**EXPLANATORY MEMORANDUM TO**

**THE CARE AND SUPPORT (PROVISION OF HEALTH SERVICES) REGULATIONS 2014**

**2014 No. 2821**

**1.** This explanatory memorandum has been prepared by Department of Health and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

The Care and Support (Provision of Health Services) Regulations 2014 make provision regarding the interaction between local authorities and the NHS concerning their respective responsibilities for the provision of care and support on the one hand, and healthcare on the other. They indicate which clinical commissioning group a local authority in England must get consent from before it makes nursing care arrangements. They also set out the duties of local authorities in supporting the NHS with assessments for NHS Continuing Healthcare and in settling any disputes the local authority may have with the NHS concerning their respective responsibilities.

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

None.

**4. Legislative Context**

4.1 Section 22 of the Care Act 2014 provides that, generally, a local authority may not meet needs under Part 1 of the Care Act by providing or arranging for the provision of a facility or service that is the responsibility of the NHS. It thus, in effect, marks the boundary between the local authority and NHS responsibilities. This prohibition reflects similar prohibitions currently imposed on local authorities in the discharge of their social care functions under sections 21(8) and 29(6)(b) of the National Assistance Act 1948 and section 49 of the Health and Social Care Act 2001.

4.2 However, section 22(4)(a) of the Care Act 2014 provides that, despite the general prohibition in that section, a local authority may make arrangements for the provision of accommodation together with the provision of nursing care (what is commonly known as a nursing home) provided it has first obtained consent to the arrangement of the nursing care element from whichever clinical commissioning group ("CCG") regulations require. Again, this system of permitting a local authority to arrange nursing home accommodation providing it has got the relevant CCG's consent reflects the current law in section 26(1C) of the National Assistance Act 1948 and regulations made under that section (currently the Residential Accommodation (Determination of District Heath Authority) Regulations 1992 [SI 1992/3182]). The consent is needed because the CCG will be responsible financially for

meeting the cost of that nursing element, which it will do by paying the appropriate flat rate nursing fee to the nursing home concerned, in accordance with its obligations under the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 ("the Standing Rules").

4.3 These regulations require the local authority to seek the consent of "the responsible clinical commissioning group" in respect of the person concerned. The "responsible" CCG in respect of any person is whichever CCG has the responsibility, under the legislation relating to the NHS, for the provision of nursing care by a registered nurse for that person. Such responsibility is established in accordance with the provisions of section 3(1), (1A) and (1E) of the National Health Service Act 2006 and any regulations made under section 3(1B) or (1D) of that Act.

4.4 In some cases, the responsibility for the provision of registered nursing care rests with the NHS Commissioning Board and not with any CCG. In such cases, the local authority is required by section 22(4) and (9) of the Care Act 2014 to get the consent of the NHS Commissioning Board (rather than any CCG) before arranging for the provision of nursing care. In such cases therefore there is no need to make any provision identifying a relevant CCG.

4.5 Section 22(6) of the Care Act 2014 provides that regulations may require a local authority to be involved in processes relating to the assessment of a person's needs for health care and may also require a local authority to make arrangements for the settlement of disputes between itself and the NHS as to whether a service or facility is something the NHS should provide. These regulations make provision on both counts.

4.6 The obligations imposed on local authorities are the same as are currently imposed on local authorities under the NHS Continuing Healthcare (Responsibilities of Social Services Authorities) Directions 2013 ("the 2013 Directions") issued under the powers conferred by section 7A of the Local Authority Social Services Act 1970. (The 2013 directions will be revoked.) They mirror similar obligations imposed on CCGs and the NHS Commissioning Board ("NHS bodies") by the Standing Rules. Together, these obligations (currently imposed by the 2013 Directions and the Standing Rules) govern the way local authorities and the NHS bodies work together at the boundary between social care and healthcare in assessing needs for NHS continuing healthcare and registered nursing care and, consequently, what must be provided by the NHS (free at the point of use) and what may be provided by the local authority (for which a charge may be made). The imposition of these similar obligations on local authorities through these regulations will enable the established co-operation arrangements to continue.

## 5. Territorial Extent and Application

5.1 This instrument applies to England only.

## 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 A key consideration when an individual is being assessed is to establish whether the individual is the statutory responsibility of the NHS or the local authority. The boundary between the NHS and local authorities is particularly important in the assessment process for NHS Continuing Healthcare. There is a well-established National Framework which sets out the principles and processes for assessment of eligibility for NHS Continuing Healthcare. These processes are already familiar with health and social care professionals involved in the assessment process.

7.2 Arrangements for the provision of nursing care by a registered nurse: responsible Clinical Commissioning Group

7.2.1 Local authorities may arrange for accommodation together with registered nursing care (in a nursing home) for an individual with the consent of the relevant Clinical Commissioning Group. The local authority must obtain this consent before the placement, or, in urgent cases, as soon as possible after the placement to ensure that there are no gaps in the provision of care. This consent reflects the Clinical Commissioning Group's financial responsibility for providing registered nursing care.

7.2.2 The provisions determine the Clinical Commissioning Group from which consent should be sought if the local authority wishes to make arrangements that include registered nursing care.

7.2.3 When the local authority obtains consent from the relevant Clinical Commissioning Group, payment of the flat rate nursing fee can then be made to the relevant care home.

7.3 Requirements on local authorities: joint working with relevant bodies

7.3.1. Assessments for NHS Continuing Healthcare are undertaken by a multi-disciplinary team organised by Clinical Commissioning Groups and may include a person/persons from the local authority. The provisions determine how a local authority must cooperate with the assessment process.

7.3.2. Local authorities should provide advice and assistance to the relevant body as far as is reasonable and practicable and, if requested, arrange for a person or persons to participate in multi-disciplinary teams.

7.3.3. Local authorities must have due regard to the continuity of services for persons found eligible for NHS Continuing Healthcare, and when eligibility ceases.

7.3.4 Individuals who have been assessed for NHS Continuing Healthcare have the right to request an independent review of the eligibility decision from the Board. Local authorities must co-operate if requested by the Board to be part of the review panel.

7.3.5. Local Authorities must, as far is reasonably practicable, nominate individuals to participate in NHS Continuing Healthcare review panels and ensure those persons are available to participate in review panels when requested by the Board.

7.4 Requirements on local authorities: dispute resolution

7.4.1. The provisions impose requirements on local authorities in the event of a dispute between a local authority and a relevant body.

7.4.2. Where there is a dispute between a relevant body and a local authority about an eligibility decision for NHS Continuing Healthcare or about contributions towards a joint package of care, the local authority must agree a dispute resolution procedure with the relevant body (having regard to the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care) and must resolve the dispute using that procedure. The policy aim is to encourage and facilitate 'joined-up' working at this interface between the NHS and local authorities. It also acknowledges the need to ensure the individual concerned is not overlooked in inter-agency disputes about respective responsibilities.

## 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 No issues were raised in respect of these regulations as a result of the consultation exercise.

## 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.

## 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, these regulations 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 a replacement for previous legislation, updated to reflect the new context of the Care Act.

## 11. Regulating small business

11.1 The legislation does not apply to small business.

## 12. Monitoring & review

12.1 The aim of the instrument is to indicate which clinical commissioning group a local authority must approach when it proposes to arrange for the provision of accommodation together with the provision of nursing care (in order to obtain consent to the arrangement of the nursing care element). It also aims to ensure cooperation between local authorities and the NHS with regard to assessments for NHS Continuing Healthcare. The instrument also sets out how local authorities should support the independent review process for eligibility decisions for NHS Continuing Healthcare and make arrangements for dispute resolution. Monitoring and review will take place via NHS Continuing Healthcare stakeholder networks.

12.2 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

John Doran at the Department of Health Tel: 0113 254 6092 or email: john.doran@dh.gsi.gov.uk can answer any queries regarding the instrument.