EXPLANATORY MEMORANDUM TO

THE CARE AND SUPPORT (DIRECT PAYMENTS) AMENDMENT REGULATIONS 2016

2016 No. 167

1. Introduction

1.1 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 This instrument amends Schedule 2 of the Care and Support (Direct Payments) Regulations 2014 (S.I. 2014/2871) and makes transitional provision in relation to that amendment so that Staffordshire County Council is not permitted to make direct payments for the purpose of securing long term accommodation in a care home for adults who are not already receiving direct payments for such a purpose before 1st April. Direct payments are monetary payments made from a local authority to individuals who request to receive one to meet some or all of their eligible care and support needs. The legislative context for direct payments is set out in the Care Act, Section 117(2C) of the Mental Health Act 1983 (the 1983 Act) and the Care and Support (Direct Payments) Regulations 2014.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 Sections 31 and 32 of the Care Act 2014 ("the Act") require, in most cases and circumstances, that local authorities meet a person's needs for care and support by making direct payments, provided the person requests that their needs be met in this way and conditions 1 to 4 in section 31 or (as the case may be) 1 to 5 in section 32 are met.

4.2 Regulations made under section 33 of the Act may, amongst other things, specify cases or circumstances in which a local authority must not meet needs by making direct payments or the cases or circumstances in which it has discretion to decide not to meet needs by making direct payments. The regulations also allow a local authority to attach conditions to the making of a direct payment.

4.3 The Regulations made under this section are the Care and Support (Direct Payment) Regulations 2014 (SI 2014/2871). Amongst other things they make provision about who is and who is not permitted to have their needs met by direct payments; about the

conditions which must or may apply in relation to the making of direct payments and they also prescribe steps which a local authority must take before making a direct payment under section 32 of the Act (that is to say, in respect of a person who lacks the capacity to request that their needs are met by the making of a direct payment).

4.4 Regulation 6 of those Regulations prohibits any local authority which is not listed in Schedule 2 from making a direct payment for the provision of accommodation in a care home for an adult for a period of more than 4 consecutive weeks in any 12 month period. The authorities listed in Schedule 2 are local authority sites which were part of a pilot exercise in respect of the use of direct payments in residential care. Dorset County Council, London Borough of Havering and Manchester City Council were taken out of the list with effect from 1 April 2015 by The Care and Support Miscellaneous Amendments) Regulations 2015 (S.I. 2015/644).

4.5 By section 33(3) of the Act a direct payment is made on the condition that it is only used to pay for arrangements under which the needs specified in the care and support plan or (as the case may be) support plan are met.

4.6 Section 33(4) of the Act requires a local authority to terminate the making of direct payments if any of the conditions in sections 31 or 32 are no longer met and section 33 (5) of the Act allows the authority to do so if it has attached a condition to the making of the direct payment which has not been met or if the condition in section 33(3) is not met.

4.7 These Regulations omit local authorities which no longer wish to use direct payments to meet the needs of long term residents from Schedule 2. They contain a transitional provision so that local authorities omitted from the Schedule are required to continue to make direct payments for the provision of accommodation in a care home for an adult for a period of more than 4 consecutive weeks in any 12 month period for anyone who is currently being provided with one for that purpose (provided the local authority is not required or permitted to terminate the making of direct payments in accordance with section 33(4) or (5) of the Act.

5. Extent and Territorial Application

5.1 This instrument extends to England and Wales

5.2 This instrument applies to local authorities in England

6. European Convention on Human Rights

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

7. Policy background

7.1 Direct payments are crucial to achieving the Government's aim to increase independence, choice and control for service users and their carers through allowing them the opportunity to arrange their own personalised care. They give people the freedom to plan flexible and innovative ways to meet care and support needs, resulting in better outcomes for both the service user and their carer. They are a key part of the reform of adult social care as set out in the Caring for Our Future White Paper.

7.2 Direct payments cannot currently be used to pay for people to live in long-term care home placements (except in the existing trailblazer sites). They can be made to enable

people to purchase for themselves a short stay in care homes, provided that the stay does not exceed a period of four consecutive weeks in any 12-month period, for example to provide a respite break for a carer. This time limit is intended to promote people's independence and to encourage them to remain at home rather than moving into residential care.

7.3 In 2011, the Law Commission recommended that there should be parity between the offer of direct payments to people in the community and people in residential care. Increasing personalisation in terms of promoting choice and control in residential care is generally accepted by local authorities, providers and other stakeholders.

7.4 In the *Caring for our Future* White Paper, the last government committed to piloting direct payments in residential care. The Trailblazer project ran from March 2013 until the end of September 2015.

7.5 Following the completion of the direct payment in residential care trailblazer project in September 2015 a decision has been taken to postpone the national rollout of direct payments in residential care until 2020. The department intends to proceed with the rollout to all local authorities in 2020 alongside the introduction of the cap on care costs so that direct payments can operate as a mechanism for local authorities to fund people in residential care once they have reached that cap.

7.6 The amendments in these Regulations remove local authorities from Schedule 2 which do not wish to continue to maintain their position under the current regulations; that they meet an adult's needs for long term accommodation in a care home if that is how the adult wishes those needs to be met, and the local authority considers it an appropriate way to meet the needs in question, in line with all conditions in section 31 and 32 of the Care Act 2014 are met.

Consolidation

7.7 The department does not intend to consolidate the legislation.

8. Consultation outcome

8.1 The Rt Hon Alistair Burt, Minster of State for Care and Communities, wrote to all trailblazer sites on 8th January with the decision that direct payments in residential care will be rolled out in 2020. He asked them to confirm whether, following the completion of the pilots, they wished to remain on the schedule of those local authorities not prohibited from making a direct payment for the purposes of securing long term care in a care home. Local authorities were given until 28th January to confirm their decision in writing. The amendments reflect the decision made by local authorities

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. An update to the guidance will include revised working to reflect the decision to rollout direct payments in residential care in 2020.

9.2 Guidance on direct payments has historically been available to local authorities since they were first introduced in 1997 and has been updated and expanded as their use has developed and increased.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 A separate impact assessment has not been prepared for these Regulations. These Regulations make a minor amendment to regulations that were 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

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Government has committed to keeping the impact of the amendments to the regulations under review. This will include continuing to work closely with local government to understand the impact of making a direct payment for the purposes of securing long term care in a care home.

13. Contact

13.1 Jean King at the Department of Health Telephone: 0207 210 5051 or email: jean.king@dh.gsi.gov.uk can answer any queries regarding the instrument.