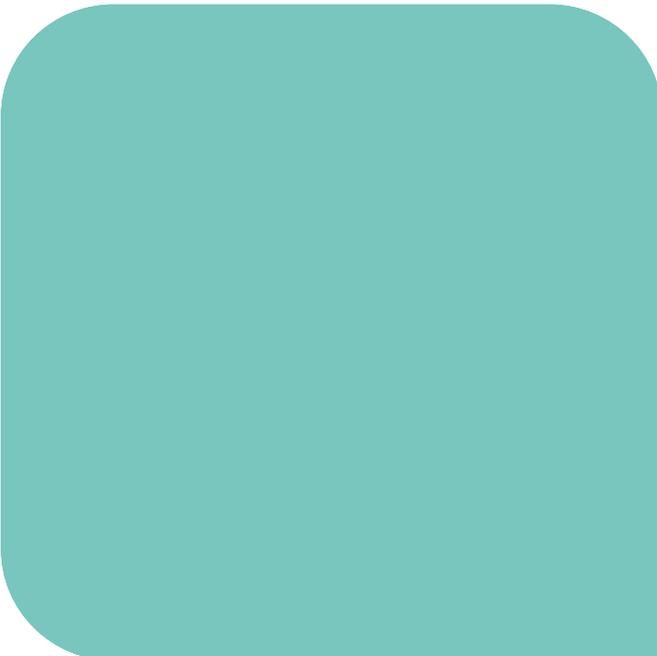
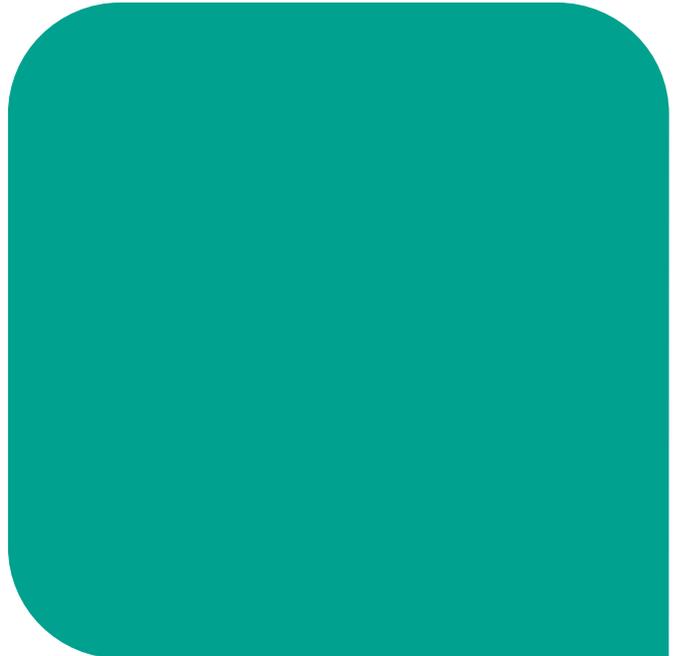




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Cross-border placements



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Introduction

This guidance is intended to assist authorities in the UK (England, Scotland, Wales and Northern Ireland) involved in cross-border placements as described in Schedule 1 to the Care Act 2014.

In this context, a cross-border placement describes a situation where an adult is being, or has been, placed by an English, Welsh or Scottish local authority or Northern Irish health and social care trust (collectively referred to in this guidance as 'authorities') into accommodation in a different UK country in order to meet their social care needs. The terms 'first authority' and 'second authority' are often used to describe the placing authority (the first authority) and the authority into whose area the person is moving (the second authority).

The guidance is not aimed at cross-border placements made by NHS bodies (in England, Scotland and Wales). It also does not cover cross-border placements where the person is being accommodated in a country outside of the UK. Cross-border placements involving children are not addressed by this guidance (except for the purposes of transition and when a young person is approaching, or has just reached, the age of 18).

In this guidance, 'social care' is used as a generic term which incorporates the following legal concepts:

- 'care and support' (in England and Wales) (1)
- 'community care services' (in Scotland) (2)
- 'social welfare' (in Northern Ireland). (3)

The meaning of 'accommodation' in England, Wales, Scotland or Northern Ireland is discussed later in this guidance.

Key messages

- The smooth functioning of cross-border arrangements is in the interests of everyone.
- It is important that people with social care needs can move to another cross-border area, confident that as far as possible they will continue to receive the support they need, and that the process of arranging and managing cross-border placements is as clear and straightforward as possible.
- As a general rule, responsibility for individuals who are placed by authorities into cross-border accommodation remains with the placing authority. All authorities are expected to cooperate fully and communicate effectively and proactively.
- Social care and health practitioners should seek appropriate legal advice for detailed queries regarding the application of the law to individual cases.
- The concept of 'ordinary residence' is a basis for determining which authority has responsibility for meeting an adult's social care needs (including non-residential care needs).
- Each of the four UK administrations has issued guidance on determining a person's ordinary residence.

Key principles of cross-border placements

The aim of the guidance is to support continuity of care across the UK's borders by setting out clear values and good practice. It is important that people with social care needs can move to another area, confident that as far as possible they will continue to receive the support they need, and that the process of arranging and managing cross-border placements is as clear and straightforward as possible. By working together and involving the person and their family, carers and other relevant persons, authorities can ensure that cross-border placements help to deliver improved outcomes for the person concerned.

During a social care assessment and in the development of an adult's care plan, the need for a cross-border placement may become apparent. Schedule 1 to the Care Act 2014 sets out the legal framework governing such placements. As a general rule, responsibility for individuals who are placed by authorities into cross-border accommodation remains with the placing authority.

The provisions contained in Schedule 1 are intended to facilitate the smooth functioning of cross-border placements. This outcome is clearly in the interest of all concerned, including authorities, care providers and, most importantly, adults and their families and carers. It is not envisaged that authorities will suffer significant added financial disadvantage as a result of a cross-border placement. All authorities are expected to cooperate fully and communicate effectively and proactively.

The four UK governments (England, Scotland, Wales and Northern Ireland) have agreed the following guiding principles which should be applied to all cross-border placements:

- authorities should ensure a person-centred process and take into account the outcomes an adult wishes to achieve
- authorities should work together and share information about their local social care system and services
- the adult moving should be given relevant information, in an accessible format, about local social care provision in the authority they are moving to
- authorities should work together to support a move across national boundaries to ensure the adult's social care provision is continued during the move
- authorities should share relevant information about the adult's social care needs, and any other information which it is believed necessary, in a timely manner and with the consent of the adult involved. (4)

These principles should be applied in a manner consistent with existing legal frameworks in each of the four UK countries. These are summarised in the next section of this guidance.

Legal frameworks

The legal frameworks governing cross-border placements are complicated and vary between jurisdictions. These frameworks include the Care Act 2014 in England, the Social Work (Scotland) Act 1968, the Social Services and Well-being (Wales) Act 2014 (when it is implemented in April 2016) and the Health and Personal Social Services (Northern Ireland) Order 1972.

The following is intended to provide a general overview of the main legal provisions that may be relevant. Health and social care practitioners should seek appropriate legal advice for detailed queries regarding the application of the law to individual cases.

Care Act 2014 and cross-border placements

New arrangements governing cross-border placements are set out in Schedule 1 to the Care Act 2014. Chapter 21 of the statutory guidance which accompanies this Act provides guidance on cross-border placements. (5) The four UK governments (England, Scotland, Wales and Northern Ireland) have worked together to agree Schedule 1 and Chapter 21 of the statutory guidance. In addition, Wales issued its own statutory guidance on cross-border placements in 2015, (6) which will be incorporated into the statutory Code of Practice relating to Part 11 of the Social Services and Well-being (Wales) Act 2014 from April 2016.

The following provides a general overview of Schedule 1 to the Care Act.

Paragraphs 1 to 4 of the Care Act 2014

These make provision to ensure that where an authority in England, Wales, Scotland or Northern Ireland places an adult into accommodation in another of those countries, in general, responsibility for the adult is not transferred (the meaning of a placement is discussed later in this guidance).

Paragraph 5 of the Care Act 2014

If authorities fall into dispute about a cross-border placement, they must request a determination of the dispute to be made if the dispute cannot be resolved within four months. Such determinations are made by the secretary of state or the relevant ministers or department in Scotland, Wales or Northern Ireland, depending on the circumstances. The process for determining disputes is discussed later in this guidance.

Paragraph 6 of the Care Act 2014

This enables an authority to recover the costs of providing accommodation in England, Wales, Scotland or Northern Ireland from an authority in another of those countries where the latter was liable to provide the adult in question with that accommodation.

Paragraph 8 of the Care Act 2014

This ensures that the general principles of non-transfer of responsibility (under paragraphs 1 to 4 of Schedule 1) remain unaffected where the adult in question is provided with NHS accommodation.

Schedule 1 also includes regulation-making powers to apply these cross-border provisions to specified types of accommodation and to where accommodation is being

paid for by direct payments. The UK government and the devolved administrations will be keeping under review the possibility of exercising the regulation-making powers, in light of the implementation of cross-border placements and policy developments across all UK administrations.

Business failure

Sections 48 to 52 of the Care Act 2014 impose duties on authorities in England, Wales and Northern Ireland to meet the needs of individuals in circumstances where registered providers of care are unable to carry on because of business failure.

In the event of provider failure in Scotland, local authorities have duties under Part 2 of the Social Work (Scotland) Act 1968 as specified in the Care and Support (Cross-border Placements) (Business Failure Duties of Scottish Local Authorities) Regulations 2013 (SI 2014/2839).

Details specifying the dispute resolution process in respect of cross-border placements are set out in the Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014 (SI 2014/2843) and Department of Health, 'Care and support statutory guidance' (October 2014).

At present, authorities in Wales may only place adults into accommodation in Wales or in England. From April 2016, when the Social Services and Well-being (Wales) Act 2014 comes into force, authorities in Wales will be able to make cross-border placements in Scotland and Northern Ireland.

Mental capacity law and cross-border placements

The law governing decision-making for or on behalf of adults who lack decision-making capacity can also be an important aspect of cross-border placements. The relevant law currently is:

- The Mental Capacity Act 2005 (which applies in England and Wales)
- The Adults with Incapacity (Scotland) Act 2000
- The Mental Health (Northern Ireland) Order 1986 and the common law

In Northern Ireland, the draft Mental Capacity Bill, if implemented, would mean that there would be a single statute governing all decision-making in relation to the care, treatment (for a physical or mental illness) or personal welfare of a person aged 16 or over, who lacks capacity to make a specific decision. The Northern Ireland Mental Health Order 1986 would no longer apply to those aged 16 or over.

Ordinary residence

Generally, the concept of 'ordinary residence' is a basis for determining which authority has responsibility for meeting an adult's social care needs (including non-residential care needs). There is no statutory definition of ordinary residence. Its meaning and the principles for determining where a person is ordinarily resident have been developed through case law involving local authorities in England and Wales.

The leading authority on the meaning of ordinary residence in a statutory context is the speech of Lord Scarman in 'R. v London Borough of Barnet ex p Shah [1983] 2 AC 30'.

This confirmed that the words ‘ordinary residence’ should be given their ordinary and natural meaning, and refers to a person’s abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or long duration. This is known as the ‘Shah test’.

Difficulties arise when applying the Shah test to determine the ordinary residence of an adult who lacks capacity to decide for themselves where to live. In the case of ‘R. v Waltham Forest LBC Ex p Vale’, therefore, the court adapted the Shah test and established a two-part approach for determining the ordinary residence of a person unable to make decisions about where to live. (7) In the more recent decision of ‘R. (Cornwall Council) v Secretary of State for Health’, the Supreme Court – while acknowledging the unusual facts of the case – described these approaches as ‘complimentary, common sense approaches to the application of the Shah test’ and to identifying the requisite ‘settled’ purpose. (8)

The approach for determining a person’s ordinary residence in Scotland is different in that there is no requirement to adapt the Shah test in order to establish the ordinary residence of a person who does not have the requisite capacity to voluntarily decide where to live. The position in Scotland, in broad terms, is that a physical move does not change a person’s ordinary residence unless the person’s residence in a place results from a voluntary decision for settled purposes (that decision having been competently taken by the person themselves or by someone authorised to make that decision on their behalf – i.e. an attorney, guardian or appointee with appropriate powers under an intervention order granted by the court). It follows that neither of the ‘Vale’ approaches for determining the ordinary residence of adults who lack capacity to decide where to live are applicable in Scotland. For further guidance see circular number CCD 3/2015. (9)

Each of the four UK administrations has issued guidance on determining a person’s ordinary residence. These guidance documents are listed below. Practitioners are advised to always refer to these when considering a person’s ordinary residence:

- in England – Department of Health, ‘Care and support statutory guidance’ (Chapter 19) (2014)
- in Scotland – Circular No. CCD 3/2015 – ‘Guidance on the recovery of expenditure on accommodation and services under section 86 of the Social Work (Scotland) Act 1968’ (2015)
- in Wales – Circular WOC 41/93: ‘Ordinary residence – personal social services’ (to be replaced by the statutory Code of Practice relating to part 11 of the Social Services and Well-being (Wales) Act from April 2016)
- in Northern Ireland – Circular PRSC 2/96, ‘Establishing ordinary residence: guidance for purchasing’ (1996).

The basics of a cross-border placement

There are occasions when an authority may need to consider placing a person in accommodation in another UK country. This could be because, for example, the person is in need of specialist accommodation that is only available in that country or has expressed a wish to live closer to their family.

Cross-border placements may be made when an adult is living in a domestic setting or family home, or any other type of accommodation. For instance, the adult could be living at home and, due to deterioration in their condition or circumstances, needs to be placed in a care home in a different UK country. Alternatively, the adult could already be living in a care home and a preference has been expressed for, or a new needs assessment indicates, that they need to be placed in care home accommodation in a different country.

The general principle is that if an adult with social care needs is placed by an authority in accommodation in a different UK country, they will continue to be the responsibility of the placing authority (the meaning of a 'placement' is discussed later in this guidance). This means that the first authority remains responsible for meeting needs, and reviewing their care plan, and further that, where applicable, the person's ordinary residence will remain as it was prior to placement in that accommodation – i.e. ordinary residence will not change. Therefore, if, for example, a person is ordinarily resident in authority A's area, and is placed, pursuant to arrangements made by authority A, into a care home in authority B's area (in a different UK country), authority A retains the same responsibility for that person as if they were placed in accommodation within their own area and the person remains ordinarily resident in area A.

At present, the framework for cross-border placements set out in Schedule 1 only applies to accommodation arranged by authorities, though there is scope for regulations to be made to extend Schedule 1 to other types of accommodation or to cases where authorities are providing services other than accommodation. Discussion of the principles that apply to non-accommodation care packages falls outside the remit of this guidance.

Accommodation for cross-border placement

Schedule 1 applies when an authority in any of the four UK countries is arranging 'accommodation'. The meaning of accommodation differs according to the legislation in each country. Thus, for the purpose of a cross-border placement:

Accommodation in England is defined as meaning care home accommodation, shared lives scheme accommodation (also known as adult placement schemes) and supported living accommodation. **(10)**

Accommodation in Scotland is defined as residential accommodation which may be provided under Sections 12 or 13A of the Social Work (Scotland) Act 1968, or Section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003 **(11)** – in effect, a residential care home. **(12)** Therefore, accommodation in any setting other than a care home is not accommodation under the 1968 Act or the 2003 Act.

Following the implementation of the Social Services and Well-being (Wales) Act 2014, accommodation in Wales will be defined as meaning care home accommodation. (13)

Accommodation in Northern Ireland means residential or other accommodation which may be provided under Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972. (14)

The meaning of accommodation is based on the legislation of the country where the person has been placed. It is not the meaning that applies in the country of the placing authority. So, for example, if a person is moved from England into supported living accommodation in Wales, this could not constitute a cross-border placement made under Schedule 1 (since the definition of accommodation in Wales does not include supported living). Whereas, if a person is moved from Wales into supported living accommodation in England, this could constitute a cross-border placement for the purposes of Schedule 1.

Local authorities in Scotland that intend to make arrangements for a person's accommodation 'outwith' Scotland should be mindful, however, of the Community Care (Provision of Residential Accommodation Outwith Scotland (Scotland)) Regulations 2015 (SI 202/2015). These regulations define the type of accommodation (known as an 'appropriate establishment') into which Scottish local authorities can place individuals cross-border, presently, as being only a care home.

What is meant by a placement?

The concept of a placement is key to an understanding of what constitutes a cross-border placement for the purposes of Schedule 1. In the case of placements from England or Wales, the authority has to be arranging for the provision of accommodation. In the case of placements from Scotland, the authority has to be securing the provision of accommodation. In the case of placements from Northern Ireland, arrangements for the provision of accommodation need to be in place.

The case study below provides an example of a cross-border placement.

Case study: Brian, aged 28

Brian, aged 28, lived in a council flat in Northern Ireland. He has learning disabilities and was frequently taunted and bullied by other young people on his estate. He became increasingly isolated and depressed.

Brian discussed fully with his health and care workers the suitability of his accommodation and feelings about moving. Brian clearly expressed a desire to start afresh in a supported community where he could learn new skills, meet friends and receive therapeutic support. A suitable care home was identified which provides, among other things, access to specialist colleges of further education and adult communities where individual abilities and qualities are recognised. The accommodation was only available in Wales. Brian lived previously in a children's home in Wales for a short period and has always expressed a desire to return there permanently. The authority in Northern Ireland accepted that due to his vulnerability it should arrange and provide new accommodation.

Brian visited the accommodation and undertook a trial week-long stay. This was successful. Once Brian had given his final consent to the placement, the authority in Northern Ireland set up a contract between itself and the care provider for the provision of accommodation. Brian moved into his new accommodation in Wales.

This is a cross-border placement and the authority in Northern Ireland remains responsible for the placement and Brian's ongoing needs.

A Schedule 1 placement therefore generally arises where the authority has made the arrangements for accommodation. It therefore follows that a person's accommodation in, for example, a care home will not constitute a cross-border placement for the purposes of Schedule 1 where that accommodation is underpinned by private arrangements made by or on behalf of the accommodated person. Private arrangements can include scenarios where there is no authority involved at all, but can also include limited involvement in the form of assistance by an authority (this is discussed further later in this guidance). In such cases the person will usually (subject to satisfaction of the Shah test) become the responsibility of the new authority into whose area they have moved (unless arrangements for a Schedule 1 placement ought to have been made but were not made – see discussion below).

Where the capital of a person who is resident in accommodation by virtue of their own private arrangements falls below the relevant threshold, they would usually need to approach the authority in which their accommodation is situated for assistance. The following case study provides an example of a privately arranged move. The position of people who lack capacity to make decisions about their living arrangements is discussed later in this guidance.

Case study: Susan, aged 20

Susan (aged 20) has Asperger's syndrome and full decision-making capacity. She lived in care home accommodation in England and decided to move to Scotland in order to take up full-time and permanent employment with a publishing company. Susan chose a specialist private care home in Scotland which aims at promoting independent living for people with Asperger's and also provides a specialist employment support service. She arranged the move herself (with some support from her family) and made all the formal arrangements (including the contract). The move was successful and she is now enjoying life in her new accommodation and job.

This is not a cross-border placement for the purpose of Schedule 1 because the local authority in England has not arranged the accommodation and she has independently organised it for herself. Given that Susan has capacity, and can be said to have made a voluntary decision for settled purposes, she is now ordinarily resident in Scotland. If Susan were to seek support for her social care needs, she would need to approach the relevant Scottish local authority of the area in which she is now living.

Self-funders and cross-border placements

Many people who use social care services will pay all of their costs. In other words, the authority does not make any financial contribution towards the costs of the person's care. This is known as being a 'self-funder'.

A cross-border placement can be made when the authority or the individual is paying, according to their means, some or all of the costs for the accommodation – the essential feature of a Schedule 1 placement is that the provision of accommodation has been 'arranged' (or in Scotland 'secured') by the authority. The mere fact that a person has capital in excess of the relevant threshold for financial support from the authority does not, however, mean that a cross-border placement cannot or should not be made. Where a person is making their own accommodation arrangements (for instance, because they are self-funding) or someone (i.e. not the local authority) is making accommodation arrangements on their behalf, this is not a Schedule 1 placement.

An authority may be approached by a self-funder seeking assistance in organising a cross-border move, or the authority may become aware of the situation of a self-funder who might benefit from some form of assistance in setting up the move. It is important to note that the offer and/or provision of assistance is unlikely, in itself, to constitute the making of arrangements for, or the securing of, the provision of accommodation that would constitute a Schedule 1 placement. The extent of assistance that might be offered before entering into the realms of arranging or securing the provision of accommodation is discussed later in this guidance.

When a self-funder's needs are to be met by the provision of accommodation in a care home and an authority in England (15) decides whether or not it is obliged to make the necessary arrangements itself, there are certain questions that should be addressed by the authority, including:

Does the person have capacity to make arrangements for the accommodation?

Does the person have someone who is in a position to make the necessary arrangements on their behalf? (16)

If the answer to both of these questions is 'no', it is likely that any arrangements for the care home, including on a cross-border basis, will need to be made by the authority for the self-funder.

An authority in England also has to consider any other matters that are relevant to the question of whether to exercise its power to meet needs by arranging accommodation in a care home. It also has to consider whether there is a duty to arrange accommodation other than in a care home.

In Scotland, the duty to provide accommodation does not depend on these questions. Rather, it arises simply on identification of need and the person in such need being ordinarily resident or physically present in the authority's area. In Scotland, moves to another authority area of persons who lack capacity to decide for themselves where to live require to be authorised by someone with the legal authority to make such decisions on their behalf. Such legal authority is obtained through power of attorney, guardianship order or other intervention order granted by the Sheriff Court. In Scotland, it is likely that appropriate authorisation is required whether the move is to be underpinned by a Schedule 1 placement or otherwise.

In Wales, a local authority has a duty to provide accommodation for a self-funder if the adult's needs meet the eligibility criteria and the adult asks the authority to make the arrangements. A duty to provide accommodation for a self-funder will also arise if the adult's needs meet the eligibility criteria and they lack capacity to make the necessary arrangements, and there is no person who is authorised or able to make the arrangements on their behalf.

In Northern Ireland, the term self-funder refers to an individual who is assessed as able, or declares themselves to be able, to meet the full cost of their care, but whose care is arranged and managed by a health and social care trust. (17) A person's ability to fund their own care has no impact on their right to access and, where appropriate, progress through, the 'care management process'. A client requiring residential or nursing home care can approach their health and social care trust at any point under the care management process. The position in Northern Ireland is similar to Scotland in that the duty to provide accommodation does not depend on the questions listed above. It arises simply on identification of need and the person being resident in the health and social care trust's area.

Can someone else make arrangements on the person's behalf?

In England and Wales, an authority does not have a duty to arrange a cross-border placement for a self-funder if the adult lacks capacity to make the arrangements themselves but there is a person authorised to make the arrangements under the Mental Capacity Act or otherwise in a position to do so on the adult's behalf. In England and Wales, such a person could be a donee of a lasting power of attorney, or a deputy appointed by the Court of Protection under the Mental Capacity Act 2005.

If there is no authorised person, the authority should consider whether there is anyone else in a position to act on the adult's behalf. This will usually involve consideration of whether there is someone both willing and able to make suitable arrangements. It should never be assumed that just because a person is a family member or a carer, they can automatically be expected to undertake this role. Consideration should not just be given to the physical ability of a person to take on this task. The person is not under a legal obligation to take on this role and should not be pressured into doing so.

In order to identify whether there is someone who is in a position to make the necessary accommodation arrangements for a person, a wide range of views should be sought wherever possible and appropriate. This would include the views of the person with social care needs. Even if, for example, the person lacks capacity to make the necessary arrangements they still may be able to express an opinion about who should take on this role and may retain decision-making capacity in this respect. Other people who might need to be consulted would include family members, carers, friends and professionals who are involved in the case.

Case study: Paul, aged 44

Paul, aged 44, has learning disabilities and needs 24-hour supervision. He lived with his mother in England but after she died he was moved to a local care home on a temporary basis. The relevant English local authority arranged this accommodation.

His brother lives in Wales and wanted Paul to move there so that he could look after him. Paul had support from an advocate and agreed to this option, and a care home was identified. The local authority arranged Paul's accommodation in the care home under the Care Act 2014. He settled in quickly, and now has regular contact with his brother.

Paul also inherited £40,000 from his mother's will and was assessed as lacking capacity to manage his finances. However, he maintained capacity to decide where to live. There was no lasting power of attorney or deputy appointed. The placing English authority (which now maintains responsibility for his care by virtue of Schedule 1) concluded that Paul had the funds to pay for his care and someone available to pay the fees on his behalf. The authority discussed future accommodation arrangements with Paul and his brother, and the possibility of the brother taking over responsibility for the management and funding of Paul's accommodation going forward. After agreeing this and handover arrangements with them, the authority decided to terminate its contract with the care provider.

Paul now pays his care home fees in full out of his inheritance. If, in the future, his resources fall below the relevant financial threshold he may become eligible for support

from the new authority in Wales. This might include responsibility for funding and arranging Paul's care.

There may be internal family disputes over the management of the person's finances and property. This may mean that there are strong disagreements over who should make the necessary arrangements. This may in turn affect an authority's view of whether a family member is able and willing to make the necessary arrangements on behalf of the person. In such cases the authority may wish to consider carefully whether it should arrange the cross-border placement, or whether there is an independent person (such as a close friend or legal representative) who might be in a position to make the arrangements on the person's behalf. In a small number of cases an application to the relevant court might be necessary to authorise this.

There may be several factors to take into account in establishing whether there is someone who is in a position to make the necessary arrangements. The precise factors, and the weight accorded to any individual factor, will vary according to the individual circumstances of the particular case.

Once a person has been identified as potentially suitable to undertake this role, it is vital that a practitioner meets with them and explains what taking on this role would mean. This should include a clear explanation of the formal legal responsibilities and the support that could be provided to assist them with making the arrangements (this distinction is discussed below). It should also be explained that they are not obliged legally to take on this role.

Where the adult lacks such capacity, the practitioner will need to check that the person making arrangements understands the legal requirements governing mental incapacity. If appropriate, the person should be given information on how to access appropriate legal advice. The need to be aware of different legal requirements is illustrated in the case example below.

Case study: Grace, aged 80

Grace is 80 years old and suffers from dementia. She lived in England in her own home. She was admitted to hospital following a fall from which she sustained a broken hip. Her mental health also deteriorated. A multidisciplinary assessment concluded that her needs would be best met in a nursing home. A mental capacity assessment determined that Grace lacks capacity to decide for herself where to live.

A financial assessment determined that Grace is not eligible for local authority funding of, or towards, the cost of her care home accommodation. Therefore, she would be a self-funder. Grace's son Phillip – who lives in Wales – wanted her to be accommodated in a care home local to him. Following a carer's assessment, the authority in England concluded that Phillip was willing and able to make suitable arrangements. With advice from the local authority in England, Phillip took steps himself to search for and identify a suitable home. Eventually he found a suitable private care home in Wales.

In England and Wales, Phillip's actions were being taken in Grace's 'best interests' in accordance with the Mental Capacity Act 2005. This does not constitute a Schedule 1 placement because Phillip (i.e. not the local authority) made the accommodation arrangements on Grace's behalf.

Did the authority make the necessary arrangements for a cross-border placement?

Schedule 1 only applies if the relevant authority has made the arrangements to provide the accommodation, or (in Scotland) secured the provision of the accommodation. Making such arrangements or securing provision entails more than just facilitating a move. In other words, there is a distinction to be drawn between, on the one hand, helping or assisting a move and, on the other hand, arranging or securing the provision of the accommodation. Only where the accommodation has been arranged or (in Scotland) secured by the authority will it be a cross-border placement for the purpose of Schedule 1.

An authority might assist a person with social care needs with their move by helping them to select the accommodation, and by transporting them to visit potential new care homes. The authority might even advise on the suitability of the accommodation to meet the person's assessed social care needs and go on to help the person move in and settle. These actions constitute information, advice or assistance and do not in themselves amount to a placement for the purposes of Schedule 1. Unless the authority makes the arrangements for accommodation (e.g. by entering into a contract with the provider) it is unlikely that the person will be considered to have been placed by the authority.

This principle will apply irrespective of whether or not the person lacks capacity to decide where to live. In contrast, if the relevant arrangements have been made on behalf of the person – for instance by an appointed decision-maker (such as a guardian, attorney or deputy) or by a private individual (such as a friend, family member or carer) – this is unlikely to be a Schedule 1 placement.

It should be noted that authorities cannot escape responsibility if they are legally obliged to make the necessary arrangements for the placement. This obligation might arise, for example, if the adult did not have capacity to make their own arrangements and did not have someone in a position to make the necessary arrangements on their behalf. In such cases the adult would normally continue to be the responsibility of the area of the authority which should have made the arrangements.

The following case studies illustrate what may or may not amount to a cross-border placement.

Case study: Rosie, aged 89

Rosie is aged 89, and lived in a care home in England. She had lived there for over 10 years and had full decision-making capacity. Rosie was a self-funder and wished to move to a care home in Wales in order to be closer to her brother. She approached the local authority in England to seek help in arranging this.

The social worker assessed her, determined that she had eligible needs for accommodation and contacted the relevant social services team in Wales to identify suitable care home accommodation in the area. The social worker took her to visit a care home in Wales which Rosie felt might be suitable, and helped Rosie to make the final decision. The social worker also assisted Rosie with the move and remained in contact with her for a short time afterwards. However, it was made clear to the care provider throughout this process that Rosie had assets over the capital limits and was making her own contract with the care provider.

In this case the authority did not make arrangements with the care provider for Rosie's accommodation. Therefore her accommodation in Wales did not fall within Schedule 1.

Case study: Douglas, aged 45

Douglas is a 45-year-old man with significant needs as a result of a brain injury sustained in a car crash. He was living in an intensive care NHS facility in England. While he has lived in England for most of his life, he originally comes from Scotland and his parents still live there.

Douglas lacked capacity to make decisions about his living arrangements and finances or to make arrangements for his own care. There was no attorney or deputy appointed.

Douglas was not eligible for NHS continuing health care but was assessed as ready to be discharged into residential care. His parents approached the social worker attached to the NHS facility for help in moving him back home to Scotland. His parents made it clear that they were physically unable to make the necessary arrangements.

The social worker contacted the home in the new area, and also arranged visits by Douglas and his transfer. The authority in England made the necessary arrangements to provide Douglas with accommodation in Scotland and in so doing entered into a contract with the care provider in Scotland for the provision of that accommodation. The authority also arranged for the provider to send invoices to the council.

In this case it is likely that the English authority would be considered to have made a Schedule 1 cross-border placement. The English authority therefore retains responsibility for meeting the person's needs placement and he remains ordinarily resident in England.

Property disregard rules

Where an authority arranges permanent residential care for a person, the value of the resident's main or only home is disregarded from the assessment (calculation) of a person's means to pay for their care costs for the first 12 weeks in a care home. This is commonly referred to as the '12-week property disregard'. It is intended to provide 'breathing space' to enable people to consider how best to fund their accommodation. For some people this may involve a decision to sell their home in order to fund their care from the proceeds. For others, it allows time for the arrangement of a deferred payment agreement (see below).

During the 12-week disregard period, if the person's accommodation is arranged by an authority, the person remains the responsibility of that authority. However, at the end of the 12-week period the value of the person's home is taken into account in assessing means to pay (unless it remains the home of the person's spouse, civil partner, partner or certain other relatives). This may result in the person remaining or becoming a self-funder and, by consequence, having to enter into, or remain in, a private contract for the accommodation, rather than being provided or continuing to be provided with accommodation by their placing authority.

It should also be noted that a different approach applies in Scotland. As stated earlier in this guidance the duty to provide accommodation arises on identification of need and the person in need being ordinarily resident or, at least, physically present in the local authority's area at the time when the need for accommodation arises. Moreover, if a person with capacity moved into a care home in Scotland under private arrangements and is self-funding, the 12-week disregard would not apply. The disregard would only be provided when the authority itself requires because of need and/or eligibility for free personal and nursing care, to provide the accommodation and accordingly requires to assess the person's ability to pay for it.

The operation of the 12-week property disregard rules in relation to cross-border placements is not certain. In relation to placements made by English authorities, it is likely that the 12-week property disregard only applies to care homes in England. (18)

Deferred payment agreements

Broadly speaking, deferred payment agreements enable people to postpone payment of the costs of meeting their needs for care and support in a care home. Deferred payments only exist in England, Scotland and Wales.

There are two types of deferred payments. In cases where the adult's needs are met by the local authority the agreement is one under which the charges due to the authority for meeting those needs are deferred to a later date. If the adult is meeting his or her own needs the agreement is one under which the authority lends the adult a sum with which to pay the costs of meeting their needs in a care home and under which the date of repayment of the loan is deferred until a later date. This provides people with flexibility in relation to how their care costs are met. For example, deferring payment can help people to delay the need to sell their home if that is necessary in order to pay their care costs. The individual enters into an agreement with their local authority and the sums due are repaid from their estate at the end of the agreement (e.g. the agreement may be terminated automatically on the sale of the property or when the person dies, at

which point the property is usually put up for sale). The individual usually grants the local authority a charge over their property for this purpose.

The responsibility for offering and funding a deferred payment agreement is with the placing authority. If the person accepts the offer and enters into a deferred payment agreement, their ordinary residence does not change and the placing authority remains responsible for funding their care and maintaining arrangements for accommodation on their behalf.

If the person decides against having a deferred payment agreement, having been offered it, then they will have to meet the costs of their care, and the placing authority (following full discussions with those involved) might decide to terminate its contract with the care provider. If this is the case, and they later require local authority funded social care services (including the option to enter into a deferred payment agreement), for instance because their funds have fallen below the relevant financial threshold, they should approach the authority in whose area the care home is located.

Transition from children's to adult services and cross-border placements

In each of the four UK countries, when a young person with social care needs reaches the age of 18, the duty on authorities to provide accommodation and services under children's legislation usually ends. In some cases the young person may have 'looked-after status'. (19) This broadly means that the child or young person is in a local authority's care by virtue of a care order or is provided with accommodation by a local authority in the exercise of their social services functions. A young person's 'looked-after status' ends when they reach 18. However, the authority which was formerly responsible for them retains ongoing duties, for example to provide advice and assistance. These duties continue after the person has reached 18, and would normally be the responsibility of the placing authority. In Northern Ireland, unless a young person has been previously looked after by a health and social care trust, when a young person with social care needs reaches the age of 18, the duty on the health and social care trust to provide accommodation and services under children's legislation usually ends.

The position of a young person who had been placed in a different area by a local authority in England has recently been considered by the courts. In 'R. (Cornwall) v Secretary of State for Health' the Supreme Court held that a young person – who lacked capacity and had been placed in foster care in South Gloucestershire which had been arranged by Wiltshire Council under the Children Act 1989 – continued to be ordinarily resident in Wiltshire when he reached 18. (20) The Court set out that the underlying purpose of both children's and adult legislation is that 'an authority should not be able to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it' and it would be highly undesirable for there to be a hiatus in the legislation whereby a young person placed in a different area would become ordinarily resident in that area on their eighteenth birthday. (21)

The implications of this judgement in respect of cross-border placements are unclear. It is possible that policy in this area will need to be reviewed by each of the four UK governments in the light of this judgement.

Cross-border placement process

The smooth functioning of cross-border arrangements is in the interests of everyone. Most importantly, this will maintain the adult's wellbeing and prevent them from falling into crisis, and help alleviate the pressure on family members or carers. In addition, it will ensure that authorities are not financially disadvantaged as a result of making or receiving cross-border placements by reducing disputes and, hence, cases where an authority has to meet needs on a provisional basis pending dispute resolution.

General suggestions

Authorities and health and social care practitioners may wish to consider the following when arranging cross-border placements.

Authorities may wish to designate a lead official for information and advice relating to cross-border placements and to act as a contact point. (22)

Authorities should consider the benefits of independent advocacy in supporting and representing the person to facilitate their involvement in the cross-border placement process and meet relevant duties (23) (e.g. an advocate may assist by representing the views of the adult to the placing authority and ensuring that the appropriate information has been provided).

Authorities should seek to conduct cross-border placements in a timely manner. However, this does not always mean with great haste. The time taken should be proportionate to the circumstances.

Where an authority is aware that a self-funder is likely to arrange a cross-border move in circumstances that do not amount to arrangements by a local authority for the purposes of Schedule 1, it should inform the new authority (with the permission of the person themselves, or someone on their behalf if they lack capacity). This may help the new authority to be aware of any people in its area that may in the future need social care.

Reporting arrangements for the cross-border placement process

There is no legal requirement for authorities to notify national authorities that a cross-border placement has taken place. However, this is a new area of policy and it would be useful for authorities to record the number of placements occurring to best inform future application of the policy. In particular, authorities should consider recording the number of placements made into their area from other UK countries, and the number of cross-border placements they make to other UK countries.

Social care planning reporting arrangements for cross-border placements

Step one of four

Identifying the potential need for a cross-border placement

The possibility of a cross-border placement may first be raised by the person themselves or by a family member or carer. For instance, in the assessment or care planning process the person may express a wish to move to a care home in a different country within the UK because they were born or lived in that country, and have friends and family still living there. The potential for a cross-border placement may also be identified by a practitioner who considers that an individual may benefit from such a placement (e.g. because of the availability of particular facilities, or because the practitioner has identified that the person has strong family or cultural links to the relevant country). If so, the practitioner should discuss this with the individual and any other person appropriate (such as family members, carers and representatives). In general terms, when making any placement, the authority in question should be seeking to promote the person's wellbeing.

Exploring the possibility of a cross-border placement

Moving to a new area – let alone a new country – can be a daunting prospect. It is important that the practitioners discuss generally what might be involved, including the advantages and disadvantages, and what support might be available for the person to help them to make decisions. It is important for practitioners to be clear with all those concerned about the realistic options and the potential issues that might arise. These potential issues will normally include being clear that the first authority will continue to be responsible overall for the person's care, including the care plan. It should also be explained that some aspects of the person's health and social care needs may be met in a different way when the adult moves to the new country.

Such discussions will need to be tailored according to the adult's level of knowledge and understanding of the placement process, and take into account any communication needs that the person has. In some cases, the provision of advocacy support for the person will be important and give rise to related duties. Most importantly, sufficient time should be allowed for people to reflect on the various options.

The possibility of a cross-border placement should be discussed with carers and anyone else the person asks to be involved, such as family members. If the person lacks capacity to consent to a cross-border placement, it will be particularly important to consider the role of an advocate, proxy decision-maker or a family member in raising the question of a cross-border placement.

People considering a cross-border placement should also be able to visit the home and, ideally, stay for several days or longer. It should be borne in mind that some people may take some time to settle into a new environment. However, it would also be important to explain any charges which might apply. The trial stay should be arranged by the placing authority (unless the person or their family would prefer to make the arrangements themselves). Similarly it is desirable, if so wished by the adult, that the manager of the home should contact potential residents to establish a personal relationship, gain

information about their way of life and advise them about what possessions (including pets) can be taken with them into the home. This may be undertaken in person or through other means such as online video chat and voice calls.

Some cross-border placements will be located some distance away from where the person is situated, which may make it difficult for some people to visit the home in person (for instance, if they are too frail). One way of overcoming this problem may be for practitioners to arrange for a virtual tour online, or a recording to be made which can be played back to the person. Full information about the home should be provided in writing if requested and access to the relevant website should also be facilitated. Before making the final decision, the person and the practitioner may want to look at a recent inspection report for the home.

The individual should also be informed of the likely arrangements between the first and second authorities (e.g. any assistance in the conduct of needs assessments and reviews), and what will be involved (for instance, the giving of a notification of the placement to the second authority and the sharing of information or the gathering of information by the second authority on behalf of the first in order to inform the review process). The individual should be informed of this at the outset and their consent sought.

A cross-border placement should only be pursued with the informed consent of the person concerned. The individual's views, wishes, feelings and beliefs will be critical to a person-centred process. If a person may or does lack capacity to decide where they should live, consideration should be given to providing support to enable a 'supported decision' to be made. Supported decision-making refers to the process of providing support to people whose decision-making ability is impaired to enable them to make their own decisions wherever possible. If it is confirmed that the person lacks capacity, it will be crucial to involve, as appropriate, family, friends, carers, an advocate and authorised decision-makers (including anyone authorised legally to make decisions on a person's behalf).

Deciding whether a cross-border placement should be arranged

Should the person wish to pursue this option, the practitioner will need to consider carefully the pros and cons. Questions the practitioner may wish to address could include the following.

Would the support network in the area of the proposed new placement improve (or at least maintain) the individual's wellbeing?

What effect might the change of location have on the individual's wellbeing? How well are they likely to adapt to their new surroundings?

Is the individual in receipt of any specialist health care? Will the locality of the proposed new placement allow for the satisfactory continuation of this treatment?

Where the person lacks capacity to decide whether or not to pursue this option, the authority will still need to consider carefully all of the above. With the permission of the individual concerned (if they have capacity to give permission) the authority should approach the friends, carers and family of the individual who are resident in the area of the proposed new placement (and any friends, carers and family in the area of their

current residence) to seek their views on the perceived benefits of the placement and any concerns they may have.

If a cross-border placement is in the interests of the individual's wellbeing, the authority should take appropriate steps to investigate the range of providers in the proposed new placement area and which are likely to be able to meet the needs of the individual. Authorities should strive to offer people a choice of placements. The authority should conduct all necessary checks and exercise due diligence, as it would with any other care home placement.

The decision to offer a cross-border placement is one for the authority to take, in accordance with public law principles. This means that the authority will need to take into account all relevant considerations, including the individual circumstances of the case and the total costs of different potential options for meeting needs. Cost may well be a relevant factor in deciding between suitable alternative options for meeting needs (although the focus should be on ensuring an individual's needs are met effectively). Other factors will also be relevant, including the views of the person. Where possible, the person should be offered choice in respect of placements. The use of 'top-up payments' or 'betterment fees' may also need to be considered.

Ultimately, the offer of a cross-border placement cannot proceed unless the person gives their consent. Where the person lacks capacity to give their consent then someone will need to make the decision on their behalf in accordance with the relevant mental capacity legislation that applies in the country. In respect of cross-border placements, decisions might be made by an authority, guardian, attorney, deputy, family member or someone else.

It is possible that the person (or someone on their behalf) will disagree with the authority's decision. For instance, the person (or their decision-maker) may seek a cross-border placement but the authority considers that it will impact negatively on the person's wellbeing. Alternatively, the offer of a cross-border placement may be rejected by the person (or their decision-maker), but the public authority does not think that an alternative care package would be appropriate. In England, Wales and Northern Ireland, the person (or their decision-maker) will need to consider whether an alternative care package could be privately funded elsewhere, or seek to negotiate with the authority. In England, when preparing a care and support plan, the local authority has to involve the adult, any carer the adult has and any person whom the adult asks the authority to involve, or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare. In involving the adult, the authority has to take all reasonable steps to reach agreement with the adult about how the authority should meet their needs. Information should also be given about the relevant complaints process and ombudsman. As a last resort, an issue relating to the provision or non-provision of a specific care package may need to be decided by the courts.

However, in Scotland the situation would be different and it would be for the local authority to find alternative accommodation and not for the individual to consider the extent to which they could privately fund an alternative care package.

In all UK countries, if the dispute is about whether or not arrangements for accommodation which were made cross-border should have been made by a particular

authority as a matter of legal obligation, then these are to be resolved with reference to the dispute resolution regulations (see below).

Making arrangements

The placing authority should ensure that satisfactory arrangements for services are in place before the placement begins. This includes ensuring that any necessary support services have been set up, such as day care arrangements, and that clear agreements are in place for funding all aspects of the person's care. For example, the placing local authority may negotiate for support services to be provided by the host authority and reimburse the costs. Authorities should consider developing standard checklists and forms to assist practitioners in negotiating these matters.

In making arrangements, practitioners must have regard to the views, wishes, feelings and beliefs of the individual. Practitioners should (and sometimes must) also involve the individual, carers, family members and any other relevant persons. In involving the individual, the authority should (and sometimes must) take all reasonable steps to reach agreement with the individual about how the authority should meet the needs in question. The individual should be kept informed and involved throughout the process. Their views on suitable providers should be sought and their agreement checked before a final decision is made.

The authority should also ensure that the provider is aware that this will be a cross-border placement and that the placing authority will be responsible for meeting costs.

Initial liaison between 'first' and 'second' authority for cross-border placements

Step two of four

Once the placement has been agreed in principle between the placing authority and the adult (or someone on their behalf) and a potential provider has been identified, the authority should immediately contact the authority in whose area the placement will be made.

In doing so, the first authority should:

- confirm its intention to make a cross-border placement
- provide a provisional start date
- give details of the proposed care provider
- seek the second authority's views on the suitability of the proposed accommodation and provider.

The second authority has no power to 'block' a placement, as the first authority makes arrangements directly with the provider. If the second authority does raise objections, all reasonable steps should be taken by the first authority to resolve the issues concerned before making the placement.

Following the initial contact (and provided no obstacles have been identified), the first authority should write to the second confirming the conclusions of the discussions and setting out a timetable for the placement.

The first authority should proceed as it would for any placement. For instance, it should:

- inform the provider of the intention to move
- confirm that the person agrees to the plans and arrangements
- notify family, carers or friends as appropriate.

Arrangements for ongoing management of placement for cross-border placements

Step three of four

The first authority should consider with the second authority arrangements for the ongoing management of the placement. It is important to recognise that the first authority retains responsibility for the individual and the management and review of their placement. In this regard, the authority's responsibilities to the individual are no different than they would be if the individual was placed with a provider in the authority's own country.

However, the practicalities of managing the placement may prove difficult, particularly when the placement is a long distance away. Therefore, the first authority may often need to make arrangements for the second authority to assist. Any such arrangements should be set out in writing – being clear as to what role the second authority is to play and for how long. Clarity should also be provided on the regularity of any reporting to the first authority and any payment involved for services provided by the second authority. In some cases there may be merit in this arrangement being part of the contract between the placing authority and care provider.

The arrangement should consider how urgent cases are to be managed where there may be a need for face-to-face contact with the provider or individual concerned. In the case of regular placement reviews, the arrangement may also consider whether and how the second authority may be able to assist the first authority by gathering information about local resources.

In accordance with the key principles outlined in this this guidance, authorities should always seek to work together and cooperate when making arrangements. Both authorities should recognise the importance of ensuring that the adult's needs and wellbeing are at the heart of the arrangements that are put in place. (24)

Confirmation of placement for cross-border placements

Step four of four

When the placement has been confirmed (i.e. the arrangements have been agreed by the care provider), the first authority should notify the second authority as soon as possible. This can be done verbally but should be followed up with a written confirmation as soon as possible. The written notification should also include:

- all the arrangements made with the second authority for assistance with ongoing placement management and other matters
- the date from which the placement will begin.

The second authority should acknowledge receipt of these documents/information and give its agreement to the arrangements in writing.

A copy of the notification should also be given to the person and, as appropriate, to any other relevant person. The first authority should provide the individual concerned and any other relevant person with contact details (including whom to contact during an emergency) for both the first and second authority. If required, it is expected that the first authority will be responsible for organising suitable transport, and for the costs of it, to take the individual and their belongings to their new placement.

As would be the case normally, the first authority will usually be responsible for closing off previous placements or making other necessary arrangements regarding the individual's prior residence.

Issues that may arise with cross-border placements

What if the person leaves the accommodation?

In general terms, if the person who has been placed cross-border subsequently leaves the accommodation of their own volition and, for instance, enters a tenancy agreement in rented accommodation in the area in which they had been placed, they will normally become ordinarily resident in that area. However, the position in Scotland is different. A person in this case would only become ordinarily resident in a Scottish authority if they had capacity to make decisions about living arrangements or the decision to reside there was taken by someone authorised to do so on their behalf. Therefore, the authority in which they had been placed would become responsible for any social care needs. This would be the case even if the person's needs remained the same.

However, there may be cases where the person leaves the accommodation provided by the local authority in circumstances which do not result from a voluntary decision. For example, this may occur because of de-registration, provider failure (see discussion on the relevant regulations below) or a dispute with the authority about the quality of the accommodation or the services being provided. In such cases the question of whether the person remains the responsibility of the first authority will need careful consideration and practitioners would need to consider the relevant ordinary residence guidance (set out earlier in this guidance) in the light of the circumstances of the case.

What if the care home de-registers?

Sometimes a care home may 'de-register' and become accommodation with support, with the individual signing their own tenancy agreement (if they have capacity to do so). In some cases the individual will be agreeing to continue with the same arrangements, live in the same place and receive the same services.

If a person lacks capacity to sign the tenancy agreement the relevant mental capacity legislation will need to be considered (see above). For instance, in Scotland only the person with legal authority would be authorised to sign.

What if the person requires a stay in NHS or health accommodation?

If NHS or health accommodation is needed during the placement, for any period of time, responsibility for the person's social care needs will not alter. In other words, the first authority will continue to be responsible overall for the individual's placement and social care needs.

During the placement in NHS or health accommodation it is normal practice for a 'retention fee' to be paid to the care provider to ensure the individual's place is secured. This is the responsibility of the first authority.

What if the person requires NHS-funded nursing care?

In England, Scotland and Wales, if a care home resident requires nursing care, but nursing is not his or her primary need, the relevant NHS body will pay part of the care costs. This contribution is known as NHS-funded nursing care.

In Northern Ireland, the relevant health and social care trust is responsible for the provision of nursing care to people in care homes. In Northern Ireland, in order to qualify for the nursing payment, the person must be responsible for the full costs of their nursing home care and the person must also be assessed as needing nursing care.

Where, prior to the cross-border placement, the person is in receipt of NHS-funded nursing care (or it is evident that they have a need for such care), the relevant authorities should work together to ensure this continues to be provided (or is provided) from the start of the placement. The relevant authorities will include:

- The first authority.
- The NHS body (or health and social care trust in Northern Ireland) delivering the care.
- The NHS body (or health and social care trust in Northern Ireland) funding the care.
- The care provider prior to the placement commencing.

Where the need for NHS-funded nursing care becomes evident after the placement has commenced, the relevant authorities and the NHS body (or health and social care trust in Northern Ireland) should work together to ensure this is provided without delay.

Early (indeed advance) engagement with the NHS body (or health and social care trust in Northern Ireland) in such circumstances is important in ensuring smooth and integrated provision of services in cross-border placements.

The four UK governments have reached separate bilateral agreements as to which NHS body (or health and social care trust in Northern Ireland) should be responsible for the cost of NHS-funded nursing care required for individuals placed cross-border into a care home. (25) In general terms:

- where the cross-border placement is between England and Scotland or between England and Northern Ireland (in either direction) the health service of the country of the first authority will be responsible for nursing costs
- where the cross-border placement is between England and Wales (in either direction), the second authority's health service will be responsible for the costs of NHS nursing care
- where the cross-border placement is between Wales and Scotland, Wales and Northern Ireland, or between Scotland and Northern Ireland, the first authority's health service will retain responsibility for the costs of NHS-funded nursing care.

Placement from England:

- Placement to Scotland: Clinical commissioning group (England)
- Placement to Wales: Local health board (Wales)
- Placement to Northern Ireland: Clinical commissioning group (England)

Placement from Scotland:

- Placement to England: NHS board (Scotland)
- Placement to Wales: NHS board (Scotland)
- Placement to Northern Ireland: NHS board (Scotland)

Placement from Wales:

- Placement to England: Clinical commissioning group (England)
- Placement to Scotland: Local health board (Wales)
- Placement to Northern Ireland: Local health board (Wales)

Placement from Northern Ireland:

- Placement to England: Health and social care trust (NI)
- Placement to Scotland: Health and social care trust (NI)
- Placement to Wales: Health and social care trust (NI)

What if the individual's care needs change during the placement?

Any changes in the person's needs should be picked up in the course of a review and the care plan amended as needed.

The first authority retains responsibility for review and amendment of the individual's care plan, although it may have agreed with the second authority that the latter will assist it in certain ways. It is also open to the second authority to make any necessary arrangements that will assist the adult, and then seek additional payment subsequently from the funding authority, having agreed this beforehand with the first authority. In all of these cases, clarity and communication will be important as to each authority's roles.

Handling complaints for cross-border placements

Where the complaint relates to the provision of care by the care provider, the complaint should normally be made to the care provider in the first instance. The complaint should then be dealt with according to the complaints process of the provider as governed by the applicable legislation, which will normally be the legislation of the country into which the individual has been placed.

Complaints regarding the first authority and the care plan should be dealt with by the first authority in accordance with the relevant legislation of that country of the UK. Complaints regarding the second authority should be dealt with by the second authority.

If the complaint relates to the provision of health care, in most cases it should be dealt with according to the legislation governing such complaints in the relevant country where the care is being provided. If the complaint refers to the funding of NHS-funded nursing care, it should be dealt with by the funding authority (see above). If referral to the health ombudsmen is necessary this should be made to the ombudsmen whose investigation the provider or authority in question is subject to, in accordance with the governing legislation.

Disputes between authorities relating to cross-border placements

It is important to note that, wherever possible, disputes should be avoided. The likelihood of a dispute should be minimised if the authorities work closely together. Disputes are most likely due to poor communication or a lack of communication altogether.

But where a dispute does arise it is important to emphasise that any dispute must not prevent, interrupt, delay or otherwise adversely affect the provision of services to the individual

The four UK governments have agreed specific dispute resolution processes for cross-border placements. These are set out in the Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014 (SI 2014/2843) (the 2014 Regulations). The following is a summary of those regulations.

The dispute resolution process applies to any dispute about the application of paragraphs 1 to 4 of Schedule 1. This could include disputes arising in connection with situations where arrangements for cross-border accommodation have been made and there is a question about whether a particular authority had a duty to make those arrangements.

The following is a summary of paragraphs 1 to 4 of Schedule 1 and the 2014 Regulations.

Who considers disputes?

The relevant department/ministers of the UK government and of the devolved administrations in Scotland, Wales and Northern Ireland have responsibility for determining cross-border disputes. The following have legal responsibility for determining disputes (these are referred to as the 'responsible person'):

- the secretary of state (in relation to a dispute involving a local authority in England where the person is living in England)
- the Welsh ministers (in relation to a dispute involving a local authority in Wales where the person is living in Wales)
- the Scottish ministers (in relation to a dispute involving a local authority in Scotland) where the person is living in Scotland) and
- the Department of Health, Social Services and Public Safety in Northern Ireland (in relation to a dispute involving a health and social care trust where the person is living in Northern Ireland).

Thus, legal responsibility for determining a dispute will generally depend on which country the person is living in when the dispute is referred. If the person is living in the same country as that in which an authority which is party to a dispute is situated, the dispute will be determined by the relevant minister or department for that authority. For

example, if the person has been placed by a Scottish local authority into a care home in England, and the dispute arises after the person has moved, the dispute should be referred to the secretary of state (in England).

In all other cases, the relevant department/ministers for the authorities who are in dispute will agree between themselves who is to determine the dispute. This will arise where the person is not living in the same country as an authority which is subject to the dispute.

The process for determining disputes

Before a dispute is referred

The authorities concerned must take a number of steps before referring a dispute. In the statutory guidance which accompanies the Care Act 2014, the authority which has accepted responsibility is referred to as ‘the lead authority’.

The lead authority must:

- identify all the authorities which are parties to the dispute as soon as reasonably practicable after the date on which the dispute arises
- coordinate discussions between those authorities in an attempt to resolve the dispute
- coordinate the discharge of duties by the authorities in dispute
- take steps to obtain relevant information from those authorities
- disclose relevant information to those authorities
- provide to the adult or carer to whom the dispute relates, or to the relevant person’s representatives, such information as appears to it to be appropriate about progress in resolving the dispute.

The authorities in dispute must:

- take all reasonable steps to resolve the dispute between themselves
- cooperate with each other in the discharge of their duties
- each nominate, as soon as reasonably practicable after the date on which the dispute arises, an individual who will act as the point of contact within that authority in relation to the dispute, and provide the other authorities in dispute with the contact details of that individual
- each engage in constructive dialogue with other authorities to bring about a speedy resolution
- each comply, without delay, with any reasonable request made by the lead authority to supply information
- each keep the other authorities in dispute informed of information which appears to it to be relevant to the determination of the dispute.

When a dispute is referred

When a dispute is referred, the following must be provided to the responsible person:

- a letter signed by the lead authority stating that the dispute is being referred and identifying the provision of the Care Act which the dispute is about
- a statement of the facts
- copies of relevant correspondence.

The statement of facts must include:

- details of the needs of the individual to whom the dispute relates
- which authority, if any, has met those needs, how they have been met and the relevant statutory provision
- any relevant steps taken by the authorities in dispute in relation to the individual
- an explanation of the nature of the dispute
- details of the individual's place of residence and any former relevant residence
- chronology of events leading up to the referral
- details of steps authorities have taken to resolve dispute
- a statement that the authorities in dispute agree that the person has, or lacks, capacity – or information relevant to the question of whether the adult has or lacks capacity
- any other relevant information.

The authorities in dispute may make legal submissions within 14 days of sending the referral, and if they do, they must send a copy to the other authorities in dispute, and provide evidence that they have done so.

The responsible person (i.e. minister or Northern Ireland department) to whom the dispute has been referred must:

- consult other relevant responsible persons (i.e. ministers or NI department) in determining the dispute
- notify those responsible persons of their determination.

If the responsible person (i.e. minister or Northern Ireland department) determining the dispute asks any of the authorities in dispute to provide further information, that authority must comply without delay.

Provider failure relating to cross-border placements

In a small number of cases, care providers may sustain business failure and cease to provide a service. It is vital that in such cases continuity of care is ensured for those affected. This may mean that authorities need to step in temporarily and meet the needs of people whose provider has failed in their geographic area. This will be just as relevant in respect of individuals who have been subject to a cross-border placement as it would to any other service user.

Sections 48 to 52 of the Care Act 2014 set out what should happen in respect of cross-border placements when the provider is unable to continue to provide care services. The relevant supporting regulations are the Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014 (SI 2014/2843), and the Care and Support (Business Failure) Regulations 2015 (SI 2015/301).

In general terms, if a care provider fails and is unable to carry on, the authority in whose area the individual is placed must meet the individual's needs for as long as it considers necessary. The first authority will normally continue to have overall responsibility.

In the event of provider failure in Scotland, local authorities have duties under Part 2 of the Social Work (Scotland) Act 1968 as specified in the Care and Support (Cross-border Placements) (Business Failure Duties of Scottish Local Authorities) Regulations 2013 (SI 2014/2839).

Close communication and cooperation between the first and second authority throughout will be important. The temporary duty to meet needs in the event of provider failure is not expected to apply to local authorities in Wales until April 2016.

The Care Act 2014 enables the authority to recover costs from the authority which made or funded the original arrangements. This power will be commenced in relation to recovery by local authorities in Wales at the same time as the temporary duty is commenced in relation to them.

If a dispute later emerges, for example regarding costs incurred as a result of the provider failure situation, then the dispute regulations described above will apply.

Case law relating to cross-border placements

Links to case law which may have an impact on the setting up of cross-border placements.

[Judicial Review of a decision, dated 26 March 2015 of the Scottish Ministers determining the ordinary residence of Mrs JR](#)

[Supreme Court Judgment: R \(on the application of Cornwall Council\) \(Respondent\) v Secretary of State for Health \(Appellant\)](#)

References

1. Care Act 2014 and Social Services and Well-being (Wales) Act 2014.
2. Social Work (Scotland) Act 1968, ss 12 and 12A.
3. Health and Personal Social Services (Northern Ireland) Order 1972, art 15.
4. Department of Health, 'Principles for maintaining continuity of care when moving across borders within the United Kingdom' (26 March 2015).
5. Department of Health, 'Care and Support Statutory Guidance' (2014).
6. Welsh Government, 'Guidance for Welsh local authorities on cross-border placements for adults' (2015).
7. 'R. v Waltham Forest LBC Ex p Vale' (1985), The Times, 25 February 1985.
8. 'R. (Cornwall Council) v Secretary of State for Health [2015] UKSC 46 at [47]'.
9. Scottish Government, Circular No: CCD 3/2015 – 'Guidance on the recovery of expenditure on accommodation and services under section 86 of the Social Work (Scotland) Act 1968 (2015)'.
10. Care Act 2014, Sch 1, para 12(2), and the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 (SI 2014/2828).
11. Care Act 2014, sch 1, para 12(4).
12. In other types of settings it is not the accommodation part that is arranged and provided for by the local authority, rather it is the services and/or facilities that are put in place to enable a person to live there that is arranged and provided by the local authority (the accommodation itself may be arranged privately and paid for, for example, through housing benefit).
13. Care Act 2014, sch 1, para 12(3) and Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015.
14. Care Act 2014, sch 1, para 12(5).
15. In relation to England, where a person with finances above the upper capital limit with mental capacity asks the local authority to meet their eligible needs, and it is anticipated that their needs will be met by a care home placement, then the local authority may choose to meet their needs, but is not required to do so. But if the person does not have mental capacity to make arrangements for the accommodation and has no attorney, deputy, friends or relatives to act on their behalf, the local authority is responsible for making the arrangements (with reimbursement from the person as necessary).

16. See Section 18(4) of the Care Act 2014 in relation to England and the statutory guidance under that Act.
17. See ECCU 2010, 'Care management, provision of services, and charging guidance'.
18. This is because the property disregard regulations in England (see para 2 of sch 2 to SI 2014/2672) apply to a 'care home' which means a care home registered under the Health and Social Care Act 2008.
19. The legal frameworks for looked-after children are governed by the Children Act 1989, the Children (Scotland) Act 1995, the Social Services and Well-being (Wales) Act 2014 and the Children (Northern Ireland) Order 1995.
20. 'R. (Cornwall Council) v Secretary of State for Health [2015] UKSC 46'.
21. 'R. (Cornwall Council) v Secretary of State for Health [2015] UKSC 46 at [54]'.
22. Department of Health, 'Care and support statutory guidance' (2014), para 21.11.
23. See e.g. duties under Section 67 of the Care Act 2014 in relation to England.
24. In relation to England, see in particular duties of authorities under Section 1 (promoting individual well-being) of the Care Act 2014.
25. For example, NHS Wales and NHS Commissioning Board Protocol for Cross-Border Healthcare Services (August 2013).

Cross-border placements

This guidance is intended to assist authorities in the UK (England, Scotland, Wales and Northern Ireland) involved in cross-border placements as described in Schedule 1 to the Care Act 2014.

In this context, a cross-border placement describes a situation where an adult is being, or has been, placed by an English, Welsh or Scottish local authority or Northern Irish health and social care trust into accommodation in a different UK country in order to meet their social care needs.

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