EXPLANATORY MEMORANDUM TO

THE CARE AND SUPPORT (CROSS-BORDER PLACEMENTS AND BUSINESS FAILURE: TEMPORARY DUTY) (DISPUTE RESOLUTION) REGULATIONS 2014

2014 No. 2843

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 makes provision about the resolution of disputes between local authorities in England, Wales and Scotland, and Health and Social Care trusts ("trusts") in Northern Ireland about the application of certain provisions of the Care Act 2014 ("the Act"). Certain of those provisions seek to ensure that, in general, where a person is placed by a local authority or trust in residential accommodation in another UK country this does not result in the transfer of responsibility for that person. The rest of those provisions impose duties on local authorities in England and Wales and on trusts to meet care and support needs of adults or support needs of carers, in circumstances where care providers are unable to carry on because of "business failure".

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

Schedule 1 to the Act (cross-border placements)

4.1 Local authorities in England, Wales and Scotland, and trusts in Northern Ireland are able or, in some cases will be able as a result of legislative changes, to make arrangements ("cross-border arrangements") for the provision of residential accommodation in another of those countries to meet people's care and support needs. In the paragraphs below, the country in which the placing authority or trust is situated is referred to as "the first country" and the country in which the person is placed is referred to as "the second country".

4.2 Cross-border arrangements may result in a person acquiring ordinary residence in the second country or in the local authority or trust in that country otherwise becoming responsible for that person. Schedule 1 to the Act makes provision to ensure that in these circumstances, in general, an authority or trust's responsibility for a person does not transfer to an authority or trust in the second country. This is achieved by treating a person as ordinarily resident in the first country and not in the second country, or by disapplying duties which would otherwise have arisen on the part of the authority or trust in the second country. The relevant provisions are to be found in paragraphs 1 to 4 of Schedule 1.

4.3 Paragraph 5 of Schedule 1 to the Act makes provision about the resolution of disputes about the application of any of paragraphs 1 to 4 of the Schedule to an adult's case, for example provision for certain persons (the Secretary of State, the Welsh Ministers, the Scottish Ministers or the Department of Health, Social

Services and Public Safety in Northern Ireland ("DHSSPS")) to determine a dispute. It requires regulations to make provision for determining which of the persons concerned is to determine the dispute and enables regulations to make further provision about the determination of disputes.

Sections 48 to 52 of the Act (provider failure)

4.4 Sections 48 to 52 of the Act impose duties ("temporary duties") on local authorities and on trusts in Northern Ireland to ensure that care and support needs of adults and support needs of carers continue to be met in circumstances where care providers become unable to carry on because of business failure. As regards Scotland, certain duties are imposed on local authorities under Part 2 of the Social Work (Scotland) Act 1968.

4.5 In relation to local authorities in England, the temporary duty applies where a provider registered with the Care Quality Commission[1] in respect of carrying on a regulated activity becomes unable to carry on that activity because of business failure.

4.6 In relation to local authorities in Wales, the temporary duty applies where a provider registered under Part 2 of the Care Standards Act 2000 in respect of an establishment or agency becomes unable to carry on or manage that establishment or agency because of business failure, and was providing accommodation or other services to an adult under arrangements made by a local authority in England or Scotland or a trust in Northern Ireland, or which were paid for by direct payments made by such an authority or trust.

4.7 In relation to trusts in Northern Ireland, the temporary duty applies where a person registered under Part 3 of the Health and Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 in respect of an establishment or agency becomes unable to carry on or manage the establishment or agency because of business failure, and was providing accommodation or other services to an adult under arrangements made by a local authority in England, Wales or Scotland, or which were paid for by direct payments made by such an authority.

4.8 In each case the authority or trust in question must, for so long as it considers necessary, meet those needs of the adult which the failed provider was meeting. Sections 49 to 51 of the Act provide for cross-border disputes between authorities and trusts about the application of sections 48 to 51, to be resolved in accordance with paragraph 5 of Schedule 1 to the Act.

The instrument

4.9 The instrument makes provision in relation to the resolution of disputes between authorities and trusts about the application of paragraphs 1 to 4 of Schedule 1, or of sections 48 to 51 of the Act (save for disputes between English local authorities about the application of section 48 which are not dealt with in this instrument).

[1] The Commission is set up by the Health and Social Care Act 2008 and provides for the registration of persons carrying on prescribed regulated activities..

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

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

7. Policy background

7.1 People in need of residential accommodation may wish to move to a different territory of the UK from that in which they reside, for example, to be near their friends and family. Such a move may improve their well-being. Schedule 1 to the Act sets out certain principles which seek to support cross-border residential care placements by ensuring that, generally, where a local authority, or a trust in Northern Ireland, places someone in residential accommodation across a border within the UK, this does not result in a transfer of the authority's responsibility for the individual concerned.

7.2 In relation to business failure of care providers as referred to above, where a care provider becomes unable to meet care and support needs because of business failure, current local authority functions would generally extend to meeting needs, however the Act imposes clear legal duties on local authorities in England and Wales and on trusts in Northern Ireland in order to ensure that people are not left without the care they need in these situations.

7.3 If authorities have regard to and apply the suggested processes and procedures outlined in guidance, work together in a spirit of reciprocity and co-operation and communicate effectively in order to ensure matters go smoothly, there should be no need for disputes to arise.

7.4 However, in the event that disputes do arise, it is important to have an agreed process for addressing and resolving them.

7.5 The instrument makes provision for dispute resolution, for example to make provision as to which authority is to resolve a dispute, specified steps to be taken before referring a dispute for determination and the documents to be supplied with the referral of a dispute.

7.6 Broadly, this mirrors the type of provision which applies in relation to the determination of disputes about ordinary residence between local authorities in England which have so far worked well and stood the test of time, and it is believed that they provide an effective framework for the resolution of disputes between authorities.

7.7 Currently, there are some mechanisms for the determination of cross-border disputes in the context of care services generally. Section 32(3) of the National Assistance Act 1948 (the 1948 Act) provides for ordinary residence disputes relating to care services under Part 3 of the 1948 Act to be determined by the Secretary of State or the Welsh Ministers. Statutory arrangements under section 32(4) of the 1948 Act set out the circumstances in which the Secretary of State or Welsh Ministers will determine disputes. For cross-border disputes between

English and Scottish local authorities, the position is governed by section 32 of the 1948 Act in relation to England and by section 86 of the Social Work (Scotland) Act 1968 (the 1968 Act) in relation to Scotland. A Memorandum of Understanding sets out the circumstances in which the Secretary of State or Scottish Ministers will determine a cross-border dispute. However, insofar as the instrument provides for a dispute resolution procedure in relation to new deeming provisions concerning cross-border residential care placements specifically as well as business failure of care providers, it represents policy-making in new areas. The provisions on cross-border placements are themselves new save for certain provisions deeming the position as regards "ordinary residence" as between England and Wales which are reflected in the 1948 Act. The provisions on business failure are also new insofar as they impose explicit duties on local authorities to meet needs in business failure situations (although existing functions of authorities would generally extend to meeting needs in such situations).

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 Eight responses were received in total on the issue of cross-border residential placements. The only comment specifically on this instrument was a need to clarify whether the instrument applies retrospectively. In this regard, transitional issues in connection with the implementation of the Act are being considered and addressed separately. Other more general comments supported the development of practice guidance for resolving and avoiding disputes. The Department is actively considering this.

8.4 In parallel to the consultation on the Act in England, the Devolved Administrations have conducted their own consultations. There has been general agreement amongst those responding that the general principles of the instrument provide for a consistent framework for a process for dispute resolution in relation to cross-border placements.

8.5 Consultation responses also included requests for certain amendments to guidance to provide greater clarity, for example to include the need to consider advocacy, and these have been addressed. Certain suggestions for amendments

to the guidance were carefully considered but not included, for example because they involved an unnecessary level of detail or prescription.

8.6 The Welsh Government held a public consultation on 'Residential Placements for Adults: Draft regulations and guidance on cross-border placements, dispute resolution and business failure' during July and August 2014. 16 responses were received, which were broadly supportive of the instrument and of the principles contained in the guidance. The Welsh Government will consider the need for further good practice guidance in the light of the comments made.

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 The Welsh Government will issue guidance to local authorities on the application of paragraphs 1 to 4 of Schedule 1 to the Act (cross-border placements). The guidance will be issued under section 7 of the Local Authority Social Services Act 1970. This guidance will be superseded by requirements or guidelines in a code issued under section 145 of the Social Services and Well-being (Wales) Act 2014 when that Act is commenced, which is expected to be in April 2016.

9.3 With regard to disputes about the application of section 50 of the Act (temporary duty on local authorities in Wales), the Welsh Government will issue guidance to local authorities in Wales on how they should discharge their functions under section 50 of the Act, which is expected to be commenced in April 2016. This guidance will be issued as part of a code on the exercise of social services functions under section 145 of the Social Services and Well-being (Wales) Act 2014. Local authorities will be required to act in accordance with requirements contained in the code and to have regard to guidelines contained in it. The code will contain a section on the instrument.

9.4 The Scottish Government and DHSSPS in Northern Ireland will provide local authorities and trusts with guidance in due course, building on the guidance that is statutory for England.

10. Impact

10.1 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.

10.2 Insofar as the instrument makes provision about the resolution of disputes about provisions which are largely new (save as set out in the Policy Background section above), it does represent a change but it is not expected to represent an additional cost burden for either the public or private sector. The instrument sets out details to support the broad framework for dispute resolution which is already on the face of the Act (paragraph 5 of Schedule 1), and in part

discharges a statutory duty under the Act to make regulations about the determination of disputes as set out in the Legislative Context above. Those details are based on existing principles of best practice in relation to matters of good administration. The instrument does require authorities to meet accommodation needs of individuals until disputes are resolved however this does not affect liability for the meeting of those needs. Paragraph 6 of Schedule 1 allows for cross-border recovery of payments towards the making of arrangements for accommodation in circumstances where another authority was liable to provide that accommodation.

11. Regulating small business

11.1 The instrument does not apply to small businesses.

12. Monitoring & review

12.1 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.

13. Contact

Niall Fry at the Department of Health Tel: (020) 7210 5260 or email: niall.fry@dh.gsi.gov.uk can answer any queries regarding the instrument.