10 set out how they differ.
5. **Territorial Extent and Application**
 - 5.1 These regulations apply to England only.

6. European Convention on Human Rights

As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 Delayed transfers of care occur when a patient who has (or is likely to have) on-going care and support needs is ready to be discharged from hospital but it is not considered safe to do so because either the patient's care and support needs have yet to be assessed or their package of onward care has not been put together. This potentially contributes to worse outcomes for the individual, particularly in the context of their quality of life, as well as placing additional and sometimes costly burdens on the NHS. The number of delays where patients have on-going care and support needs is a small but important proportion of all delays.
- 7.2 The Community Care (Delayed Discharges) Act 2003 ("the 2003 Act") and its relevant regulations sought to minimise such delayed transfers of care by establishing separate procedures for community care and carer's assessments when certain prescribed NHS patients who have been in receipt of acute medical care are ready to be discharged from hospital. This included the introduction of a system of reimbursement for such delayed transfers of care whereby a local authority would be liable to make a payment to the healthcare provider for each day of delay when an NHS patient's discharge from hospital is delayed and the local authority is responsible for that delay.
- 7.3 The policy position remains that no-one should stay in hospital longer than necessary. The NHS and local authorities must continue to work together to ensure people have the correct support they need on leaving hospital. Recent policy developments have also aimed to make improvements in this area by improving integrated working between hospitals and community health and social care services. Examples of this include the establishment of the Better Care Fund, which builds further on what is already happening locally in some areas by creating a shared budget that will enable further and deeper integration of health and social care provision and the duties to cooperate and promote integration that are included in the Care Act.
- 7.4 The Law Commission in its report on Adult Social Care (Law Com 326, HC 941, May 2011) to consolidate and modernise existing care and support law reviewed the delayed discharges provisions and recommended that the content of the 2003 Act and its relevant regulations should be maintained but incorporated into the new statute: see recommendation 68. Accordingly, section 74 and Schedule 3 to the Act give effect to that recommendation by re-enacting the effect of the 2003 Act and relevant regulations, subject to simplification and amendments to fit the new NHS architecture. The reimbursement regime continues to apply to the same group of NHS hospital patients who are in receipt of medical acute care.

- 7.5 However, as the policy has moved to promote more collaborative working between health and social care, the potential for reimbursement liability is now to be discretionary see paragraphs 4(1) and (2) of Schedule 3 to the Act. The policy intention is that collaborative solutions are sought to address barriers locally in the first instance and for reimbursement to act as an incentive to improve joint working between the NHS and local authorities as a matter of last resort. The reimbursement provisions should not be seen in isolation. They are part of a wider picture in which joint and integrated working is embedded in the Act (see, for example, the duties to promote integration of care and support with health services etc. in section 3, the duties to co-operate in sections 6 and 7 and the provisions as to the integration fund in section 121 of the Care Act). However, the reason for maintaining the reimbursement provisions is still to enable the NHS to have the option of using them as a trigger where necessary in order to improve the effectiveness of partnership working at a local level between the health and care system.
- 7.6 Subject to the changes set out in paragraphs 7.7 to 7.10 below, these Regulations replicate the effect of the Delayed Discharges (England) Regulations (S.I. 2003/2277) in that they:
- prescribe the form and content of notices;
 - prescribe the circumstances for withdrawal of notices;
 - prescribe deeming provisions for the day a notice is to be treated as given;
 - set the minimum time period for which the discharge notice remains in force;
 - set the sums for delayed discharge payments;
 - prescribe days for which delayed discharge payment may be recovered; and
 - make provision for adjustments between local authorities where it appears that a patient is ordinarily resident in the area of another local authority.
- 7.7 Having had regard to the costs to local authorities of meeting care and support needs in the case of persons who have been discharged, the Secretary of State has increased the daily amount payable for each delayed discharge day to £155 in respect of the City of London and a London Borough Council (previously the amount set for higher rate authorities was £120) and to £130 in respect of all other local authorities (previously the lower rate was £100.)
- 7.8 The Secretary of State has considered the potential impact of the increased reimbursement fees that will be established through these Regulations and concluded that there is no evidence to support an argument that they place an additional cost burden on local authorities. These increases are in line with inflation.
- 7.9 Further, any cost to the local authority would need to be considered against the backdrop of its savings as a result of not providing the social care provision that is needed. In some cases, such care and support may involve the provision of residential care where the costs in

many cases would provide a significant offset against the cost of the reimbursement rate. In addition, with the purpose of the reimbursement provisions being part of the wider drive to improve cooperation between health and social care, to increase the amounts to a level higher than the inflationary increases being made could potentially lead to such payments becoming a source of conflict between the health and social care sectors as it might well encourage NHS organisations to use them more routinely.

- 7.10 In addition, the following further changes have been made to the regime as established by, and under, the 2003 Act.
- Sundays and public holidays are no longer excluded from the delayed discharge periods whilst the same rules apply for when a notice is deemed to have been received regardless of whether it is weekday, weekend or public holiday. This is to reflect the policy expectations that both the NHS and local authorities need to have arrangements in place for 7 days a week service provision.
 - The Regulations also provide for assessment and discharge notices to include contact details for the person at the hospital responsible for liaising with the local authority and the patient's NHS number. The purpose of this is to ensure that the local authority is able to act on these notices more quickly, with the ability to secure any additional information from the relevant NHS organisation through the contact details of the person at the NHS organisation by now making this information a mandatory requirement on these forms. The addition of the NHS number also supports the wider expectation that this will be the unique identifier used across the health and care system.

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 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>

- 8.3 The comments on the Regulations and associated statutory guidance have largely focussed on the need to recognise that while they have a role to play in terms of the interface between the NHS and local authorities when it comes to discharge it needed to be made clearer that:
- these were discrete processes that would not by themselves achieve the objective of safe and effective discharge; and
 - there are a range of wider practice issues that would benefit from additional guidance beyond the regulations and statutory guidance to support progress on this agenda.
- 8.4 Some amendments have been made to the draft regulations to reflect drafting changes and to reflect the policy intention more clearly.

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.

10. Impact

- 10.1 A separate impact assessment has not been prepared for these Regulations as no impact on the private sector or civil society organisations is foreseen. We are also satisfied that there is no significant impact being placed on the NHS or local authorities. The proposed Regulations provide discretion for the NHS to use the reimbursement provisions.
- 10.2 A separate impact assessment has not been prepared for this 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>.
- 10.3 The impact assessment relevant to the consolidation of the delayed discharge provisions into the new framework is the Care and Support Legal Reform Impact Assessment published on 9th October 2013, in particular paragraphs 1.36 and 1.80. As that assessment sets out, these Regulations are not expected to represent an additional burden for either the public or the private sector. As set out in the *Legislative Context* section above, they are a replacement for previous legislation, updated to reflect the next context of the Care Act and no additional costs or activity arises from them.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 These Regulations maintain the ability of the NHS to seek reimbursement from local authorities for any days delay in a hospital patient's transfer of care which can be attributed to the delay in local authorities not undertaking assessments or putting case and support in place as part of their armoury to minimise the number of delayed transfers of care.

12.2 Through monthly and annual NHS England publication of Delayed Transfers of Care data, social care attributable days will be assessed to determine whether progress is being made in reducing them. With the increased focus on collaborative working between health and social care it would be appropriate to review these provisions after 3 years to determine whether they are making a positive contribution. This will be done via an assessment of the data combined with a review of areas using the reimbursement provisions to establish whether there is a link between their use and a reduction in numbers of social care attributed days.

13. Contact

David Jones at the Department of Health Tel: 0207 210 6269 or email: David.G.Jones@dh.gsi.gov.uk can answer any queries regarding the instrument.