

PERSONAL CARE AT HOME BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Personal Care at Home Bill introduced in the House of Commons on 25 November 2009. They have been prepared by the Department of Health in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. At present local authorities providing certain social care services have the power under section 17 of the Health and Social Services and Social Security Adjudications Act 1983 to recover such charges as they consider reasonable in respect of those services. Those services include personal care.
4. The Secretary of State has power under section 15 of the Community Care (Delayed Discharges etc.) Act 2003 (“the 2003 Act”) to make regulations requiring certain social care services to be provided by local authorities free of charge. However the regulations cannot require some of those services to be provided free for a period longer than six weeks. These services include personal care provided to a person in any place where that person is living.
5. The Bill enables regulations to be made requiring personal care to be provided free to persons in their own homes for an indefinite period. It does this by amending the regulation-making power in the 2003 Act to restrict the six-week limitation to personal care provided to people living in certain types of accommodation.

Territorial application: Wales

6. The Bill has the effect of broadening the regulation-making powers of Welsh Ministers under the 2003 Act. This is because under section 16 of the 2003 Act the Welsh

Ministers have the same powers to make regulations as the Secretary of State does under section 15. As the Bill is making provision for a matter within the competence of the National Assembly for Wales, a Legislative Consent Motion is expected to be sought in the Assembly.

COMMENTARY ON CLAUSES

Clause 1: Free provision of personal care at home

7. Clause 1 makes amendments to section 15 of the 2003 Act together with consequential amendments to other primary legislation.
8. *Subsection (2)* amends section 15(4)(b) of the 2003 Act to remove the six-week restriction on the free provision of personal care, except in so far as this relates to the provision of personal care to someone living in accommodation that an establishment provides together with personal care. This would cover, for example, care homes but not sheltered accommodation or extra care housing. Extra care housing is an arrangement whereby a person is provided with community care services in specialist accommodation designed for the needs of older people, which may often be found or arranged for them by the care provider. The accommodation and care provided in such accommodation are not provided together but under separate arrangements made by the individual.
9. *Subsection (3)* provides that the six-week limitation in section 15(4)(b) does not apply to the provision of personal care under an adult placement scheme. An adult placement scheme involves placing an adult in need (such as a disabled person) with a carer who might share their home with the person. It is similar to fostering and the purpose is to enable the person in need to live as independently as possible.
10. *Subsection (4)* provides that the regulations under section 15 can, in particular, impose on a local authority functions relating to eligibility for the free provision of personal care, and can refer to guidance under section 7 of the Local Authority Social Services Act 1970. The functions which could be imposed might, for example, include the setting of criteria for the free provision and the determination of eligibility by reference to those criteria and any criteria that the Secretary of State sets.
11. *Subsection (4)* also inserts new subsection (4C) into section 15 of the 2003 Act. The new provision will ensure that a local authority has the power to make a person's eligibility for free personal care conditional on the person undergoing a process designed to maximise the person's ability to live independently. This could include a short period of intensive and focussed support to maximise the person's independent living skills.
12. *Subsection (4)* also inserts a new subsection (4D). The effect of it is that a person is to be regarded for the purposes of section 15 as living at home if the place where the

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person lives is not accommodation provided under Part 3 of the 1948 Act or accommodation of the kind described in the amended subsection (4)(b) (a care home, for example).

13. *Subsection (5)* inserts new subsection (4E) into section 15 of the 2003 Act. This provides that section 21(5) of the National Assistance Act 1948 (“the 1948 Act”) applies for the purposes of section 15 of the 2003 Act. Section 21(5) of the 1948 Act provides that references to accommodation provided under Part 3 of that Act include references to accommodation as well as board and other services, amenities and requisites provided in connection with the accommodation (except where in the opinion of the authority managing the premises their provision is unnecessary). As a result, references in section 15 to the provision of accommodation under Part 3 of the 1948 Act will include the provision of personal care.
14. *Subsection (6)* makes a consequential amendment to the Local Authority Social Services Act 1970 to include functions conferred on local authorities under sections 15 and 16 of the 2003 Act in the list of social services functions in Schedule 1 to that Act. Section 7 of that Act requires local authorities to act under the general guidance of the Secretary of State in the exercise of their social services functions.
15. *Subsections (7) and (8)* make consequential amendments to the 1948 Act and the Health and Social Services and Social Security Adjudications Act 1983.

Clause 2: Extent and short title

16. Clause 2 makes provision as to the extent of the provisions of the Bill. See paragraph 6 above for further information on the application of the Bill to Wales.

PUBLIC SECTOR FINANCIAL COST AND MANPOWER IMPLICATIONS

17. The Government’s view is that the Bill has little overall effect on public sector manpower and public expenditure. The full year costs will be made up of £420 million from existing Department of Health budgets and £250 million from local authority efficiency savings. Further details on the financial implications of the provisions contained in the Bill can be found in the Impact Assessment (referred to in paragraph 18).

SUMMARY OF IMPACT ASSESSMENT

18. A separate Impact Assessment has been produced to accompany the Bill. The Impact Assessment can be found at www.dh.gov.uk/en/publicationsandstatistics/legislation. It is also available for Members of the House of Commons from the Vote Office.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Consideration of the European Convention on Human Rights

19. The Bill will amend section 15 of the 2003 Act to enable the Secretary of State to make regulations requiring personal care to be provided free of charge to, for example, people with the highest needs living in their own homes for an indefinite period.
20. ECHR issues arise to the extent that a person living in accommodation that an establishment provides together with personal care might allege that they are being discriminated against in the protection of their rights under Article 14 ECHR (freedom from discrimination in the protection of Convention rights) read with Article 1 of Protocol 1 ECHR (right to peaceful enjoyment of possessions). This would be in so far as that person would have to pay for any personal care that they receive, whereas if they were living at home, they might be entitled to free personal care.
21. The Department accepts that “living in accommodation that an establishment provides to the person together with the care” may be found to be an “other status” for the purposes of Article 14. This is because it was held in the case of *R (RJM) v Secretary of State for Work and Pensions [2008] UKHL 63* that treating homeless people differently from those with homes fell within Article 14. Their Lordships’ view was that if persons living in a certain type of home, for example flats, were treated differently from those living in another type, for example houses, that would clearly potentially fall within Article 14 as an “other status”.
22. However, the Department’s view is that the different treatment of people living at home is not discriminatory. This is because the policy underlying the different treatment pursues a legitimate aim in a proportionate way.
23. The key aim of the policy behind the Bill is to enable, support and encourage more people to avoid or delay entering residential accommodation. Recent advances in technology designed to support people in their own homes (such as “telecare” and “telehealth”) mean that it is now possible for people to remain at home safely and for longer than previously when often the only option was to go into residential or nursing home care. Average stays in care homes are short, and remaining at home can improve not only the quality of a person’s life, but also give them more choice over the setting

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in which they die - most people's first preference is to die in their own home, whereas only 18% are able to do so.¹

24. It is considered that the proposals are proportionate as they are aimed at those people in highest need – the group of people who are most at risk of having to enter residential accommodation.
25. Moreover, it was noted in the *RJM* case referred to in paragraph 21 above that social policy is an area where a wide measure of appreciation is accorded to the State by the European Court of Human Rights. It was also noted in *RJM* that, where there is a general rule, a line must be drawn; and it is for Parliament to decide where. This inevitably means that hard cases will arise falling on the wrong side of it, but (as was noted in *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] 2WLR 781) that should not be held to invalidate the rule if, judged in the round, it is beneficial.
26. It is therefore considered that any interference with individuals' Article 14 rights is justified.

Section 19 of the Human Rights Act 1998

27. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined in section 1 of that Act). The Secretary of State for Health, the Rt. Hon. Andy Burnham M.P., has made the following statement:

“In my view, the provisions of the Personal Care at Home Bill are compatible with the Convention rights”.

Commencement

28. The Bill makes no express provision for commencement. By virtue of section 4(b) of the Interpretation Act 1978 the provisions will therefore commence on Royal Assent.

¹www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_086277