EXPLANATORY MEMORANDUM TO

THE CARE AND SUPPORT (ORDINARY RESIDENCE) (SPECIFIED ACCOMMODATION) REGULATIONS 2014

2014 No. 2828

AND

THE CARE AND SUPPORT (DISPUTES BETWEEN LOCAL AUTHORITIES) REGULATIONS 2014

2014 No. 2829

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 instruments

2.1. The purpose of the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 is to specify which local authority is responsible for meeting a person's care and support needs when a local authority places that person into certain types of accommodation in another local authority's area.

2.2. The purpose of the Care and Support (Disputes Between Local Authorities) Regulations 2014 is to set out the procedures local authorities must follow when a dispute arises between two or more authorities about the provision of a person's care under Part 1 of the Care Act 2014, or about the application of sections 37 (continuity of care and support – notification and assessment) or 48 (provider failure – temporary duty on local authority) of the Act.

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

3.1. None.

4. Legislative Context

<u>The Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014</u>

4.1. Section 39 of the Care Act 2014 specifies where a person who is being provided with accommodation to meet their care and support needs is considered to be ordinarily resident. This is to help identify where responsibility lies for meeting the person's needs.

4.2. The equivalent provision in the current legislation (section 24 of the National Assistance Act 1948) in general applies only to accommodation in care homes. The instrument extends the provision to other types of accommodation settings (supported living arrangements and shared lives schemes placements). Apart from this, the instrument does not represent new policy.

4.3. Under the current legislation, where a person is placed into residential accommodation (normally a care home) by a local authority under the National Assistance Act, their ordinary residence remains in the area where the person was living before they moved into the accommodation. The Care Act extends this principle to certain other type of accommodation in addition to care homes. Similar provision about ordinary residence is made for the situation where a person goes into hospital or other NHS accommodation.

The Care and Support (Disputes Between Local Authorities) Regulations 2014

4.4. Section 40 of the Care Act sets out a dispute resolution process. Where two or more local authorities fall into dispute about where a person is ordinarily resident (and therefore which local authority should be meeting the person's needs) and cannot resolve the question locally, the authorities involved may request a determination to be made by the Secretary of State. The instrument sets out steps that local authorities must take as part of the dispute resolution process.

4.5. The duty to meet a person's care and support needs rests with the local authority in whose area that person is ordinarily resident. Sometimes local authorities cannot agree on where a person's ordinary residence is. Without this process, people whose ordinary residence is unclear could be left without care.

4.6. Previously, the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010, ('the Directions') set out the steps that local authorities had to take to resolve disputes locally and the procedure for making an application to the Secretary of State for a determination. The instrument makes provisions similar to those in the existing Directions accordingly does not represent a change of policy.

5. Territorial Extent and Application

5.1. This instrument applies to England only.

6. European Convention on Human Rights

As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

7.1. The concept of "ordinary residence" is a core element of the existing legal framework for adult social care, and helps to determine which local authority is responsible for providing services to an individual. As recommended by the Law Commission in their review of social care law, the Care Act incorporates the same concept as one of the key criteria for deciding when a local authority must meet a person's eligible needs.

7.2. A person's ordinary residence is usually based on the place where they live. However, when local authorities make placements in accommodation out of their own area, it is necessary to make additional provisions to be clear which authority is responsible. Without such rules, local authorities could place people outside their area and effectively give away responsibility for providing their care, as the person could acquire an ordinary residence in the new areas. Poor commissioning practice

of this kind could lead to uncertainty for individuals and make effective care planning impossible. It is therefore essential that we maintain the link between making the placement and being responsible for meeting the person's needs.

7.3. Section 39 of the Care Act 2014 provides clarity about local authority responsibility for a person's care and support when a person is placed in accommodation in another authority's area, and retains the principle established in the National Assistance Act that the local authority arranging the accommodation must retain responsibility for the provision of care.

7.4. Section 39 provides that where a local authority makes a placement in specified types of accommodation outside its own area, the person is treated as ordinarily resident in the area where they were living before the placement was made. This means that the placing authority remains responsible for the person's care. This applies when a person's needs can only be met by living in certain types of accommodation. No matter where in England the accommodation is provided, the local authority will continue to be responsible for meeting the person's needs.

7.5. The instrument extends the definition of 'accommodation' in relation to Section 39 from that which is currently understood under the National Assistance Act, by making it clear that this must be wider than just care home accommodation. This is intended to give people receiving services and local authorities greater flexibility in making "out of area" placements that best meet people's needs, which also removing a lacuna through which responsibility can become unclear under the current provisions. This also ends a problem that that some local authorities face when a care home deregisters. Previously, people placed out of area in a care home remained the responsibility of the local authority which made the placement, as the person's ordinary residence was deemed not to change. But if that accommodation ceased to be registered as a care home, the ordinary residence deeming provision came to an end and then the residents were likely to become the responsibility of the local authority where the accommodation was located.

7.6. Subsection 39(4) of the Act provides that a person who is provided with accommodation under section 117 of the Mental Health Act 1983 ("the 1983 Act") is treated as ordinarily resident in the area of the local authority in England or Wales on which the duty in that section is imposed.

7.7. Under section 117 of the 1983 Act, local authorities and Clinical Commissioning Groups have a joint duty to provide mental health after-care services for certain people who have been detained for treatment for mental disorder under that Act. Section 117(3) of the 1983 Act, as amended by the Care Act, provides that the duty rests with the local authority for the area in which the person concerned was ordinarily resident immediately before they were detained under the 1983 Act (or where the person was not ordinarily resident in England or Wales before they were detained, with the local authority in which the person is resident or sent on discharge).

7.8. Section 39(5) provides that where a person is in NHS accommodation (such as a hospital), they are treated as ordinarily resident in the area where they were living before they went into hospital. This means that responsibility for the person' care and support remains with the authority for that area and does not transfer to the area of the hospital.

7.9. Section 39(6) defines NHS accommodation for this purpose and includes the provision of NHS accommodation in Scotland, Wales or Northern Ireland. This means that if a person who is ordinarily resident in England goes into hospital anywhere in the United Kingdom, their ordinary residence will remain in the areas of the placing local authority for the purposes of responsibility for the adult's care and support.

7.10. Section 40 of the Care Act 2014 provides for the Secretary of State or appointed person to determine disputes about ordinary residence and continuity of care. This is needed because disputes sometimes occur when two or more local authorities in England disagree about who is responsible for the provision of care and support. We want to provide clarity about who is responsible for meeting a person's care and support needs.

7.11. In relation to mental health after-care, section 117 of the 1983 Act, subsection (4) provides that if there is a dispute between local authorities in England about where the person was ordinarily resident immediately before being detained, this will be determined by the process set out in section 40 of the Care Act 2014.

7.12. Similarly, disputes may arise when an adult moves to live in a different local authority area and their ordinary residence changes. Where the adult is already in receipt of care and support, section 37 of the Act provides that local authorities must continue to meet their care and support needs throughout the move. The Dispute Regulations provides a mechanism to address any disputes between local authorities where they disagree on the application of section 37, for example, if the authorities disagree on which is responsible for maintaining continuity of care.

7.13. Section 48 of the Care Act 2014 places a temporary duty on authorities to meet adults' and carers' needs for support in situations where the registered care provider providing services to them is unable to carry on the regulated activity because of business failure. Local authorities are required to meet needs regardless of whether the relevant adult is ordinarily resident in their area. Section 48(7)(a) and (b) provide that in meeting needs which were being met under arrangements made by another local authority, a local authority must co-operate with that authority. Section 48(7)(c) provides that a local authority may recover from the other local authority the cost it incurs in meeting the adult's or carer's needs. Section 48(8) provides that any dispute between local authorities about the application of Section 48 in these circumstances is to be determined under Section 40 of the Care Act.

7.14. Regulation 5 of the Care and Support (Disputes Between Local Authorities) Regulations relates to disputes about cooperation under Section 48. Regulation 6 relates to disputes about costs incurred under Section 48. In each case, the regulations explain the procedure to be followed when making such referrals.

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. There were wide and varied consultation responses in relation to the matter of ordinary residence, mainly from local authorities and voluntary organisations. Whilst several responses expressed support for the proposals for the instruments and guidance, some did raise

issues, of varying levels of concern, particularly around the specified accommodation regulations. Although it was clear that overwhelmingly the responses supported the widening of the definition of types of accommodation, it was felt that the instrument could be made clearer. In particular, consultation respondents felt that the categories were not broad enough to reflect the diverse patterns of care which are likely to develop over the 'life' of the Act and stressed that the definitions should be as clear as possible to avoid local authorities getting into dispute about ordinary residence.

8.2. Responses were carefully analysed and, where appropriate, changes were made to instrument. For example it was felt that the instrument as it stood with regard to the definition of Shared Lives would only apply to people with personal care needs which would have a undermining effect on people using Shared Lives and would create confusion, particularly as people's needs may change over time. Therefore we amended this part of the instrument to mirror the instrument as set out in the Care Quality Commission's definition of this Scheme to overcome this issue. (The Health and Social Care Act (Regulated Activities) Regulations 2010).

8.3 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

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 guidance will contain a chapter outlining local authorities' roles and responsibilities when managing business failure (in respect of both providers who will not be subject to the market oversight regime and those who will be) and other service interruptions.

10. Impact

10.1 A separate impact assessment has not been prepared for these Regulations. These Regulations are 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 As the impact assessment sets out, the instruments are not expected to represent an additional cost burden for either the public or private sector. As set out in the 'Legislative Context' section above, they are largely a replacement for existing legislation, updated to reflect the new context of the Care Act.

11. Regulating small business

11.1. The Order will have no bearing on the regulation of existing small businesses.

12. Monitoring and 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

Michelle McDaid at the Department of Health Tel: 0207 210 5083 or e-mail: michelle.mcdaid@dh.gsi.gov.uk can answer any queries regarding the instrument.