

ADULT SUPPORT AND PROTECTION (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT – AN OVERVIEW

Part 3

Adult Support Etc.: Miscellaneous Amendments and Repeals

Section 62 – Accommodation charges: removal of liability to maintain spouse and child etc.

144. This section repeals sections 42 and 43 of the National Assistance Act 1948 whereby a spouse or parent of a person resident in accommodation provided or secured by a local authority under the Social Work (Scotland) Act 1968 or provided with accommodation under section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003 can be required to contribute to the cost of the resident's care. Section 62 of the Act includes technical amendments in order to clarify the provisions in section 65(f) of the National Assistance Act 1948 and section 87(3) of the Social Work (Scotland) Act 1968, and makes a consequential amendment to section 4(1)(b) of the Community Care and Health (Scotland) Act 2002 in order to repeal the reference to liable relatives in that section.

Section 63 – Direct payments: sub-delegation to councils

145. The section amends section 12B(6) of the Social Work (Scotland) Act 1968. The amendment allows regulations made under section 12B to be more flexible by enabling them to include provisions delegating functions (including decision-making functions) to local authorities. For example, the new power could be used to allow local authorities to determine whether exceptional circumstances exist which would justify using direct payments to employ a close relative in a particular case.

Section 64 - Power to help incapable adults to benefit from social services etc

146. **Section 64** inserts a new section 13ZA into the Social Work (Scotland) Act 1968. This section clarifies local authorities' power under the Social Work (Scotland) Act 1968 to take steps to deliver community care services to an adult with incapacity. Subsections (1) and (2) make it explicit that where a local authority has assessed an adult as needing community care services and the adult is not capable of making decisions about the services, it may take any steps which it considers necessary to help the adult benefit from the services, including moving the adult into residential accommodation. Subsection (3) sets out that the general principles of the 2000 Act apply to whatever steps are taken by the local authority under the Social Work (Scotland) Act 1968 in relation to the provision of community care services to an adult with incapacity. Subsection (4) prevents local authorities using this power where there is a proxy under the 2000 Act with relevant powers or if an application for the appointment of a proxy with relevant powers is under way.

Section 65 – Adjustments between councils in relation to social services etc.

147. This section clarifies and updates the legislation determining which local authority is financially responsible for providing community care services when a person moves between local authority areas. The Scottish Executive's policy is that normally the local authority in which a person is ordinarily resident is financially responsible for the community care services for that person. Previous legislation did not clearly support this policy and the amendments to section 86 of the Social Work (Scotland) Act 1968 ("the 1968 Act") put the matter beyond doubt. The amendments also update the provisions in recognition of the changes in the range of services available and the methods of provision.
148. **Section 65(1)(a)** extends the provision to cover direct payments and makes a consequential amendment to section 86(1) of the 1968 Act. Section 65(1)(b)(i) introduces a new provision into section 86(3) of the 1968 Act to disregard from determining a child's ordinary residence any period during which he or she is provided with accommodation under the 1968 Act or under section 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Section 64(1)(b)(ii) updates the statutory references to hospitals.
149. **Section 65(1)(c)** inserts new subsections into section 86 of the 1968 Act to extend the provisions for adjustments between local authorities to cover care provided by way of an arrangement between them.
150. New sections 86(4) and (5) of the 1968 Act supplement the provisions of section 86(1) of the 1968 Act which allows local authorities who provide or secure services or accommodation provided under the Acts mentioned in section 86(1) of the 1968 Act to recover the net cost of doing so from the local authority in whose area the person to whom the care is provided is ordinarily resident. New section 86(4) and (5) provide that where one local authority ("the responsible authority") arranges with another local authority or a third party ("the provider") for accommodation to be provided in an area in which the person is not ordinarily resident, so that the responsible authority can fulfil its obligations under the provisions referred to in new section 86(4)(a) to (c), two consequences flow. First, if the provider is a local authority, then any cost incurred by the provider is recoverable from the responsible authority: where the provider is a third party, payment will be governed by the contract between the responsible authority and the third party provider. Secondly, any period during which the person is accommodated under the arrangement is to be disregarded in determining the person's ordinary residence for the purposes of determining which local authority should fund the net cost of the accommodation.
151. New section 86(6) to (8) also supplement the provisions of section 86(1) of the 1968 Act. They apply when one local authority ("the other authority") arranges with another local authority ("the providing authority") that the providing authority will arrange services in the providing authority's area so that the other authority can fulfil its obligations under the provisions listed in new section 86(6)(a) to (c). The new subsections provide the Scottish Ministers with the power to make regulations specifying when the providing authority may recover from the other authority expenditure incurred in arranging the relevant services where the person for whom the services are providing is not ordinarily resident in the provider authority's area.
152. New section 86(7) provides the Scottish Ministers with the power to make regulations specifying circumstances which are to be taken into account or disregarded when determining a person's ordinary residence for the purposes of section 86 of the 1968 Act.
153. New sections 86(8) and (9) supplement the regulation-making powers in amended section 86 of the 1968 Act to provide the flexibility needed to keep up to date with changes in the way services and accommodation are delivered and require any

These notes relate to the Adult Support and Protection (Scotland) Act 2007 (asp 10) which received Royal Assent on 21 March 2007

regulations made under new section 86(6) in relation to arrangements dealing with services to be subject to affirmative resolution.

154. New section 86(10) ensures that “local authority” has the same meaning in new section 86(4) to (6) as it does in section 86(1) to (3) of the 1968 Act.
155. **Section 65(2)** amends section 2 of the Community Care and Health (Scotland) Act 2002 which allows Ministers to determine what is and is not to be regarded as accommodation provided under section 86 of the 1968 Act so that the meaning of “accommodation” in section 86 of the 1968 Act can remain the same as for section 87(2) and (3) of the 1968 Act.

Section 66 – Application of Social Work (Scotland) Act 1968: persons outwith Scotland

156. **Section 66** inserts section 87A into the 1968 Act. This section relates to persons placed in Scotland by an arrangement made by a local authority in any other part of the United Kingdom or in the Channel Islands or the Isle of Man. It provides for the Scottish Ministers to make regulations to amend the 1968 Act as it applies to such persons. Section 5 of the Community Care and Health (Scotland) Act 2002 provides powers to enable Scottish local authorities to make placements to other parts of the United Kingdom, the Channel Islands and the Isle of Man. Section 5 has not yet been commenced but should these section 5 powers be required, the powers provided by section 87 of the 1968 Act will also be required to make provision for reciprocal cases of those placed in Scotland from such other countries. Section 87(2) and (3) supplements the regulation-making power in section 87(1) of the 1968 Act and requires any regulations made under section 87(1) to be subject to affirmative resolution.

Section 67 – Public Guardian: interaction with courts

157. This section extends the powers of the Public Guardian to take part in or initiate court proceedings, when it appears to him or her to be necessary, to safeguard the property or financial affairs of an adult with incapacity. This new provision will complement the existing provision in section 12 of the Adults With Incapacity (Scotland) Act 2000 which limits the Public Guardian’s ability to enter into court proceedings to where this is explicitly tied to an investigation he or she has carried out. An example of when these new powers might be used is where the Public Guardian is aware of particular facts about an applicant for guardianship which he or she considers may impact adversely on an adult’s property or financial interests, derived from prior dealings with the adult’s affairs rather than from an investigation. In such circumstances the Public Guardian will be able to inform the court of these facts to protect the adult’s interests, if it is necessary to do so.