

COMMUNITY CARE AND HEALTH (SCOTLAND) ACT 2002

EXPLANATORY NOTES

Part 1 – Community Care

Accommodation

Section 2 - Accommodation provided under 1968 Act etc.

15. [Section 2](#) enables the Scottish Ministers by regulations to determine what is and what is not to be regarded as accommodation chargeable under the 1968 Act and hence under the 1948 Act. The definition also applies (by virtue of section 19) to the definition of social care, which applies to the charging provisions under section 1 of the Act.
16. Accommodation provided under the 1968 Act and section 7 of the 1984 Act comprises more than simply board and lodgings. In general, what is provided is a wider package of residential care which includes both the board and lodging element of accommodation and the social care aspect of accommodation. At present, the provision of the whole package is charged for under the 1968 Act, which applies the charging provisions of the 1948 Act. To enable implementation of free personal care, it is necessary to separate out the social care element from the board and lodging element in the provision of accommodation – and so in the provision of the residential care package.
17. [Section 2](#) of the Act enables the Scottish Ministers by regulations, therefore, to determine what elements of the package will remain subject to the charging provisions of the 1968 and 1948 Acts, and what elements will not, being subject instead to section 1 of the Act and regulations made under it. Those regulations can only affect charging and will not affect the definition of accommodation for the purposes of provision of services under the 1968 Act or section 7 of the 1984 Act.

Section 3 - Disregarding of resources when determining whether to make available assistance by providing residential accommodation

18. Currently, local authorities must disregard £18,500 of a person's capital when determining whether to provide (directly or by making arrangements with another provider) a care home place for that person. This is the effect of section 12(3A) and (3B) of the 1968 Act, which requires authorities to disregard capital equal to or below the capital limit of the residential care means test, currently £18,500. (These limits are set in the National Assistance (Assessment of Resources) Regulations 1992, as amended for Scotland). Thus local authorities are precluded from deciding not to provide residential accommodation to someone simply because he or she has a certain level of capital, if that is below £18,500. The effect of this is that where someone has capital over £18,500, a local authority may refuse to provide accommodation for him or her. (The implication is that the capital exceeding £18,500 could be used to meet care costs.)

19. **Section 3** of the Act replaces section 12(3A) and (3B) of the 1968 Act with new provisions which enable the Scottish Ministers to specify by order what resources of a person, and how much of those resources, should be disregarded when deciding whether to provide residential accommodation. The provision breaks the link with the capital limit and an order can make provisions that apply differently for different cases.
20. The power is wide and is needed as a consequence of the Act's provisions on free nursing and personal care and deferred payment agreements. Regulations under section 12 of the 1968 Act (as amended by this Act) will be needed to remove any question about local authorities' discretion to decide not to provide or arrange accommodation, for example, because of the capital value of the homes of people who are to be eligible for free care or deferred payments.

Section 4 - Accommodation more expensive than usually provided

21. Currently, it is not clear whether people provided with accommodation by local authorities can themselves pay the extra required for them to receive more expensive accommodation than the local authority would usually expect to pay for. It has been accepted practice that a third party (such as a relative) can make up the difference in costs, but the legislation does not clearly grant that right, either to third parties or to individuals receiving care.
22. **Section 4** enables regulations to be made to specify how, and in what circumstances, top-up payments can be made, either by third parties or by residents themselves. Restrictions on the right of a resident to make top-up payments may be imposed – these might relate to his or her available resources, to ensure that the arrangement can be sustained and that the resident is not likely to be impoverished as a consequence.

Section 5 - Local authority arrangements for residential accommodation outwith Scotland

23. Currently, Scottish local authorities have no power themselves to arrange for residential accommodation with nursing anywhere other than in Scotland. It has been accepted practice that there is no similar restriction on arranging for residential accommodation without nursing but the legislation does not provide a clear power to arrange such placements outside Scotland.
24. Subsection (1) of section 5 enables the Scottish Ministers to permit or require, as appropriate, local authorities to make such arrangements for residential accommodation, both with and without nursing. These arrangements would be made in fulfilment of the local authority's duties under sections 12(1) and 13A(1) of the 1968 Act.
25. Subsection (2) enables the Scottish Ministers by regulations to modify the way in which any of the provisions of the 1968 Act would apply to a placement under this section. An example of the type of modification would be section 12A(3) of the 1968 Act. Under section 12A(3), a local authority notifies and liaises with a Health Authority in the place where accommodation is proposed to be provided, where it appears to the local authority that there might be a need for the provision of health services there to the person. Modification would be needed for the purposes of a placement under this section, to refer to the appropriate equivalent health body in the other parts of the UK.
26. Subsection (3) recognises that arrangements have already been made for residential accommodation outside Scotland, on the understanding that this was possible under section 12(1) of the 1968 Act. It makes sure that any such existing arrangements are on a sound legislative footing by bringing them under section 5.
27. For placements made under this section, subsection (4) removes the requirement under section 13A(2) of the 1968 Act for residential accommodation with nursing to be in care homes registered under Scottish legislation. Subsection (4) also removes the

requirements of section 13A(3) of the 1968 Act from premises where someone is to be placed under this section. This serves to clarify that the inspection provisions of section 6 of the 1968 Act do not apply. The accommodation will not be in Scotland and inspection arrangements will be secured through the appropriate regime in the place where it is situated.

28. The accommodation which may be arranged in Scotland under sections 12 and 13A of the 1968 Act must meet certain requirements and, in the case of section 13A(1), must be of a certain type. Section 5(5) of the Act, read with section 5(6), defines what is an “appropriate establishment” in which residential accommodation outside Scotland may be arranged. Paragraph (a) specifies the equivalent for England and Wales of residential accommodation without nursing and allows for such establishments in Northern Ireland, the Channel Islands and the Isle of Man to be specified in regulations under subsection (1). Paragraph (b) provides similar definitions for residential accommodation with nursing.
29. The same type of restrictions therefore apply for placements in England and Wales, and the Scottish Ministers, by regulations, are able to secure such restrictions where appropriate as regards Northern Ireland, any of the Channel Islands or the Isle of Man.

Section 6 - Deferred payment of accommodation costs

30. The effect of this section is to make it possible for a person already in or going into a care home to defer selling their home in order to pay for their care. In effect, where a deferred payment agreement is in place, the local authority will meet all or part of the resident’s contribution to his or her care home fees. The authority will ultimately recover the money, either from the estate when the resident dies or from the resident if he or she decides to make a full repayment during his or her lifetime.
31. Subsection (1) gives local authorities the power, in accordance with regulations made by the Scottish Ministers, to enter into deferred payment agreements and it enables Ministers to require local authorities to enter into such agreements. Such an agreement may be made with someone for whom a local authority is already providing or securing the provision of residential accommodation under the 1968 Act or section 7 of the 1984 Act, or is proposing to do so, in circumstances where the person would be liable to make a financial contribution towards the cost. The power applies whether the financial contribution would be towards the cost which the local authority would usually expect to pay, or whether it would be a top up payment by the person by virtue of section 4 of the Act. A deferred payment agreement will have to comply with the provisions of the regulations, which may apply differently to top-up and normal payments.
32. Subsection (2) sets out the nature of the deferred payment arrangement. In essence it is an agreement whereby during a certain period of time a resident will not be required to make all or a portion of the payments that he or she would otherwise have to make under the means testing regime and/or an agreed top-up. Instead, the resident will grant the authority a standard security over his or her property.
33. Under the agreement, payments will be deferred from the date on which the agreement takes effect until the expiry of 56 days after the date of death of the person or the earlier date of termination of the agreement by the person. Interest will not become due on the amount secured until that amount becomes payable and is then due at such rate as the authority may determine in accordance with directions by the Scottish Ministers. A deferred payment agreement is competent only where the person grants a standard security in favour of the authority securing the authority’s estimate of the total amount of the payments deferred and the amount of interest likely to be due from the date the payments become due. In essence, therefore, the person must have property of a value sufficient to secure the portion to be deferred of the amount that he or she would otherwise be liable to pay for his or her residential care during his or her lifetime.

*These notes relate to the Community Care and Health (Scotland)
Act 2002 (asp 5) which received Royal Assent on 12 March 2002*

34. Subsection (3) allows for the portion of the payment to be deferred to be specified in regulations. For example, the regulations may ensure that the agreement defers payment by a person of that part of his or her contribution which would come from the capital value of his or her home.