

Consultation on the Draft Regulations relating to the Care Act 2014

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Executive Summary

The Care Act 2014 (“the Act”) was introduced in the House of Lords on 9 May 2013 and received Royal Assent on 14 May 2014. The Act creates a legislative basis for local authorities in England, Wales and Northern Ireland to make cross-border placements for those who require care in residential accommodation in Scotland. Equivalent provisions exist in Scottish, Welsh and Northern Irish legislation allowing authorities in those areas to make cross-border placements. These provisions will be supplemented further to allow local authorities to make cross-border placements comprising of accommodation with nursing care.

The Act is generally concerned with care and support matters in England and makes provision for:

- reforming the law in relation to care and support for adults;
- the law relating to support for carers;
- safeguarding adults from abuse or neglect;
- care standards;
- establish and make provision about Health Education England;
- establish and make provision about the Health Research Authority and for connected purposes to regulate assessments of the ethics of health and social care research.

The Act also extends to Scotland in three areas, namely:

- Cross-border placement arrangements;
- Dispute resolutions; and,
- Provider failure arrangements.

The Scottish Government has been working with administrations in England, Wales and Northern Ireland to enable cross-border placements. A legislative framework for cross border placements has now been agreed as part of the Act. This creates a clear and consistent approach across the whole of the UK in cross border placements, provider failure situations and dispute resolutions.

Draft regulations have been published to accompany the Act in collaboration with the devolved administrations to achieve consistency in this new framework. This framework contains overarching principles prescribing which authority has financial and operational responsibility for people who are subject to such cross-border placements. Schedule one of the Act sets out the general principles that the placing authority retains all of the duties which it would have had if the individual had remained in their area and the individual’s ordinary residence does not change.

Consultation on these regulations will run for ten weeks from 9 June – 18 August and will cover draft Regulations relating to cross-border placements, dispute resolutions and provider failure arrangements.

Consultation Paper

Introduction

Cross-border placements and dispute resolution

At present, there is currently no legislative basis for cross border placements for those who require care and accommodation. The Act creates a legislative basis for English local authorities to make cross-border placements for those who require care in residential accommodation in a devolved administration area. Equivalent provisions exist in Scottish, Welsh and Northern Irish legislation allowing authorities in those areas to make cross-border placements. These provisions will be supplemented further to allow local authorities to make cross-border placements comprising of accommodation with nursing care.

The policy intention of the cross-border placement arrangements is to ensure an appropriate division of financial and operational responsibility, where local authorities in one part of the United Kingdom place adults for whom they have a responsibility under legislation into residential care in another part of the United Kingdom. The Scottish Government has been working with devolved administrations to ensure that the framework achieves reciprocity.

To create a clear and consistent framework Schedule one also contains dispute resolution provisions that logically provides a mechanism to appoint the Scottish Minister, Secretary of State, Welsh Minister or NI Department should a dispute arise between local authorities in a cross border placement.

Provider Failure arrangements

Clauses 48 – 52 of the Act introduces the temporary duties that apply to Local authorities in England, Northern Ireland and Wales in provider failure situations to meet the needs of people in its area where a care provider is unable to carry on meeting those needs. In Scotland, Section 12 of the Social Work (Scotland) Act 1968 (" the 1968 Act") already places a duty on Scottish local authorities to provide or arrange care for any individual in their area who requires assistance in an emergency. The drafted regulations clarify the existing duties that are provoked to meet the needs of people whose needs were being met in their areas under arrangements made by an authority in England, Wales or Northern Ireland, where a care provider operating in Scotland can no longer continue to function due to business failure. The drafted regulations define business failure with reference to the different types of insolvency situations such as bankruptcy or entering into administration.

The rationale for the provider failure regulations is to ensure that the circumstances constituting provider failure in cross border cases is consistent with those already recognised in the context of intra Scottish placements.

The provisions of the Act will come into force in April 2015. The four administrations have worked together to agree the principles set out in Schedule One

The Care and Support (Cross-border Placements and Provider Failure: Temporary Duty) (Dispute Resolution) Regulations 2014

Regulation 1

The definitions of terms that apply in the cross-border placement arrangements can be found here. The meaning of “accommodation” is based on the definition in paragraph 12 of Schedule 1 of the Act. “Accommodation in Scotland” means residential accommodation in Scotland of a type which may be provided under or by virtue of section 12 or 13A of the 1968 Act, or section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003, but not of a type specified in regulations under this paragraph.

Regulation 1(5)

This is aimed at capturing the terms in which a dispute would be expressed. Disputes have been captured in these regulations to cover situations that would consist of an assertion that another local authority is or was liable to meet needs or is or was liable to pay the costs of meeting those needs. As regards the latter, in a cross-border provider failure case, different authorities would be liable to meet needs and costs respectively so a dispute may arise in relation to costs without also being about liability.

Regulations 2 and 3

Regulation 2 and 3 details the generic scenarios taking into consideration the individual’s physical location to conclude whether the Secretary of State, Scottish Minister, Welsh Minister or NI Department should determine the dispute. Regulation 3 introduces the Lead authority definition.

Regulation 4

This sets the process for referrals and demands co-operation from all involved parties to resolve the dispute as expediently as possible.

Regulation 5

It is explicit that the individual’s care needs should not be interrupted whilst a dispute is being resolved. As such it is the local authorities responsibility to ensure that there is a continuity of care.

Regulation 6

Local authorities must ensure that these steps are satisfied prior to making a referral. Each step is essential for the referral to take place and provides further opportunities to resolve the dispute.

Regulation 7

This regulation clearly sets out the lead authority’s role in the dispute resolution process.

Regulation 8

Local authorities have a period of four months to resolve the dispute and if they are unable to resolve the dispute it must be referred for a determination.

The Care and Support (Cross-border Placements) (Business Failure [Duties]) (Scotland) Regulations 2014

Regulation 3

This regulation defines when the local authority where the individual is physically present should be provoked in a provider failure situation due to financial difficulties.

Regulation 4

Provider failure situations are defined here in detail to clearly set this regulation for financial failure only.

Regulation 5

This regulation details the duties of the 1968 Act that apply in a provider failure situation, including homecare needs that would need to be met in provider failure cases. Also this regulation includes residential care only without nursing care.

Responding to this consultation paper

We are inviting written responses to this consultation paper by 18 August 2014. Please send your response with the completed Respondent Information Form (see "Handling your response" below) to:

careforolderpeople@scotland.gsi.gov.uk

or

Integration and Reshaping Care Division, 3ER

St Andrews House

Regent Road

Edinburgh

EH1 3DG

If you have any queries, please contact the Integration and Reshaping Care Division by email at careforolderpeople@scotland.gsi.gov.uk.

This consultation can be viewed online on the Scottish Government website at:

<http://www.scotland.gov.uk/consultations>

The Scottish Government (SG) has an email alert system for consultations, <http://register.scotland.gov.uk>. This allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form enclosed with this consultation paper as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form). These will be made available to the public in the Scottish Government Library later in 2014. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

Responding to this consultation paper

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the current drafting of the regulations in relation to cross-border placements under the Act. We aim to issue a report on this consultation process in summer 2014.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact details above.

The Scottish Government Consultation Process

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government Library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (eg, analysis of response reports) can be accessed at: Scottish Government consultations (<http://www.scotland.gov.uk/consultations>).

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- Indicate the need for policy development or review
- Inform the development of a particular policy
- Help decisions to be made between alternative policy proposals
- Be used to finalise legislation before it is implemented.

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

STATUTORY INSTRUMENTS

2014 No. XXXX

SOCIAL CARE

The Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations
2014

Made - - - - XXX

Laid before Parliament XXX

Coming into force in accordance with regulation 1(2)

The Secretary of State makes these Regulations in exercise of the powers conferred by paragraph 5(9) to (11) of Schedule 1 to, and section 125(7) and (8) of, the Care Act 2014(a).

In accordance with paragraph 11 of Schedule 1 to the Care Act 2014, the Secretary of State has obtained the consent of the Welsh Ministers, the Scottish Ministers and the Northern Ireland Department(b) prior to the making of these Regulations.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014.

(2) These Regulations come into force on—

- (a) [] 2016 insofar as they make provision for the resolution of a dispute about the application of section 50 of the Act (temporary duty on local authority in Wales); and
- (b) 1st April 2015 for all other purposes.

(3) In these Regulations—

“accommodation” means accommodation in England, accommodation in Wales, accommodation in Scotland or accommodation in Northern Ireland(c);

“the Act” means the Care Act 2014;

“HSC trust” means Health and Social Care trust established under Article 10 of the Health and Personal Social Services (Northern Ireland) Order 1991(d) and “an HSC trust” is to be construed accordingly;

(a) 2014 c.23 (“the Act”). The power to make regulations is exercisable by the Secretary of State, *see* section 125(1). *See* also sections 49(4), 50(5) and 51(5) of the Act.

(b) *See* paragraph 12(9) of Schedule 1 to the Act as to the meaning of “The Northern Ireland Department”.

(c) *See* paragraph 12 of Schedule 1 to the Act as to the meaning of “Accommodation in England”, “Accommodation in Wales”, “Accommodation in Scotland” and “Accommodation in Northern Ireland”. The meaning of “Accommodation in Wales” has been modified by paragraph 14(5) of that Schedule pending the commencement of Part 4 of the Social Services and Well-being (Wales) Act 2014 (2014 anaw 4) (“the 2014 Act”).

(d) S.I. 1991/194 (N.I. 1).

“authority”, unless the context otherwise requires, means local authority in England, local authority in Wales, local authority in Scotland or HSC trust(a);

“dispute” means dispute about the application of—

- (a) section 48 or 49 of the Act (temporary duty on local authority in England – cross-border cases) to the case of an adult or a carer(b), in so far as the dispute is between a local authority in England and a local authority in Wales, a local authority in Scotland or an HSC trust;
- (b) section 50 or 51 (temporary duty on local authority in Northern Ireland) of the Act to the case of an adult or a carer; or
- (c) any of paragraphs 1 to 4 of Schedule 1 to the case of an adult(c) (cross-border placements);

“lead authority” has the meaning given in regulation 3;

“needs”, unless the context otherwise requires, means—

- (a) in respect of duties falling on local authorities in England, in relation to an adult, needs for care and support and, in relation to a carer, needs for support;
- (b) in respect of duties falling on local authorities in Scotland, needs which must be met under section 12 or 13A of the Social Work (Scotland) Act 1968 (social welfare services and residential accommodation with nursing)(d);
- (c) in respect of duties falling on local authorities in Wales, needs which must be met or are to be met under section 35, 36, 40 or 45 of the Social Services and Well-being (Wales) Act 2014(e);
- (d) in respect of duties falling on HSC trusts, needs which must be met under Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 (general social welfare)(f) or which may be met under section 2 of the Carers Direct Payments (Northern Ireland) Act 2002 (services to carers);

“the Northern Ireland Department” means the Department of Health, Social Services and Public Safety in Northern Ireland;

“referred”, unless the context otherwise requires, means referred for determination under paragraph 5 of Schedule 1, and “referral” is to be construed accordingly;

“Responsible Person” means the Secretary of State, the Welsh Ministers, the Scottish Ministers or the Northern Ireland Department;

“Schedule 1” means Schedule 1 to the Act.

(4) For the purposes of these Regulations, the following are Responsible Persons in relation to authorities—

- (a) in relation to a local authority in England, the Secretary of State;
- (b) in relation to a local authority in Wales, the Welsh Ministers;
- (c) in relation to a local authority in Scotland, the Scottish Ministers;

(a) See paragraph 12 of Schedule 1 to the Act as to the meaning of “Local authority in England”, “Local authority in Wales” and “Local authority in Scotland”. The meaning of “Local authority in Wales” has been modified by paragraph 14(6) of that Schedule pending the commencement of Part 4 of the 2014 Act.

(b) See section 10(3) of the Act as to the meaning of “carer”. See also section 79.

(c) See section 2(8) of the Act as to the meaning of “adult”. See also section 79.

(d) 1968 c.49 (“the 1968 Act”). Section 12 has been amended by paragraph 10(5) of Schedule 9 to the National Health Service and Community Care Act 1990 (c.19) (“the 1990 Act”), paragraph 15(11) of Schedule 4 to the Children (Scotland) Act 1995 (c.36), section 120(1) of the Immigration and Asylum Act 1999 (c.33) (“the 1999 Act”) and section 3 of the Community Care and Health (Scotland) Act 2002 (asp 5) (“the CCHSA 2002”), and is prospectively amended by section 46(1) of the Nationality, Immigration and Asylum Act 2002 (c.41) (“the 2002 Act”). Section 13A was inserted by section 56 of the 1990 Act and amended by section 120(2) of the 1999 Act, section 72(a) of, and paragraph 4(3) of Schedule 3 to, the Regulation of Care (Scotland) Act 2001 (asp 8) and paragraph 1(4) of Schedule 2 to the CCHSA 2002, and by S.S.I. 2011/211, and is prospectively amended by section 46(2) of the 2002 Act.

(e) 2014 anaw 4.

(f) S.I. 1972/1265 (N.I. 14).

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(d) in relation to an HSC trust, the Northern Ireland Department.

(5) References in these Regulations to the date on which a dispute arises (however expressed) are references to the first date on which a written communication is sent by one of the authorities which are parties to the dispute to another of those authorities raising an issue about—

- (a) the application of any of sections 48 to 51 of the Act to the case of an adult or a carer; or
- (b) the application of any of paragraphs 1 to 4 of Schedule 1 to the case of an adult.

(6) In regulations 6 and 7 and for the purposes of the duty in regulation 8, a reference to the authorities which are parties to a dispute includes (where different) a reference to the lead authority in relation to that dispute, but this does not apply in relation to regulation 6(4)(a) or (5)(b) or to regulation 7(3)(h).

(7) In a case where a person is homeless, references in these Regulations (however expressed) to a person living in an area or a place are to be read as references to that person being physically present in that area or place.

Responsibility for determination of disputes

2.—(1) This regulation applies for the purposes of determining which Responsible Person is to determine a dispute between authorities.

(2) Where the authorities which are parties to the dispute (“the authorities in dispute”) include a local authority in England, and the adult or carer to whom the dispute relates (“the relevant person”) is living in England at the time the dispute is referred (“the relevant time”), the dispute is to be determined by the Secretary of State.

(3) Where the authorities in dispute include a local authority in Wales, and the relevant person is living in Wales at the relevant time, the dispute is to be determined by the Welsh Ministers.

(4) Where the authorities in dispute include a local authority in Scotland, and the relevant person is living in Scotland at the relevant time, the dispute is to be determined by the Scottish Ministers.

(5) Where the authorities in dispute include an HSC trust, and the relevant person is living in Northern Ireland at the relevant time, the dispute is to be determined by the Northern Ireland Department.

(6) In any other case, the dispute is to be determined by whichever of the persons who are Responsible Persons in relation to the authorities in dispute, those persons agree is to do so.

Lead authority in relation to disputes

3.—(1) For the purposes of these Regulations, the lead authority in relation to a dispute is the authority in whose area the adult or carer to whom the dispute relates is living as at the date on which the dispute arises.

(2) If that authority (“A”) is not one of the authorities which are parties to the dispute—

- (a) those authorities must, without delay, bring to A’s attention A’s duties under these Regulations; and
- (b) A is not under those duties until the date on which A is aware of, or could reasonably be expected to have been aware of, those duties.

Notification etc

4.—(1) This regulation applies where a referral is—

- (a) made to a Responsible Person by authorities in accordance with regulation 8; or
- (b) sent to a Responsible Person by another Responsible Person pursuant to paragraph (4).

(3) In the following provisions of this regulation, the Responsible Person to whom the referral is made or sent is referred to as the “Relevant Responsible Person”.

(4) If the dispute falls to be determined by the Relevant Responsible Person, that person must—

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- (a) in determining the dispute, consult all persons who are Responsible Persons in relation to the authorities which are parties to the dispute (“the authorities in dispute”); and
 - (b) prior to notifying those authorities of the outcome of the determination, notify those Responsible Persons of that outcome.
- (5) If the dispute does not fall to be determined by the Relevant Responsible Person, that person must—
- (a) as soon as reasonably practicable after receiving the referral, send the referral to the Responsible Person by whom the dispute appears to the Relevant Responsible Person to fall to be determined; and
 - (b) notify the authorities in dispute of the action taken pursuant to sub-paragraph (a).
- (6) For the purposes of this regulation, a reference to a dispute falling, or appearing to fall, to be determined by a Responsible Person (however expressed) is a reference to that dispute so falling, or appearing to fall, to be determined pursuant to regulation 2.

Responsibility for meeting needs pending determination of dispute etc

5.—(1) The authorities which are parties to a dispute must not allow the existence of the dispute to prevent, delay, interrupt or otherwise adversely affect the meeting of the needs of the adult or carer to whom the dispute relates.

(2) The authority which is meeting the needs for accommodation of the adult on the date on which the dispute arises must continue to meet those needs.

(3) This paragraph applies to a case where—

- (a) a dispute concerns the application of any of paragraphs 1 to 4 of Schedule 1 to the case of an adult (“the relevant adult”); and
- (b) no authority is meeting that adult’s needs for accommodation as at the date on which the dispute arises (“the relevant date”).

(4) In a case to which paragraph (3) applies, the authority in whose area the relevant adult is living as at the relevant date must meet that adult’s needs for accommodation from that date.

(5) Provision by an authority of accommodation to an adult pursuant to paragraph (2) or (4) does not affect the liability of any authority for the provision of accommodation to that adult in respect of the period during which that accommodation is provided.

(6) For the purposes of paragraphs (2) and (4), a requirement to meet needs is a requirement to meet those needs until the dispute in question is resolved.

Steps to be taken prior to referral of a dispute including steps to try to resolve a dispute

6.—(1) The authorities which are parties to a dispute (“authorities in dispute”) must, prior to the referral of the dispute, take the steps specified in this regulation.

(2) As soon as reasonably practicable after the date on which the dispute arises—

- (a) the authority which is the lead authority in relation to the dispute must identify all the authorities which are parties to the dispute and co-ordinate discussions between those authorities in an attempt to resolve the dispute; and
- (b) each of the authorities in dispute must—
 - (i) nominate an individual who will act as the point of contact within that authority in relation to the dispute; and
 - (ii) provide the other authorities in dispute with the contact details of that individual.

(3) The lead authority must—

- (a) co-ordinate the discharge, by the authorities in dispute, of their duties under this regulation;
- (b) take steps to obtain, from the other authorities in dispute, information which may be relevant to the determination of the dispute;

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- (c) disclose that information to the other authorities in dispute (if any); and
 - (d) disclose to the other authorities in dispute any information the lead authority itself holds that may help to resolve the dispute.
- (4) The authorities in dispute must—
- (a) take all reasonable steps to resolve the dispute between themselves; and
 - (b) co-operate with each other in the discharge of their duties under this regulation.
- (5) Each of the authorities in dispute must—
- (a) engage in a constructive dialogue with the other authorities in dispute, with a view to bringing about the speedy resolution of the dispute;
 - (b) comply, without delay, with any reasonable request for relevant information made by the lead authority; and
 - (c) keep the other authorities in dispute informed of information which appears to it to be relevant to the determination of the dispute.
- (6) The lead authority in relation to the dispute must provide to the adult or carer to whom the dispute relates (“the relevant person”), or to the relevant person’s representatives, such information as appears to it to be appropriate about progress in resolving the dispute.

Contents of referral etc

7.—(1) Where a referral is made in accordance with regulation 8, the authority which is the lead authority in relation to the dispute which is the subject of the referral (“the lead authority”), must send a copy of the referral to all persons who are Responsible Persons in relation to the authorities which are parties to the dispute.

- (2) Subject to paragraphs (8) and (9), the referral must include the following documents—
- (a) a letter signed by the authority which is the lead authority in relation to the dispute stating that the dispute is being referred and identifying the provision of the Act, the application of which the dispute is about;
 - (b) a statement of facts signed by each of the authorities which are parties to the dispute (“the authorities in dispute”) which includes the information specified in paragraph (3); and
 - (c) copies of all correspondence between the authorities in dispute which relates to the dispute.
- (3) The information referred to in paragraph (2)(b) is—
- (a) an explanation of the nature of the dispute;
 - (b) a chronology of the events leading up to the referral of the dispute, including the date on which the dispute arose;
 - (c) details of the needs of the adult or carer (“the relevant adult or carer”) to whom the dispute relates since the beginning of the period to which the dispute relates;
 - (d) a statement as to which authority has met those needs since then, how those needs have been met and the statutory provisions under which they have been met;
 - (e) details of the relevant adult’s place of residence, and of any former places of residence which are relevant to the dispute;
 - (f) in a case where the relevant adult’s capacity to decide where to live is relevant to the dispute, either—
 - (i) a statement that the authorities in dispute agree that the adult has, or lacks, such capacity; or
 - (ii) information which appears to any of the authorities in dispute to be relevant to the question of whether the adult has, or lacks such capacity;
 - (g) a statement as to any other steps taken by the authorities in dispute in relation to the relevant adult or carer, and which may be relevant to the dispute;

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- (h) details of the steps that the authorities in dispute have taken to resolve the dispute between themselves;
- (i) any other information which appears to any of the authorities in dispute to be relevant to the determination of the dispute.

(4) The authorities in dispute may submit legal arguments they are relying on in relation to the dispute provided that this is done within 14 days of the date on which the documents referred to in paragraph (2) are sent.

(5) If an authority submits legal arguments, it must—

- (a) send a copy of those arguments to the other authorities in dispute; and
- (b) provide evidence to the Responsible Person determining the dispute that it has done so.

(6) If the Responsible Person determining the dispute asks any of the authorities in dispute to provide further information, that authority must comply without delay.

(7) For the purposes of this regulation—

- (a) a reference to lacking capacity (however expressed) is a reference to—
 - (i) lacking capacity within the meaning of section 2 of the Mental Capacity Act 2005(a);
 - (ii) being incapable within the meaning of the Adults with Incapacity (Scotland) Act 2000(b); or
 - (iii) being incapable by reason of mental disorder within the meaning of Article 3(1) of the Mental Health (Northern Ireland) Order 1986(c);
- (b) a reference to having capacity (however expressed) is a reference to not lacking capacity.

(8) Where the dispute is solely about the application of section 49(3)(c), 50(4)(c) or 51(4)(c) of the Act (recovery of costs), paragraph (3) is to read as if sub-paragraphs (e), (f) and (g) were omitted and as if after sub-paragraph (i) there was inserted—

“(j) information as to the costs being sought to be recovered, and a breakdown of those costs.”

(9) Where the dispute is solely about the application of section 49(3)(a) or (b), 50(4)(a) or (b) or 51(4)(a) or (b) of the Act (duty to co-operate), paragraph (3) is to read as if sub-paragraphs (c) to (g) were omitted.

Stage at which dispute must be referred

8. If the authorities which are parties to a dispute cannot resolve the dispute between themselves within four months of the date on which it arose, they must refer it to the appropriate Responsible Person for determination.

Transitory provision

9. Pending the commencement of Part 4 of the Social Services and Well-being (Wales) Act 2014—

- (a) in regulation 1(3), the reference in paragraph (c) of the definition of “needs”, to section 35 or 36 of that Act, is to be read as a reference to—
 - (i) Part 3 of the National Assistance Act 1948(d),
 - (ii) section 45 of the Health Services and Public Health Act 1968(e),

(a) 2005 c.9.

(b) 2000 asp 4.

(c) S.I.1986/595 (N.I. 4).

(d) 1948 c.29.

(e) 1968 c.46. Section 45 was amended by Schedule 3 to the Local Authority Social Services Act 1970 (c.42), paragraph 15 of Schedule 23 to the Local Government Act 1972 (c.70), Part 12 of Schedule 1 to the Statute Law (Repeals) Act 1978 (c.45),

(iii) section 117 of the Mental Health Act 1983(a), or

(iv) Schedule 15 to the National Health Service (Wales) Act 2006(b);

(b) in that paragraph, the reference to section 40 or 45 of that Act is to be read as a reference to section 2 of the Carers and Disabled Children Act 2000(c).

Signed by authority of the Secretary of State for Health

Date

Name
Minister of State for Health
Department of Health

EXPLANATORY NOTE

(This note is not part of the Regulations)

Schedule 1 to the Care Act 2014 (“the Act”) makes provision to ensure that where a local authority in England, Wales or Scotland, or a Health and Social Care trust in Northern Ireland (“an HSC trust”) places an adult in residential accommodation in another of those territories, in general, this does not result in the transfer of that authority’s responsibility for that adult. The relevant provisions are to be found in paragraphs 1 to 4 of Schedule 1.

Sections 48 to 52 of the Act impose duties on local authorities in England and Wales, and on HSC trusts, to meet needs of individuals in circumstances where registered providers of care are unable to carry on because of business failure.

These Regulations make further provision in relation to the resolution of disputes between authorities 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 these Regulations).

Regulation 2 sets out who is to determine disputes. The effect of this is that where the adult or carer in question (“the relevant person”) is living (or, in a case where the adult is homeless, is physically present) in the same territory as that in which an authority which is party to a dispute is situated, the dispute is to be determined by the Responsible Person in relation to that authority. In other cases the dispute is to be determined by agreement between the persons who are Responsible Persons in relation to the authorities in dispute. The Responsible Person in relation to an authority is: in relation to a local authority in England, the Secretary of State, in relation to a local authority in Wales, the Welsh Ministers, in relation to a local authority in Scotland, the

Schedule 2 to the Residential Homes Act 1980 (c.7), Part 1 of Schedule 10 to the Health and Social Services and Social Security Adjudications Act 1983 (c.41), section 42(7) of, and Schedule 10 to, the 1990 Act, paragraph 5(1) of Schedule 10 to the Local Government (Wales) Act 1994 (c.19), section 117(1) of the 1999 Act and paragraphs 33 and 34 of Schedule 1 to the National Health Service (Consequential Provisions) Act 2006 (c.43), and by S.I. 1968/1699, and is prospectively amended by section 45(6) of the 2002 Act. Section 45 has been repealed in relation to Scotland by section 14(4) of, and Part 1 of Schedule 9 to, the 1968 Act. The functions of the Secretary of State under section 45 were, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales by Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) (“the TOFO”). Functions of the National Assembly for Wales were transferred to the Welsh Ministers by section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 (c.32) (“the GOWA”).

- (a) 1983 c.20. Section 117 was amended by paragraph 107 of the Health Authorities Act 1995 (c.17), paragraph 12(17) of Schedule 4 to the Crime (Sentences) Act 1997 (c.43), paragraphs 42 and 47 of Schedule 2 to the National Health Service Reform and Health Care Professions Act 2002 (c.17), paragraphs 1 and 24 of Schedule 3 and Part 5 of Schedule 11 to the Mental Health Act 2007 (c.12), paragraph 3 of Schedule 1 to the Health Act 2009 (c.21), paragraph 15 of Schedule 1 to the Mental Health (Patients in the Community) Act 1995 (c.52), section 4 of the Health and Social Care Act 2012 (c.7), and by S.I. 2007/961. The functions of the Secretary of State under section 117 were, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales by Schedule 1 to the TOFO. Functions of the National Assembly for Wales were transferred to the Welsh Ministers by section 162 of, and paragraph 30 of Schedule 11 to, the GOWA.
- (b) 2006 c.42.
- (c) 2000 c.16.

Annex 1: The Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014

Scottish Ministers and in relation to an HSC trust, the Department of Health, Social Services and Public Safety in Northern Ireland.

Regulation 3 sets out who the “lead authority” is for the purposes of duties imposed on such an authority under the Regulations. The lead authority is the authority in whose area the relevant person is living (or physically present) as at the date on which the dispute arises.

Regulation 4 imposes duties to be discharged by Responsible Persons upon receipt of a referral of a dispute. This includes a duty to consult other persons who are Responsible Persons in relation to the authorities in dispute when determining the dispute, and to send on a referral to the appropriate Responsible Person where this has not been sent to the correct Responsible Person.

Regulation 5 sets out duties on authorities in dispute in relation to the meeting of needs until a dispute is determined. This includes a requirement for the authority in whose area the person is living (or physically present) to meet an adult’s needs for accommodation in circumstances where no authority is meeting such needs as at the date on which the dispute arises. This does not affect the liability of that authority or any other authority for meeting those needs.

Regulation 6 sets out steps which authorities in dispute have to take before referring a dispute for determination.

Regulation 7 requires the lead authority to send a copy of the referral of a dispute to relevant Responsible Persons, and sets out what must or may be included with a referral. The documents to be included are a letter from the lead authority, a statement of facts and copies of relevant correspondence. The authorities may also submit supporting legal arguments. Where a dispute solely concerns the recovery of costs or a duty to co-operate, regulation 7 omits the requirement to submit certain information, and, in the case of a dispute solely concerning the recovery of costs, includes a requirement to submit information concerning the costs being sought to be recovered.

Regulation 8 sets out a duty to refer disputes if they cannot be resolved within a specified time.

Regulation 9 makes transitory provision in respect of the period before Part 4 of the Social Services and Well-being (Wales) Act 2014 is commenced.

2014 No. XXXX

SOCIAL CARE, SCOTLAND

The Care and Support (Cross-border Placements) (Business Failure Duties) (Scotland) Regulations 2014

Made - - - - - XXX

Laid before Parliament XXX

Coming into force in accordance with regulation 1(2)

The Secretary of State makes these Regulations in exercise of the powers conferred by paragraphs 1(6) and (7), 2(9) and (10) and 4(5) and (6) of Schedule 1 to, and section 125(7) and (8) of the Care Act 2014(a).

In accordance with paragraph 11 of Schedule 1 to the Care Act 2014, the Secretary of State has obtained the consent of the Scottish Ministers to the making of these Regulations.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Care and Support (Cross-border Placements) (Business Failure Duties) (Scotland) Regulations 2014.

(2) These Regulations come into force on—

- (a) [] 2016 in so far as they relate to a case within paragraph 2(3) or (4) of the Schedule (cross-border placements from Wales to Scotland); and
- (b) 1st April 2015 for all other purposes.

(3) In these Regulations—

- “the 1986 Act” means the Insolvency Act 1986(b);
- “the 2010 Act” means the Public Services Reform (Scotland) Act 2010(c);
- “a care provider” means a person registered under section 59 of the 2010 Act in respect of a care service and “the care provider” is to be construed accordingly;
- “care service” has the meaning given in section 47 of the 2010 Act;
- “the Schedule” means Schedule 1 to the Care Act 2014.

Regulations 3 to 5 – application and interpretation

2.—(1) Regulations 3 to 5 apply to a case within paragraph 1(3) (cross-border placements from England to Scotland), 2(3) or (4) (cross-border placements from Wales to Scotland) or 4(3) (cross-border placements from Northern Ireland to Scotland) of the Schedule.

(a) 2014 c.23 (“the Act”). The power to make regulations is exercisable by the Secretary of State – *see* section 125(1).
(b) 1986 c.45.
(c) 2010 asp 8.

Annex 2: The Care and Support (Cross-border Placements) (Business Failure [Duties]) (Scotland) Regulations 2014

(2) In those regulations—

“the relevant adult” means the adult in respect of whom the arrangements mentioned in the relevant paragraph have been made;

“the relevant arrangements” means the arrangements mentioned in the relevant paragraph;

“the relevant care provider” means the care provider with whom those arrangements have been made;

“the relevant paragraph” means paragraph 1(3), 2(3) or (4) or 4(3) of the Schedule, as the case may be.

Temporary duty on local authority in Scotland

3.—(1) In the circumstances specified in paragraph (2)—

- (a) the duties specified in regulation 5 are to apply in the case of the relevant adult; and
- (b) the discharge of any such duties is to continue for so long as the local authority(a) discharging the duty considers necessary.

(2) The circumstances referred to in paragraph (1) are that—

- (a) the relevant care provider is unable to continue to provide the care service in respect of which the relevant arrangements have been made; and
- (b) such inability arises by virtue of any of the circumstances set out in regulation 4.

Circumstances in which a local authority is required to carry out specified duties

4.—(1) In relation to a care provider which is a company, the circumstances referred to in regulation 3(2)(b) are—

- (a) the nominee in relation to a proposal for a voluntary arrangement under Part 1 of the 1986 Act submits a report to the court under section 2 (procedure where nominee is not the liquidator or administrator) of that Act which states that in the nominee's opinion meetings of the company and its creditors should be summoned to consider the proposal;
- (b) the directors of the company lodge with the court documents and statements in accordance with paragraph 7(1) of Schedule A1 (moratorium where directors propose voluntary arrangement) to the 1986 Act;
- (c) an administrative receiver within the meaning of section 251 of the 1986 Act is appointed in relation to the company;
- (d) the company enters administration within the meaning of paragraph 1(2)(b) of Schedule B1 to the 1986 Act;
- (e) a resolution is passed for a voluntary winding up of the company without a declaration of solvency under section 89 of the 1986 Act;
- (f) a meeting of creditors is held in relation to the company under section 95 (creditors' meeting which has the effect of converting a members' voluntary winding up into a creditors' voluntary winding up) of the 1986 Act;
- (g) an order for the winding up of the company is made by the court under Part 4 or 5 of the 1986 Act;
- (h) an administration order is made by the court in respect of the company by virtue of any enactment which applies Part 2 (administration orders) of the 1986 Act (with or without modification);
- (i) a notice from an administrator under paragraph 83(3) of Schedule B1 (moving from administration to creditors' voluntary liquidation) to the 1986 Act in relation to the company is registered by the registrar of companies;

(a) See section 1(2) of the Social Work (Scotland) Act 1968 (c. 49) as to the meaning of “local authority”..

Annex 2: The Care and Support (Cross-border Placements) (Business Failure [Duties]) (Scotland) Regulations 2014

- (j) the company moves from administration to winding up pursuant to an order of the court under rule 2.132 (conversion of administration to winding up - power of court) of the Insolvency Rules 1986(a);
 - (k) an administrator or liquidator of the company, being the nominee in relation to a proposal for a voluntary arrangement under Part 1 of the 1986 Act (company voluntary arrangements), summons meetings of the company and of its creditors, to consider the proposal, in accordance with section 3(2) (summoning of meetings) of the 1986 Act.
- (2) In relation to a care provider who is an individual, the circumstances referred to in regulation 3(2)(b) are—
- (a) the individual is adjudged bankrupt or sequestration of the provider's estate has been awarded;
 - (b) the nominee in relation to a proposal for a voluntary arrangement under Part 8 of the 1986 Act submits a report to the court under section 256(1) or 256A(3) of that Act which states that in the nominee's opinion a meeting of the individual's creditors should be summoned to consider the debtor's proposal;
 - (c) a deed of arrangement made by or in respect of the affairs of the individual is registered in accordance with the Deeds of Arrangement Act 1914(b);
 - (d) the individual executes a trust deed for the individual's creditors or enters into a composition contract.
- (3) In relation to a care provider which is a partnership, the circumstances referred to in regulation 3(2)(b) are—
- (a) an order for the winding up of the partnership is made by the court under any provision of the 1986 Act (as applied by an order under section 420 (insolvent partnerships) of that Act);
 - (b) sequestration is awarded on the estate of the partnership under section 12 of the Bankruptcy (Scotland) Act 1985(c) or the partnership grants a trust deed for its creditors;
 - (c) the nominee in relation to a proposal for a voluntary arrangement under Part 1 of the 1986 Act (as applied by an order under section 420 of that Act) submits a report to the court under section 2 (procedure where nominee is not the liquidator or administrator) of that Act which states that in the nominee's opinion meetings of the members of the partnership and the partnership's creditors should be summoned to consider the proposal;
 - (d) the members of the partnership lodge with the court documents and statements in accordance with paragraph 7(1) of Schedule A1 (moratorium where directors propose voluntary arrangement) to the 1986 Act (as applied by an order under section 420 of that Act).

Specified duties

5.—(1) The duties referred to in regulation 3(1)(a) are the duties under section 12 or 13A of the Social Work (Scotland) Act 1968 (social welfare services and residential accommodation with nursing)(d) in so far as the discharge of the duties would involve meeting the relevant adult's needs by taking the following steps—

- (a) providing or securing the provision of accommodation; or

(a) S.I. 1986/1925.

(b) 1914 c.47.

(c) 1985 c.66.

(d) 1968 c.49. Section 12 has been amended by paragraph 10(5) of Schedule 9 to the National Health Service and Community Care Act 1990 (c.19) ("the 1990 Act"), paragraph 15(11) of Schedule 4 to the Children (Scotland) Act 1995 (c.36), section 120(1) of the Immigration and Asylum Act 1999 (c.33) ("the 1999 Act") and section 3 of the Community Care and Health (Scotland) Act 2002 (asp 5) ("the CCHSA 2002"), and is prospectively amended by section 46(1) of the Nationality, Immigration and Asylum Act 2002 (c.41) ("the 2002 Act"). Section 13A was inserted by section 56 of the 1990 Act and amended by section 120(2) of the 1999 Act, section 72(a) of, and paragraph 4(3) of Schedule 3 to, the Regulation of Care (Scotland) Act 2001 (asp 8) and paragraph 1(4) of Schedule 2 to the CCHSA 2002, and by S.S.I. 2011/211, and is prospectively amended by section 46(2) of the 2002 Act.

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- (b) providing, maintaining and making such arrangements as a local authority considers appropriate and adequate for the provision of suitable accommodation where nursing is provided for persons who are or appear to be in need of such accommodation by reason of infirmity, age, illness or mental disorder, dependency on drugs or alcohol or being substantially handicapped by any deformity or disability.

(2) In paragraph (1), “needs” means, in relation to an adult, the needs of the adult which were being met by the relevant care provider under the relevant arrangements immediately before the provider became unable to continue to provide the care service in question as mentioned in regulation 3(2)(a).

Signed by authority of the Secretary of State for Health

Date

Name
Minister of State for Health
Department of Health

EXPLANATORY NOTE

(This note is not part of the Regulations)

Schedule 1 to the Care Act 2014 makes provision to ensure that where a local authority in England, Wales or Scotland, or a Health and Social Care trust in Northern Ireland makes arrangements for the provision to an adult of residential accommodation in another of those territories, in general, this does not result in the transfer of that authority’s responsibility for that adult. The relevant provisions are to be found in paragraphs 1 to 4 of Schedule 1.

These Regulations make provision to specify circumstances in which in the case of arrangements for the provision of accommodation in Scotland, specified duties on Scottish local authorities under Part 2 of the Social Work (Scotland) Act 1968 (“the 1968 Act”) are nonetheless to apply in the case of the adult concerned.

Regulation 3 sets out that the circumstances are that the care provider with whom the arrangements have been made is unable to continue to provide the service in respect of which those arrangements have been made (this would be accommodation) and this inability arises by virtue of any of the circumstances set out in regulation 4. Those duties are to continue to be discharged for so long as the local authority considers necessary.

Regulation 5 sets out the duties under the 1968 Act which are to apply.

Annex 3: Respondent Information Form

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately. **If you are responding to more than one set of regulations at the same time, you only need to complete this form once.**

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Forename

2. Postal Address

<input type="text"/>		
Postcode	Phone	Email

3. Permissions - I am responding as...

Individual / Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response,
name and address all

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

Yes No

Annex 3: Respondent Information Form

<p>available</p> <p>or</p> <p>Yes, make my response available, but not my name and address <input type="checkbox"/></p> <p>or</p> <p>Yes, make my response and name available, but not my address <input type="checkbox"/></p>	
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

4. Additional information – I am responding as:

Please tick as appropriate

1. NHS Health Board	
2. Other NHS Organisation	
3. General Practitioner	
4. Local Authority	
5. Other statutory organisation	
6. Third sector care provider organisation	
7. Independent / private care provider organisation	
8. Representative organisation for professional group	
9. Representative organisation for staff group e.g. trade union	
10. Education / academic group	
11. Representative group for patients / care users	
12. Representative group for carers	
13. Patient / service user	
14. Carer	
15. Other – please specify	

Annex 4: **Consultation Questions**

Cross-border placements

People in residential care 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. The Act sets out certain principles which seek to support the notion of residential care placements by ensuring that, generally, where a local authority (or equivalent in Northern Ireland) places someone in residential care cross-border within the UK, it does not result in transfer of the authority's responsibility for the individual concerned.

The draft Care and Support (Cross-border Placements and Provider Failure: Temporary Duty) (Dispute Resolution) Regulations 2014, cover:

- Process for resolution of cross-border disputes that may arise between authorities about the general principles of non-transfer of responsibility;
- Process for resolution of cross-border disputes that may arise between authorities in relation to temporary duties to meet needs in the provider failure context.

Questions for consultation

1. Do the regulations provide for an effective dispute resolution procedure?

Provider Failure

The Act also requires the Regulations to define the meaning of "business failure". This has been done by referencing different types of insolvency in the Regulations e.g. the appointment of an administrator. These insolvency 'situations' will act as a trigger for local authorities in England and Wales, and equivalent in Northern Ireland to temporarily meet care and support needs where insolvency causes a care provider to become unable to do so.

Questions for consultation

1. We invite views on the approach to defining business failure by reference to insolvency situations.
2. We also invite views on the insolvency situations listed, e.g. are they appropriate and clear. Should other situations be covered?

Annex 5: **List of consultees**

Responses to this consultation are welcome from any individual or organisation with an interest. The following have been invited to respond:

Convention of Scottish Local Authorities
Society of Local Authority Lawyers and Administrators in Scotland
Age Scotland
Alzheimer Scotland - Action on Dementia
ARK Housing Association
Association of Directors of Social Work
Audit Scotland
Bield Housing Association
BUPA
Camphill Scotland
Capability Scotland
Care Commission
Care Information Scotland
Carers Scotland
Citizens Advice Scotland
Community Care Providers Scotland
Cornerstone Community Care
Counsel and Care
CrossReach
Crossroads Scotland
Scottish Human Rights Commission
The Scottish Housing Regulator
ELCAP Ltd
ENABLE
People First Scotland
Independent Living Services Scotland
RNIB Scotland
Action on Hearing Loss Scotland
Scottish Care
Scottish Churches Parliamentary Office
Scottish Consortium for Learning Disabilities
Scottish Council for Voluntary Organisations
Scottish Council on Deafness
Scottish Federation of Housing Associations
Scottish Older People's Helpline
Scottish Pensioners Forum
SCSWIS
Housing Support Enabling Unit
The Abbeyfield Society for Scotland Ltd
The Scottish Housing Regulator
United Kingdom Home Care Association
Values into Action Scotland



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