

## POLICY NOTE

### THE SELF-DIRECTED SUPPORT (DIRECT PAYMENTS) (SCOTLAND) REGULATIONS 2014

#### SSI 2014/25

1. The above instrument are made in exercise of the powers conferred by sections 15 and 22 (1) of the Social Care (Self-directed Support) (Scotland) Act 2013 and are subject to the negative procedure.

#### Policy Objectives

2. These Regulations accompany the Social Care (Self-directed Support) (Scotland) Act 2013 (“the 2013 Act”) and make further provision about direct payments made under the 2013 Act.

3. The 2013 Act, which applies both to adult and children’s social care and support to carers, aim to provide people with choice and control over their support. The policy aims are to ensure that services and support become more flexible and responsive to people’s needs and to drive a cultural shift around the delivery of support that views people as equal citizens with rights and responsibilities, rather than people who receive services.

4. Self-directed support is a term that describes the ways in which individuals and families can have informed choice about the way support is provided to them. It includes a range of options for exercising those choices. Available resources can be used so people can have greater levels of control over how their support needs are met, and by whom. By providing greater choice, control and flexibility to users, the social care system should become much more responsive to people’s needs. The aim is to unlock the creativity of individuals and practitioners and support an approach led by personal outcomes and not by historical models of service provision.

5. The four choices available to social care users under the 2013 Act are:

Option 1	The making of a direct payment by the local authority to the supported person for the provision of support.
Option 2	The selection of support by the supported person, the making of arrangements for the provision of it by the local authority on behalf of the supported person and, where it is provided by someone other than the authority, the payment by the local authority of the relevant amount in respect of the cost of that provision.
Option 3	The selection of support for the supported person by the local authority, the making of arrangements for the provision of it by the authority and, where it is provided by someone other than the authority, the payment by the authority of the relevant amount in respect of the cost of that provision.
Option 4	The selection by the supported person of Option 1, 2 or 3 for each type of

	support and, where it is provided by someone other than the authority, the payment by the local authority of the relevant amount in respect of the cost of the support.
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6. The Regulations deal solely with direct payments. The Regulations have benefited from extensive consultation across the social care sector including local authorities, user and carer groups, provider organisations and information, support and advocacy organisations. There was a general consensus that additional Regulations on direct payments were necessary but that these should provide a fair and balanced framework for decision-making, taking account of social work's "duty of care" but recognising the duties on choice and control provided by the 2013 Act.

- **Regulation 3** sets out the administrative arrangements for any means testing in relation to the direct payment - i.e. the arrangements for the assessment of a person's ability to pay a charge with respect to the support which is to be provided by means of the direct payment;
- **Regulation 4** establishes that a direct payment can be paid in instalments (i.e. in a series of separate payments as opposed to one single payment - though this can also be done)
- **Regulation 5** establishes that a direct payment can be paid to a third party to manage the day to day practicalities under the direction of the supported person. This is an important additional option which may be suitable for individuals who would like a direct payment, and would like to employ their own staff, but require additional administrative support in relation to holding and managing the budget. A local authority cannot pay a direct payment to a third party unless it is satisfied that the user retains total control over how the money is spent.
- **Regulation 6** sets out an exhaustive list of the circumstances under which an authority can terminate a direct payment. These are where the person has become ineligible, where the payment has been used for purposes out-with the person's support plan, where it has been used to secure the provision of support by a family member other than in the circumstances permitted by Part 3 of the Regulations or where the money has been used unlawfully. In addition, Regulation 6 imposes certain requirements on the authority when they decide to terminate the direct payment, such as the requirement to inform the person as to the reason why the payment is terminated and the date on which it is to be terminated. This power is necessary due to the specific nature of a direct payment (ie a cash payment in place of service provision). It recognises that in some cases the direct payments may be used in an inappropriate way and it provides a means by which the authority can make appropriate use of its "duty of care" discretion. The accompanying statutory guidance will provide further detail about the appropriate use of this power by the authority.
- **Part 3 of the Regulations (regulations 7 to 9)** sets out appropriate and inappropriate circumstances where the supported person, carer and professional are considering the option of employing a close relative (for example as a personal assistant). This Part of the Regulations applies to the use of direct payments by disabled or cared-for adults and children. The rules do not apply to the use of direct payments made to adult or young carers.

- Regulation 8** provides a list of circumstances and factors in which family members may be employed - regulation 8(3)(h) is intended to give the professional the discretion to agree to the employment of family members in circumstances other than those specifically listed where he or she considers it appropriate. It is important to note that a family member can only be employed in these circumstances if each of the family member, direct payment user and local authority agree and the family member is capable (on an objective basis) of meeting the direct payment user's needs. It is important that all three parties agree to the arrangement. However, by articulating appropriate circumstances, the regulation seeks to encourage professionals to consider the outcomes and potential benefits of such arrangements.
- Regulation 9** provides exceptions to the family members rule (regulation 8). Even if a family member would otherwise be permitted to provide support under a direct payment as a result of regulation 8, he or she cannot do so if the local authority consider that the direct payment user is under undue pressure to agree to employing the family member, or if the family member is a guardian or attorney who effectively controls how the direct payment is spent. Together, Regulations 8 and 9 aim to provide an appropriate balance, providing reasonable discretion to authorities, whilst ensuring that the appropriate circumstances are made transparent to all parties involved, and users can engage in discussions with their authority within the context of the Regulations and accompanying statutory guidance.
- Regulation 10** provides that certain persons are ineligible to receive direct payments. These are persons to whom a local authority has decided to provide residential care (with or without nursing). If a person is ineligible, the local authority cannot offer the option of a direct payment but must give the person the opportunity to choose one of the other options for self-directed support. The arguments for and against the provision of direct payments for residential care were a matter of significant debate during consultation. In its response to the consultation the Scottish Government acknowledged local authorities concerns on the impact on removing the restriction in 2014 (a number of authorities stated that they were not yet prepared to provide the direct payment option for those in residential care). However Ministers acknowledged the points made by a number of user groups and providers regarding the potential range of positive benefits of direct payments in residential care. The Scottish Government's policy is to impose as few restrictions as possible on access to direct payments. Restrictions should only be imposed where there is a clear policy justification or where there are practical hurdles that cannot be overcome in the short-term. In relation to this particular question the Scottish Government has decided to retain the exclusion over the short-term but to pursue the opportunity to develop detailed test site activity in order to test, monitor and evaluate the direct payment option in a residential context. In light of this Regulation 10 retains a bar on the provision of direct payments for persons where their needs call for residential care, however Ministers have signalled their intention to remove the restriction at a later date in particular geographical areas in order to allow for testing of this approach.
- Regulation 11** provides circumstances in which local authorities are not placed under an obligation to offer the direct payment option but retain the discretion to offer the direct payment where it is the professional's judgement that this is an appropriate means by which to meet the person's assessed needs. The general policy aim is to provide authorities with an appropriate degree of discretion to refuse direct payments, to define the limits of this discretion via statutory guidance, but to provide individual

practitioners with appropriate discretion to allow direct payments in the defined circumstances on a case by case basis.

- The circumstances in which local authorities are not placed under an obligation to offer the direct payment option but retain the discretion to offer the direct payment are (a) where a local authority has previously terminated a direct payment on the grounds set out in Regulation 6 (1)(b), (c) and (d), or (b) where the making of a direct payment is likely to place the person to whom the support is to be provided at risk.
- The latter circumstance reflects the fact that there may be particular crisis or safeguarding situations where it is clear that the offer of a direct payment is clearly inappropriate and may in fact have a negative impact on the assessed needs of the individual, meaning that the authority cannot fulfil its duty of care. This reflects a long-standing policy position articulated in the 2007 Self-directed Support guidance. For example, the person may be in a crisis situation and there needs to be a further period of assessment before the person is provided with the formal options under the 2013 Act. The policy aim is to develop an appropriate balance in the legal framework, ensuring that Regulations are not used inappropriately to deny people the direct payment choice. The accompanying statutory guidance will make it clear that Regulation 11(2)(b) relates to specific circumstances and should not be used as a means by which to deny people the direct payment choice for inappropriate reasons.

## **Consultation**

7. During the Self-directed Support Bill's passage through the Scottish Parliament, Scottish Ministers made a commitment to develop statutory guidance and Regulations to accompany the 2013 Social Care (Self-directed Support) (Scotland) Act, and to consult on the content of the guidance and Regulations. On 17 April 2013, the Scottish Government launched a consultation on the Social Care (Self-directed Support) (Scotland) Act 2013 draft Regulations and Statutory Guidance. The consultation sought views on the proposed draft Regulations and Statutory Guidance and ran until 10 July 2013. A total of 144 consultation responses were received; 21 from individuals and 123 from organisations. The consultation presented the draft Regulations and the Statutory Guidance and included questions on both of these documents as well as on the associated Equality Impact Assessment (EQIA) and Business and Regulatory Impact Assessment (BRIA). Many of those responding to this consultation welcomed the opportunity to do so and noted their broad agreement with the underlying principles and values of self-directed support (SDS). Most of the comments made on each of the sections of the guidance and regulations were specific and, in very many cases, one-off issues around things which respondents thought had been omitted or needed clarification, or on suggested changes to ordering, or to words and phrases. The main theme to emerge was significant disagreement with the concept of excluding certain types of individual from receiving a direct payment. This was primarily because respondents felt that each potential exclusion from a direct payment should be based on assessment, support planning and professional judgement. The Scottish Government accepted the arguments behind these consultation responses, and the final version of the Regulations does not contain a number of the excluded categories which had been included in the consultation version.

A full list of those consulted and who agreed to the release of this information is attached to the consultation report published on the Scottish Government website  
<http://www.scotland.gov.uk/Publications/2013/08/2518>

### **Impact Assessments**

An equality impact assessment has been completed on The Self-directed Support (Direct Payments) (Scotland) Regulations 2014 and is attached.

### **Financial Effects**

A Business and Regulatory Impact Assessment on The Self-directed Support (Direct Payments) (Scotland) Regulations 2014 has been completed and is attached.

Scottish Government  
Directorate for Chief Nursing Officer, Patients, Public and Health Professions  
Adult Care and Support Division