EXPLANATORY MEMORANDUM TO

THE CARE AND SUPPORT (ELIGIBILITY CRITERIA) REGULATIONS 2014

2014 No. [XXXX]

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 purpose of the Care and Support (Eligibility Criteria) Regulations 2014 is to set a national minimum eligibility threshold for the meeting of adult care and support needs and carer support needs.

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

3.1 None.

4. Legislative Context

4.1 Sections 9 and 10 of the Care Act 2014 ("the Act") place duties on local authorities in England to carry out, respectively, an assessment of an adult's needs for care and support and a carer's needs for support where it appears that an adult or a carer may have such needs. Section 13(1) of the Act then requires local authorities to determine on the basis of such assessments whether the needs that an adult has for care and support, or the needs that a carer has for support, meet the eligibility criteria (which are to be specified in regulations).

4.2 These Regulations set out those eligibility criteria. Local authorities, having made a determination as to whether an adult or carer's needs meet the eligibility criteria, are then under the duties in section 18 (for adults) and 20 (for carers) of the Act to meet those needs that do meet the eligibility criteria if certain additional conditions are met (which relate to ordinary residence and finance). Equally, if none of the needs meet the eligibility criteria, under section 13, local authorities must give the adult or carer (as the case may be) written advice and information about certain matters relating to the meeting, reduction, prevention or delay of development of needs.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

The Minister of State for Care and Support has made the following statement regarding Human Rights:

In my view the provisions of the Care and Support (Eligibility Criteria) Regulations 2014 are compatible with the Convention rights.

7. Policy background

7.1 Prior to the Care Act, the statutory framework relating to the provision of care and support and the meeting of needs has been set out in a number of enactments. There is, prior to the relevant sections of the Act being commenced, no provision set out in statute as to the criteria which would make a person eligible to have care and support needs met. Instead, local authorities have had a duty under section 47(1) of the NHS and Community Care Act 1990 to assess the needs of persons for whom they may provide or arrange community care services and who may be in need of such services, and then to decide whether their needs call for the provision of any such services. For further direction about how to decide what needs should call for the provision of such services (in other words what needs are eligible for care and support), local authorities must have regard to guidance called *Fair access to care services (FACS) – guidance on eligibility criteria for adult social care.* This sets out a framework for determining which needs are eligible for care and support, and was issued to local authorities in 2003 to address inconsistencies across England about who gets support, and to put in place a fairer more transparent system for the allocation of care and support services. This guidance was replaced in 2010 by *Prioritising Need in the Context of Putting People First: A whole system approach to eligibility for social care.* The framework developed by FACS was replicated in this new guidance. The intention was to improve how the FACS eligibility framework operated and support more consistent and transparent implementation across authorities.

7.2 The FACS framework sets out four bandings which describe the seriousness of the risk to independence and wellbeing or other consequences if needs are not addressed, and local authorities determine locally where they set their criteria in the context of those bands. Local authorities currently set their eligibility as follows:

FACS threshold for access to care and support	**Number of local authorities setting their threshold at that criterion in 2013**
Critical	3
Substantial	130
Moderate	16
Low	3

7.3 Equally, prior to the Act, there is no provision set out in statute as to the criteria which would make a carer eligible to have support needs met. The power for local authorities to meet a carer's needs, having assessed those

needs, is set out in the Carers and Disabled Children Act 2000, and further direction about how to decide what needs the local authority will meet is set out in Department of Health guidance issued in 2001 entitled *Carers and people with parental responsibility for disabled children: practice guidance*.

7.4 In the White Paper *Caring for our future: reforming care and support*, the Government recognised that the current system of determining eligibility locally in compliance with the relevant guidance led to an inconsistency of approach between different areas and so was confusing, uncertain and unfair for people with care and support needs. The Government announced that it would introduce a national minimum eligibility threshold to address these issues. All local authorities would at a minimum have to meet this threshold and could not tighten their criteria beyond this, although they could decide at their discretion to continue to meet other needs that were not considered eligible. The new national criteria would apply to adults with care and support needs and to carers.

7.5 The Act, therefore, in section 13(7) and (8), makes provision enabling the Secretary of State to make regulations to specify descriptions of needs which will meet the eligibility criteria (and thus, in effect, set out in statute the criteria for a national eligibility threshold for adult care and support needs and carer support needs).

7.6 These Regulations describe the needs which are to meet the eligibility criteria by reference to the reason for the needs arising, whether certain outcomes can be achieved by the adult or carer, and the impact of an inability to achieve certain outcomes on the wellbeing of the person concerned. The intention is that, in determining whether an adult or carer's assessed needs meet the eligibility criteria (and thus whether the duty to meet those needs arises as described in section 4 of this memorandum), local authorities will retain some flexibility as to how to interpret the eligibility criteria but there will be more transparency about the eligibility determination for care and support, or support, needs. The national eligibility threshold has been set at a level where the person's care and support needs have "a significant impact on their wellbeing". This is intended to reflect the level at which the majority of local authorities have set their criteria locally, to enable authorities to maintain their existing access to care and support when the new framework is introduced in April 2015.

7.7 These Regulations come into force immediately after section 13(7) of the Act comes fully into force. Section 13(7) has been commenced for the purposes of making regulations on 1 October 2014 by a commencement order (S.I. 2014/2473). It is intended that section 13(7) will be brought into force for remaining purposes, by a further commencement order, in April 2015.

8. Consultation outcome

8.1 The Department of Health established the Assessment and Eligibility Task and Finish Group to advise on the detail of these Regulations and statutory guidance on eligibility. The Task and Finish Group included representatives from organisations representing people who receive care and support, carers, academics, providers, Association of Directors of Adult Social Services, local authorities, occupational therapists, Social Care Institute of Excellence ("SCIE"), Skills for Care, and the Association of British Insurers.

8.2 The Department held an extensive engagement process to develop the detailed policy behind these Regulations. An initial version was published in June 2013 while the Care Bill was passing through Parliament, and the Department consulted on these for three months. The Department also engaged the Personal Social Services Research Unit (PSSRU) at the London School of Economics to evaluate the draft regulations against current practice. PSSRU asked local authorities to compare the regulations with the current FACS guidance using case study vignettes. The key messages from the extensive engagement and research were:

- The national eligibility criteria set out in the draft Regulations were clearer than the existing FACS guidance;

- Local authorities were concerned that the draft Regulations as drafted would see more people become eligible for care and support;

- The voluntary sector, people who use services and carers called for the eligibility threshold to be lowered. As far as the draft Regulations were concerned, they asked for the inability to achieve certain outcomes relating to mobility in the home and communication to be included in the criteria.

8.3 These findings informed the second version of the eligibility regulations which were consulted upon in June – August 2014 along with other draft regulations and statutory guidance.

8.4 As part of the consultation process the Department attended 13 events over the summer; received over 900 website and e-mail comments to the questions set out in the consultation document; and received extensive comments through different campaigns run by a number of organisations.

8.5 The comments received in the consultation over the summer of this year indicated that:

- There continued to be a widely-held view that the eligibility threshold was not appropriate to maintain existing levels of access to care and support. However, this view was roughly split between public sector bodies, who warned that in their interpretation, the level set in the regulations was too low, and others, largely from voluntary sector, who

felt the level was too high. Of those that said the level was appropriate, most were local authorities.

- Voluntary organisations wanted the risk of harm and abuse included in the eligibility criteria, thus merging issues relating to the safeguarding process and the eligibility determination. Local authorities, on the other hand, wanted care and support and safeguarding dealt with separately, as is provided for in the Care Act, where there are separate duties on local authorities relating to meeting eligible needs and safeguarding. Their view was that the inclusion of risk of harm and abuse in the FACS framework can distract attention from addressing safeguarding issues and that the separation of safeguarding and care and support provides more clarity, particularly when responding to cases where the adult is at risk of harm or abuse.

- A slight majority of public sector respondents preferred the regulations to be cast in outcomes-based language; that is, focusing on whether a person is able to achieve a specified outcome as opposed to carry out a specified activity. Proponents of outcomes-focused language said it would be in better keeping with current practice and that the Act is outcomes focused. In their view, outcomes-focused language invites a discussion of a person's capabilities because it guides a discussion of what is important to the individual as well as what they need to achieve their goals. A majority of voluntary sector respondents preferred the regulations to stay phrased in activity, or needs, terms as this provided more clarity over whether a person is eligible compared to outcomes-focussed language.

8.6 The Department continued to engage PSSRU to evaluate the second draft of the regulations. This time PSSRU asked local authorities to evaluate the regulations against recent real cases drawn from local authorities. This found that people who have substantial and critical levels of need and are currently eligible would continue to be eligible if a determination under the draft regulations were made in their cases. The research also found that the number of people who have moderate levels of need and would be eligible to have their needs met might have a small increase in number, whilst very few with low levels of needs would be eligible.

8.7 To respond to the findings of the consultation and the research, the Department has looked to refine the eligibility criteria so that they match current practice as closely as possible, and to bring more flexibility into the criteria so that they do not inadvertently exclude any group with particular needs from eligibility. These Regulations aim to achieve this by creating a single list of specified outcomes, and requiring that a person would have to be unable to achieve two or more of any of these outcomes in order to have eligible needs (assuming the other eligibility criteria are met).

8.8 The Department received fewer comments on the carers' eligibility criteria during the consultation. Respondents mostly requested more clarity on the three conditions which carers had to meet to have eligible needs. The

confusion was caused by the draft regulations setting out two parallel routes for how carers could have eligible needs: (1) where they were unable to continue caring, or, (2) where they were unable to achieve certain outcomes and these had a significant impact on their wellbeing. Having reflected on the issues raised in consultation, we concluded that in practice, it was intended that there would be only one route to a carer having eligible needs rather than two. The reason being that a carer being unable to achieve their day-to-day outcomes would, in reality, result in them being unable to continue caring. To remove this confusion, the three conditions which a carer must meet to have eligible needs were redrafted in the final version of the regulations so that they more closely reflected the three conditions a person with care and support needs must meet.

8.9 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 1 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 Skills for Care has developed and published training tools to assist local authorities to put the eligibility criteria into practice. The Social Care Institute for Excellence has also been commissioned to produce best practice tools to support implementation.

10. Impact

10.1 There will be no impact on business, charities or voluntary bodies from these Regulations.

10.2 The Department engaged PSSRU to model the possible cost to local authorities of implementing the eligibility criteria for those with care and support needs. It estimated that an additional 4,000 adults would become eligible for care and support following the introduction of the national eligibility threshold in these Regulations. In addition to these, PSSRU also estimated that a further 2,000 people may come forward for an assessment and be assessed as not having eligible needs. Taking an average assessment cost of £500, these 6,000 assessments would represent a cost of £3.0 million. Using 2015/2016 prices, PSSRU estimated that care and support for an additional 4,000 people would increase expenditure by local authorities by £25.3m per year.

10.3 The impact assessment referred to below anticipates a cost of £73.3m to local authorities for provision of support to meet the eligible needs of extra carers coming into the system in 2015/16 – rising to £251m annually by 2019/20. This is based on the Department of Health's assumptions about the increase in demand for assessment on the basis of the new rights in the Care Act, the likely proportion of such assessments likely to lead to a determination that a carer is eligible for support, and the unit costs associated with that support.

10. 4 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.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Government has committed to keeping the impact of the package of regulations under Part 1 of the Act 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 care providers, local government and other stakeholders to understand the impact of implementation of the reforms.

13. Contact

Paul Woods at the Department of Health (Tel: 0207 210 5701 or email: paul.woods@dh.gsi.gov.uk) can answer any queries regarding the instrument.