

**Explanatory Memorandum to the Health and Social Care Act 2008
(Commencement No 2 and Transitional Provisions) (Wales) Order 2010**

1. This Explanatory Memorandum has been prepared by the Older People and Long Term Care Policy Directorate of the Health and Social Services Directorate General and is laid before the National Assembly for Wales in conjunction with the above commencement order and in accordance with Standing Order 24.1

Minister's Declaration

2. In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Health and Social Care Act 2008 (Commencement No 2 and Transitional Provisions) (Wales) Order 2010. I am satisfied that there are no additional costs associated with this commencement order.

Gwenda Thomas AM,

Deputy Minister for Health and Social Services under authority of the Ministers for Health and Social Services, one of the Welsh Ministers

24 March 2010

Description

3. The Health and Social Care Act 2008 (Commencement No 2 and Transitional Provisions) (Wales) Order 2010 will commence in Wales section 148 of the Health and Social Care Act 2008 so as to:

- amend sections 24 and 32 of the National Assistance Act 1948 and make transitional provisions to clarify that these amendments will not affect certain individuals. In relation to the provision of residential accommodation with care, section 24 sets out provisions about the ordinary residence of a person for the purposes of a local authority providing this, while section 32 provides that local authorities can refer a dispute over a person's ordinary residence to the Secretary of State for Health or Welsh Ministers for determination;
- amend section 2 of the Chronically Sick and Disabled Persons Act 1970 and make a transitional provision that provides that this amendment will not operate in certain circumstances. This amendment makes disputes between local authorities over the ordinary residence of a person to be provided with services under section 2 subject to determination through the same procedure as under section 32 of the 1948 Act.

Matters of special interest to the Subordinate Legislation Committee

4. None.

Legislative Background

5. The powers exercisable by the Secretary of State under the National Assistance Act 1948 have been transferred to the Welsh Ministers. Powers to commence section 148 of the Health and Social Care Act 2008 are exercisable by the Welsh Ministers under section 170(3) of the Act in so far as they relate to Wales.

6. As this order to commence in Wales section 148 of the Health and Social Care Act 2008 makes certain transitional provisions, it should be processed through the Negative Resolution Procedure.

Purpose and intended effect of the legislation

Policy Objective

7. To clarify for local authorities the mechanism to be used to determine the ordinary residence of a person requiring accommodation and services under Part 3 of the National Assistance Act 1948 and section 2 of the Chronically Sick and Disabled Persons Act 1970. This is to reduce the occurrence of

disputes between authorities as to the ordinary residence of a person requiring accommodation and services.

8. Where disputes over ordinary residence nevertheless occur, to provide for a clear mechanism for these to be determined; both disputes between authorities in Wales and for disputes between authorities in Wales with authorities in England.

9. Accordingly, the provisions of the order will:

Amendment to section 24 of the 1948 Act

10. Under Part 3 of the 1948 Act a local authority is liable for the provision of residential accommodation and services to persons who are ordinary resident in its area. Section 24 of the 1948 Act sets out provisions about the ordinary residence of a person for this purpose. Section 24(6) contains a 'deeming provision' covering NHS hospital accommodation. This provision sets out that where a person is in receipt of NHS hospital accommodation, they remain ordinarily resident in the area in which they were ordinarily resident immediately before that accommodation was provided.

11. Pending the coming into force of section 148 of the 2008 Act, the deeming provision in section 24(6) applies only to NHS hospital accommodation and not other forms of accommodation where NHS services are provided. Section 148 of the 2008 Act will extend this "deeming provision" to cover all forms of accommodation where NHS services are being provided. This is to reflect the fact that accommodation provided by the NHS is now provided in a variety of settings, including private facilities, and is no longer limited to hospital settings only.

12. This order contains transitional provisions relating to the extension of section 24(6). This extension will only apply to people who are provided with non-hospital accommodation where NHS services are provided on or after the coming into force date of the order. Therefore, a person who is already being provided with NHS services in accommodation in a non-hospital setting will not be subject to this extension of the "deeming provision". This is because local authorities will have made assumptions about a person's ordinary residence on the basis of the current law and will have made arrangements for that person's care accordingly.

Amendment to section 32 of the 1948 Act

13. Under section 32 of the 1948 Act, local authorities in dispute over a person's place of ordinary residence can refer their dispute to the Secretary of State for Health or the Welsh Minister for resolution. The Welsh Ministers have held the power to determine such disputes since devolution of social care provision in Wales. However, pending the coming into force of section 148 of the 2008 Act, the Secretary of State for Health can only determine disputes that arise between local authorities in England and the Welsh Ministers can only determine disputes that arise between local authorities in Wales. For resolving cross-border disputes that arise between English and

Welsh authorities, to date it has been necessary to rely on agency arrangements made under the Government of Wales Act 1998.

14. The amendment to section 32 allows the Secretary of State for Health and the Welsh Ministers to determine cross-border disputes that arise between English and Welsh authorities and places a duty on them to publish arrangements for dealing with these disputes. Cross border arrangements will be published at the same time that this order is enacted. There are no transitional provisions in relation to this amendment.

Amendment to section 2 of the 1970 Act

15. Section 2 of the 1970 Act places a duty on local authorities to provide non-residential services to people who are ordinarily resident in their area. The amendment to section 2 enables local authorities to refer disputes occurring under this section to the Secretary of State for Health or the Welsh Ministers for resolution through the same mechanism under section 32 of the 1948 Act.

16. Prior to enacting section 148 of the 2008 Act, local authorities have been unable to refer such disputes to the Secretary of State for Health or the Welsh Ministers. Their only option to date has been to seek resolution from the courts if they are unable to resolve disputes locally. Therefore, this order contains a transitional provision in relation to this amendment. The transitional provision ensures that any disputes which have arisen before the coming into force date of the order, which are already subject to court proceedings, cannot be referred to the Welsh Ministers. This is to ensure the jurisdiction of the Welsh Ministers in determining disputes does not conflict with the courts' jurisdiction.

Consultation

17. There has been no formal consultation on these amendments. That said, a range of stakeholders were consulted on the amendments to the 1948 and 1970 Acts prior to the insertion of the ordinary residence provisions within the Health and Social Care Act 2008.

Regulatory Impact Assessment

18. As this is an order commencing primary legislation, there is no requirement for a Regulatory Impact Assessment in this particular case. That said it should be noted that as this commencement merely amends existing provisions over the determination of the ordinary residence of a person requiring accommodation and services, there are no additional costs or financial burdens for local authorities and others resulting from it