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WELSH STATUTORY INSTRUMENTS

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**2011 No. 831 (W.125)**

**SOCIAL SERVICES, WALES**

**The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011**

<i>Made</i>	- - - -	<i>16 March 2011</i>
<i>Laid before the National Assembly for Wales</i>	- -	<i>18 March 2011</i>
<i>Coming into force</i>	- -	<i>11 April 2011</i>

The Welsh Ministers make the following Regulations in exercise of the powers conferred by sections 57(1), (1A) (3), (5B), (5C), (6), (7) and (7B) and 64(4A), (6) and (8) of the Health and Social Care Act 2001(1) and sections 17A(1), (3) and (4) and 104(4) and 104A of the Children Act 1989(2).

**Title, commencement and application**

1.—(1) The title of these Regulations is the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011 and they come into force on 11 April 2011.

(2) These Regulations apply in relation to Wales.

**Interpretation**

2. In these Regulations—

“the 1983 Act” (“*Deddf 1983*”) means the Mental Health Act 1983(3);

“the 1989 Act” (“*Deddf 1989*”) means the Children Act 1989;

“the 1990 Act” (“*Deddf 1990*”) means the National Health Service and Community Care Act 1990(4);

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(1) 2001 c. 15 (“the Act”). Section 57 of the Act was amended by section 146 of the Health and Social Care Act 2008 (c. 14) (“the 2008 Act”). Sections 57(1A), (5B) and (5C) of the Act were inserted by section 146(2) and (6) of the 2008 Act and section 57(7B) was inserted by section 16 of the Social Care Charges (Wales) Measure 2010 (nawm 2). See section 57(8) of the Act for the definition of “prescribed” and section 66 for the definitions of “regulations” and “the relevant authority”. The functions of the National Assembly for Wales under the Act were transferred to the Welsh Ministers in accordance with paragraph 30 of Schedule 11 to the Government of Wales Act 2006 (c. 32).

(2) 1989 c. 41. Section 17A was substituted by section 58 of the Act, and amended by paragraph 3 of Schedule 3 to the Children and Young Persons Act 2008 (c. 23) (“the CYPA”). Section 104 was amended by paragraph 25 of Schedule 3 to the CYPA and section 104A was inserted by paragraph 26 of Schedule 3 to the CYPA. See section 17A(6) for the definition of “prescribed” and section 30A (as inserted by paragraph 22 of Schedule 3 to the CYPA) for the definition of “appropriate national authority”.

(3) 1983 c. 20.

(4) 1990 c. 19.

- “the 2001 Act” (“*Deddf 2001*”) means the Health and Social Care Act 2001;
- “chargeable service” (“*gwasanaeth y caniateir codi ffioedd amdano*”) has the meaning set out in section 13 of the Social Care Charges (Wales) Measure 2010(5);
- “direct payment” (“*taliad uniongyrchol*”) has the meaning given in regulation 8 or 9;
- “prescribed person” (“*person rhagnodedig*”) means a person falling within the description prescribed by regulation 3 or 5 who falls within section 57(2) of the 2001 Act or section 17A(2) of the 1989 Act;
- “P” means a person falling within the description prescribed by regulation 4 who falls within subsection (2)(a) of section 57 of the 2001 Act and subsection (5A)(6) of that section or is reasonably believed by the responsible authority(7) to fall within that subsection;
- “relevant service” (“*gwasanaeth perthnasol*”) means —
- (a) in the case of direct payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act—
    - (i) a community care service within the meaning of section 46 of the 1990 Act(8),
    - (ii) a service under section 2 of the Carers and Disabled Children Act 2000 (services for carers)(9), or
    - (iii) a service which the responsible authority(10) may provide in exercise of functions under section 17 of the 1989 Act (11) (provision of services for children in need, their families and others); or
  - (b) in the case of direct payments under section 57(1A) of the 2001 Act, a community care service within the meaning of section 46 of the 1990 Act;
- “S” is the suitable person referred to in regulation 9(1).

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- (5) [2010 nawm 2](#). Section 13(2) contains the list of chargeable services which are —
- (a) *a service provided under section 29 of the National Assistance Act 1948 (c. 29) unless the service is one for which payment may be required under section 22 or 26 of that Act;*
  - (b) *a service provided under section 45(1) of the Health Services and Public Health Act 1968 (c. 46);*
  - (c) *a service provided under Schedule 15 to the National Health Service (Wales) Act 2006 (c. 42);*
  - (d) *a service provided under paragraph 1 of Part II of Schedule 9 to the Health and Social Services and Social Security Adjudications Act 1983 (c. 41) unless the service is one for which payment may be required under section 22 or 26 of the National Assistance Act 1948;*
  - (e) *a service provided under section 2 of the Carers and Disabled Children Act 2000 (c. 16) unless the service is provided in the form of residential care.*
- The Welsh Ministers may, by order, amend the list of services prescribed by section 13(2).
- (6) Section 57A of the Act was inserted by section 146(6) of the 2008 Act.
- (7) See section 57(2) of the Act for the definition of “responsible authority”.
- (8) Section 46 was amended by paragraph 14 of Schedule 10 to the Local Government (Wales) Act 1994 (c. 19) and by paragraphs 128 and 129 of Schedule 1 to the National Health Service (Consequential Provisions) Act 2006 (c. 43).
- (9) [2000 c. 16](#).
- (10) See section 17A(2) of the Children Act 1989 (c. 41) for the definition of “responsible authority”.
- (11) Section 17 was amended by section 7(1) and (2) of the Children (Leaving Care) Act 2000 (c. 35), by paragraphs 15 and 16 of Schedule 3 to the Tax Credits Act 2002 (c. 21) and by section 116(1) of the Adoption and Children Act 2002 (c. 38), by section 53(1) of the Children Act 2004 (c. 31), by paragraph 6 of Schedule 3 to the Welfare Reform Act 2007 (c. 5), by section 24 of the Children and Young Persons Act 2008 (c. 23), paragraph 1 of Schedule 1, paragraphs 1 and 2 of Schedule 3 and by Schedule 4 to that Act.

### **Prescribed descriptions of persons under section 57(1) of the 2001 Act – community care services and services for carers**

3. For the purposes of section 57(1) of the 2001 Act, a person is of a prescribed description if he or she is—

- (a) a person who appears to the responsible authority to be capable of managing a direct payment by himself or herself, or with such assistance as may be available to him or her;
- (b) not a person who falls, or is reasonably believed by the responsible authority to fall within section 57(5A) of the 2001 Act; and
- (c) not a person to whom Schedule 1 applies.

### **Prescribed descriptions of persons under section 57(1A) of the 2001 Act – community care services**

4. For the purposes of section 57(1A) of the 2001 Act a person is of a prescribed description if they are not a person to whom Schedule 1 applies.

### **Prescribed descriptions of persons under section 17A(1) of the 1989 Act – children’s services**

5. For the purposes of section 17A(1) of the 1989 Act, a person is of a prescribed description if he or she is—

- (a) a person who appears to the responsible authority to be capable of managing a direct payment by himself or herself or with such assistance as may be available to him or her; and
- (b) not a person to whom Schedule 1 applies.

### **Persons prescribed as representatives**

6. For the purposes of section 57(5B) of the 2001 Act, a person is prescribed as a representative in relation to another person if they are—

- (a) a deputy appointed for that other person by the Court of Protection under section 16(2)(b) of the Mental Capacity Act 2005(12); or
- (b) a donee of a lasting power of attorney within the meaning of section 9 of the Mental Capacity Act 2005 created by that other person.

### **Prescribed powers for surrogates**

7. For the purposes of section 57(5C) of the 2001 Act (which provides that a “surrogate” (“*lladmeredd*”), in relation to a person, means a person listed in that provision whose powers consist of or include such powers as may be prescribed), the prescribed powers are powers relating to decisions about securing the provision of a community care service within the meaning of section 46 of the 1990 Act.

### **Direct payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act**

8.—(1) If the conditions in paragraph (2) are satisfied, a responsible authority—

- (a) may, with that person’s consent, make in respect of a prescribed person such payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act as are determined in accordance with regulation 10 (“direct payments”) (“*taliadau uniongyrchol*”) in respect of the prescribed person securing the provision of a relevant service which the person is

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(12) 2005 c. 9.

obliged to receive as a result of an obligation imposed under an enactment mentioned in Schedule 2;

- (b) may, with that person’s consent, make in respect of a prescribed person in respect of whom there is in force a condition imposed in accordance with section 42(2) or 73(4) (including such a condition which has been varied in accordance with section 73(5) or 75(3)) of the 1983 Act or who is a patient who has been conditionally discharged under section 193(7) of the Mental Health (Care and Treatment) (Scotland) Act 2003(13), direct payments in respect of the prescribed person securing the provision of a relevant service; and
  - (c) in all other cases must, with that person’s consent, make in respect of a prescribed person direct payments in respect of the prescribed person securing the provision of a relevant service.
- (2) The conditions referred to in paragraph (1) are that the responsible authority is satisfied—
- (a) that the person’s need for the relevant service can be met by securing the provision of it by means of a direct payment; and
  - (b) in the case of a relevant service as defined in paragraph (a)(iii) of the definition of that term in regulation 2 that the welfare of the child in respect of whom the service is needed will be safeguarded and promoted by securing the provision of it by means of a direct payment.

#### **Direct payments under section 57(1A) of the 2001 Act**

9.—(1) The responsible authority must take the steps in paragraph (2) before it may be satisfied that it is appropriate for a payment under section 57(1A) of the 2001 Act to be made to a suitable person (“S”) in respect of S securing the provision of a relevant service for a person falling within the description prescribed by regulation 4 (“P”).

- (2) The steps referred to in paragraph (1) are that the responsible authority must—
- (a) so far as is reasonably practicable and appropriate, consult and take into account the views of—
    - (i) anyone named by P as someone to be consulted on the matter of whether a payment should be made to S for the purpose of securing provision for P of a relevant service or on matters of that kind,
    - (ii) anyone engaged in caring for P or interested in P’s welfare, and
    - (iii) any representative or surrogate of P(14);
  - (b) so far as is reasonably ascertainable, consider—
    - (i) P’s past and present wishes and feelings (and, in particular, any relevant written statement made by P when P had capacity, within the meaning of the Mental Capacity Act 2005(15), to consent to the making of direct payments),
    - (ii) the beliefs and values that would be likely to influence P’s decision if P had such capacity, and
    - (iii) the other factors that P would be likely to consider if P were able to do so;
  - (c) obtain an enhanced criminal record certificate issued under section 113B of the Police Act 1997(16)—

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(13) 2003 asp 13.

(14) See section 57(5B) of the 2001 Act and regulation 6 for the definition of “representative”. See section 57(5C) of the 2001 Act and regulation 7 for the definition of “surrogate”.

(15) 2005 c. 9. See section 1 of that Act for the key principles applying to decisions and actions taken under that Act, including the presumption of capacity. See section 2 of that Act for the definition of a person who lacks capacity.

(16) 1997 c. 50. Section 113B was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005 (c. 15) and was amended by paragraph 14 of Schedule 9 to the Safeguarding Vulnerable Groups Act 2006 (c. 47), by paragraph 149 of

- (i) in respect of S where S is an individual and is neither a person mentioned in paragraph (3) nor a friend of P who is involved in the provision of care for P, and
    - (ii) where S is a body corporate or an unincorporated body of persons, in respect of the individual who will, on behalf of that body, have overall responsibility for the day-to-day management of P's direct payments,
- such certificate to include suitability information relating to vulnerable adults (within the meaning of section 113BB(2) of that Act(17)).
- (3) The persons referred to in paragraph (2)(c)(i) are—
    - (a) the spouse or civil partner of P;
    - (b) a person who lives with P as if their spouse or civil partner;
    - (c) a person who is P's—
      - (i) parent or parent-in-law,
      - (ii) son or daughter,
      - (iii) son-in-law or daughter-in-law,
      - (iv) stepson or stepdaughter,
      - (v) brother or sister,
      - (vi) aunt or uncle, or
      - (vii) grandparent;
    - (d) the spouse or civil partner of any person specified in sub-paragraph (c); and
    - (e) a person who lives with any person specified in sub-paragraph (c) as if that person's spouse or civil partner.
  - (4) Where, having taken the steps in paragraph (2), the responsible authority is satisfied of the matters listed in paragraph (5), the responsible authority —
    - (a) may, with the requisite consent(18), make such payments under section 57(1A) of the 2001 Act as are determined in accordance with regulation 11 ("direct payments") ("*taliadau uniongrychol*") to S in respect of S securing the provision of a relevant service for P which P is obliged to receive as a result of an obligation imposed under an enactment mentioned in Schedule 2;
    - (b) in a case where there is in force, in respect of P, a condition imposed in accordance with section 42(2) or 73(4) (including such a condition which has been varied in accordance with section 73(5) or 75(3)) of the 1983 Act or in a case where P is a patient who has been conditionally discharged under section 193(7) of the Mental Health (Care and Treatment) (Scotland) Act 2003, may, with the requisite consent, make direct payments to S in respect of S securing the provision of a relevant service for P; and
    - (c) in all other cases must, with the requisite consent, make direct payments to S in respect of S securing the provision of a relevant service for P.
  - (5) The matters referred to in paragraph (4) are that—
    - (a) P's need for the relevant service can be met by securing the provision of it by means of a direct payment;

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Schedule 16 to the Armed Forces Act 2006 (c. 52), by sections 79(1) and 80 of the [Protection of Vulnerable Groups \(Scotland\) Act 2007](#) (asp 14) and by [S.I. 2009/203](#).

(17) Inserted by the Safeguarding and Vulnerable Groups Act 2006 (c. 47); sub-section (2)(d) was amended by the Policing and Crime Act 2009 (c. 26), section 81(2) and (3)(h).

(18) See section 57(1B) of the 2001 Act for the definition of "requisite consent". Section 57(1B) was inserted by section 146(2) of the Health and Social Care Act 2008 (c. 14).

- (b) S—
  - (i) will act in the best interests, within the meaning of the Mental Capacity Act 2005<sup>(19)</sup>, of P when securing the provision of services in respect of which the direct payment is made, and
  - (ii) appears to be capable of managing a direct payment by himself or herself or with such assistance as may be available to him or her, and
- (c) in all the circumstances it is appropriate for a direct payment to be made to S.

**Amount and payment of direct payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act**

**10.**—(1) Subject to paragraphs (5) and (6), a direct payment under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act will be made as a gross payment<sup>(20)</sup> unless the responsible authority decides it will be made as a net payment<sup>(21)</sup>.

(2) Subject to paragraphs (3) and (8), for the purpose of making the payment referred to in paragraph (1), the responsible authority must determine, having regard to the prescribed person's means, what amount or amounts (if any) it is reasonably practicable for the prescribed person to pay towards securing the provision of the relevant service (whether by way of reimbursement as mentioned in section 57(4) of the 2001 Act or by way of a contribution as mentioned in section 57(5) of that Act).

(3) Paragraphs (2), (5) and (8) do not apply to a prescribed person who—

- (a) falls within the description prescribed by regulation 3; and
- (b) is, or will be, securing the provision of a chargeable service,

but paragraph (4) has effect in respect of such a person.

(4) For the purposes of making the payment referred to in paragraph (1), the responsible authority must determine what amount or amounts (if any) it is reasonably practicable for the prescribed person to pay towards securing the provision of a chargeable service (whether by way of reimbursement as mentioned in section 57(4) of the 2001 Act or by way of contribution as mentioned in section 57(5) of that Act) in accordance with the Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011.

(5) Where the relevant service is one which, apart from these Regulations, would be provided under section 117 of the 1983 Act (after-care)—

- (a) the payment is to be made at the rate mentioned in subsection (4)(a) of section 57 of the 2001 Act; and
- (b) subsection (4)(b) of that section does not apply.

(6) Where a direct payment is made to a person falling within section 17A(5) of the 1989 Act—

- (a) the payment is to be made at the rate mentioned in subsection (4)(a) of section 57 of the 2001 Act; and
- (b) subsection (4)(b) of that section does not apply.

(7) The payment referred to in paragraph (1) may be made to—

- (a) the prescribed person; or
- (b) a person nominated by the prescribed person to receive the payment on their behalf.

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<sup>(19)</sup> 2005 c. 9. See section 4 of that Act for the best interests principle.

<sup>(20)</sup> See section 57(4) of the 2001 Act, as amended by section 146(4) of the 2008 Act, for the definition of “gross payment”.

<sup>(21)</sup> See section 57(5) of the 2001 Act, as amended by section 146(5) of the 2008 Act, for the definition of “net payment”.

(8) For the purpose of making a direct payment under section 57(1) of the 2001 Act in respect of the prescribed person securing the provision of residential accommodation, the responsible authority may make the determination referred to in paragraph (2) irrespective of the means of the prescribed person.

#### **Amount and payment of direct payments under section 57(1A) of the 2001 Act**

**11.**—(1) Subject to paragraph (5), a direct payment under section 57(1A) of the 2001 Act will be made to S as a gross payment unless the responsible authority decides it will be made as a net payment.

(2) Subject to paragraphs (3) and (6), for the purpose of making the payment referred to in paragraph (1), the responsible authority must determine, having regard to P's means, what amount or amounts (if any) it is reasonably practicable for P to pay towards securing the provision of the relevant service (whether by way of reimbursement as mentioned in section 57(4) of the 2001 Act or by way of a contribution as mentioned in section 57(5) of that Act).

(3) Paragraphs (2), (5) and (6) do not apply to P where P is a person—

- (a) who falls within the description prescribed by regulation 4; and
- (b) for whom provision of a chargeable service is or will be secured,

but paragraph (4) applies in respect of such a person.

(4) For the purposes of making the payment referred to in paragraph (1), the responsible authority must determine what amount or amounts (if any) it is reasonably practicable for P to pay towards securing the provision of a chargeable service (whether by way of reimbursement as mentioned in section 57(4) of the 2001 Act or by way of contribution as mentioned in section 57(5) of that Act) in accordance with the Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011.

(5) Where the relevant service is one which, apart from these Regulations, would be provided under section 117 of the 1983 Act (after-care)—

- (a) the payment is to be made at the rate mentioned in subsection (4)(a) of section 57 of the 2001 Act; and
- (b) subsection (4)(b) of that section does not apply.

(6) For the purpose of making the payment referred to in paragraph (1) in respect of the person securing the provision of residential accommodation, the responsible authority, in making the determination referred to in paragraph (2), may do so irrespective of P's means.

#### **Conditions in respect of direct payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act**

**12.**—(1) A direct payment under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act is subject to the condition that the service in respect of which it is made must not be secured from a person mentioned in paragraph (2) unless the responsible authority is satisfied that securing the service from such a person is necessary—

- (a) in the case of a relevant service as defined in paragraph (a)(i) or (ii) of the definition of that term in regulation 2, to meet satisfactorily the prescribed person's need for that service; or
- (b) in the case of a relevant service as defined in paragraph (a)(iii) of the definition of that term in regulation 2, for promoting the welfare of the child in respect of whom the service is needed.

(2) The persons referred to in paragraph (1) are—

- (a) the spouse or civil partner of the prescribed person;

- (b) a person who lives with the prescribed person as if their spouse or civil partner;
  - (c) a person living in the same household as the prescribed person who is the prescribed person's—
    - (i) parent or parent-in-law,
    - (ii) son or daughter,
    - (iii) son-in-law or daughter-in-law,
    - (iv) stepson or stepdaughter,
    - (v) brother or sister,
    - (vi) aunt or uncle, or
    - (vii) grandparent;
  - (d) the spouse or civil partner of any person specified in sub-paragraph (c) who lives in the same household as the prescribed person; and
  - (e) a person who lives with any person specified in sub-paragraph (c) as if that person's spouse or civil partner.
- (3) Paragraphs (2)(c)(ii) and (iii) do not apply in the case of a person mentioned in section 17A(2)(c) of the 1989 Act.
- (4) A responsible authority may make a direct payment under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act subject to such other conditions (if any) as it considers appropriate.
- (5) The conditions referred to in paragraph (4) may, in particular, require that the payee—
- (a) must not secure the relevant service from a particular person; and
  - (b) must provide such information to the responsible authority as the authority considers necessary in connection with the direct payment.

### **Conditions in respect of direct payments under section 57(1A) of the 2001 Act**

**13.—**(1) A direct payment under section 57(1A) of the 2001 Act is subject to the conditions in paragraph (2).

- (2) The conditions referred to in paragraph (1) are that—
- (a) the service in respect of which the direct payment is made may not be secured from a person mentioned in paragraph (3) unless the responsible authority is satisfied that securing the service from such a person is necessary to meet satisfactorily P's need for that service; and
  - (b) S must —
    - (i) act in the best interests, within the meaning of the Mental Capacity Act 2005, of P when securing the provision of services in respect of which the direct payment is made,
    - (ii) provide such information to the responsible authority as that authority considers necessary in connection with the direct payment,
    - (iii) if S is an individual mentioned in regulation 9(2)(c)(i) or a body corporate or an unincorporated body of persons, obtain an enhanced criminal record certificate issued under section 113B of the Police Act 1997, which includes suitability information relating to vulnerable adults (within the meaning of section 113BB (2) of that Act), or obtain verification that a satisfactory certificate under that Act has been obtained, in respect of any person from whom a service in respect of which a direct payment is made is secured,

- (iv) notify the responsible authority if S reasonably believes that P no longer falls within section 57(5A) of the 2001 Act, and
  - (v) use the direct payment for securing the provision for P of the services for which the payment was made.
- (3) The persons referred to in paragraph (2) are—
- (a) the spouse or civil partner of P;
  - (b) a person who lives with P as if their spouse or civil partner;
  - (c) a person living in the same household as P who is P's—
    - (i) parent or parent-in-law,
    - (ii) son or daughter,
    - (iii) son-in-law or daughter-in-law,
    - (iv) stepson or stepdaughter,
    - (v) brother or sister,
    - (vi) aunt or uncle, or
    - (vii) grandparent;
  - (d) the spouse or civil partner of any person specified in sub-paragraph (c) who lives in the same household as P; and
  - (e) a person who lives with any person specified in sub-paragraph (c) as if that person's spouse or civil partner.
- (4) A responsible authority may make a direct payment under section 57(1A) of the 2001 Act subject to such other conditions (if any) as it considers appropriate.

**Maximum periods of residential accommodation which may be secured by means of a direct payment**

- 14.—**(1) Subject to paragraphs (2) and (4), a direct payment may not be made in respect of a prescribed person who falls within regulation 3 or 4 for the provision to that person of residential accommodation for a period in excess of 4 weeks in any period of 12 months.
- (2) In calculating the period of 4 weeks mentioned in paragraph (1), in any 12 month period—
- (a) an initial period in residential accommodation of less than 4 weeks (period A) will only be added to a succeeding period (period B) where period B begins within 4 weeks of the end of period A; and
  - (b) any period in residential accommodation subsequent to period B will be included in the calculation.
- (3) A direct payment may not be made in respect of a prescribed person who falls within regulation 5 for the provision of residential accommodation—
- (a) for any single period in excess of 4 weeks; and
  - (b) for any period in excess of 120 days in any period of 12 months.
- (4) A direct payment may not be made for the provision of residential accommodation where a person—
- (a) falls within the description of a person prescribed by regulation 3 or 4; and
  - (b) that person is or will be receiving a direct payment, or a direct payment is being or will be made in respect of that person, for the purposes of securing the provision of a chargeable service.

### **Displaced functions and obligations of the responsible authority**

15.—(1) Except as provided by paragraph (2), the fact that a responsible authority makes a direct payment does not affect its functions with respect to the provision under the relevant enactment of the service to which the payment relates.

(2) Where a responsible authority makes a direct payment, it is not under any obligation with respect to the provision under the relevant enactment of the service to which the payment relates as long as it is satisfied that the need which calls for the provision of the service will be secured by—

- (a) in the case of direct payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act, the payee's own arrangements; or
- (b) in the case of direct payments under section 57(1A) of the 2001 Act, the arrangements made by S.

(3) In paragraphs (1) and (2), references to the relevant enactment, in relation to the provision of a service, are to the enactment under which the service would fall to be provided apart from these Regulations.

### **Repayment of direct payments**

16.—(1) A responsible authority which has made a direct payment may require the payment or part of the payment to be repaid where it is satisfied that—

- (a) the direct payment or part of the payment has not been used to secure the provision of the service to which it relates; or
- (b) a condition imposed under regulation 12 or 13 has not been complied with.

(2) Any sum falling to be repaid by virtue of paragraph (1) may be recoverable as a debt due to the responsible authority.

### **Review**

17.—(1) A responsible authority must review the making of direct payments under section 57(1A) of the 2001 Act—

- (a) at least once within the first year of the direct payments being made;
- (b) at appropriate intervals, not exceeding twelve months, thereafter;
- (c) where the responsible authority reasonably considers, on the basis of information given by S or by any other person, that P no longer falls within section 57(5A) of the 2001 Act; and
- (d) whenever notified by any person of concerns that—
  - (i) the direct payment may not have been used to secure the provision for P of the services for which the payment was made, or
  - (ii) may mean that the responsible authority would no longer be satisfied of the matters listed in regulation 9(5)(b) or (c).

(2) A responsible authority must review the making of direct payments under section 57(1) of the 2001 Act where the responsible authority reasonably considers, on the basis of information given by any person, that P falls within section 57(5A) of that Act.

### **Termination of direct payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act**

18.—(1) Subject to paragraph (3), a responsible authority must stop making direct payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act to a person if—

- (a) the person ceases to be a prescribed person; or

- (b) a condition mentioned in regulation 8(2) ceases to be met.
- (2) A responsible authority may stop making the whole or part of direct payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act to a prescribed person if—
  - (a) any condition imposed under regulation 12 or referred to in section 57(4)(b) of the 2001 Act is not complied with; or
  - (b) in all the circumstances the responsible authority considers it appropriate to stop the making of direct payments.
- (3) A responsible authority may continue to make direct payments to a person who ceases to satisfy regulation 3(b) who would otherwise be a prescribed person if—
  - (a) the authority is reasonably satisfied that that person’s lack of capacity to consent will be temporary;
  - (b) another person who appears to the responsible authority to be capable of managing a direct payment is prepared to accept and manage such payments on behalf of that person during the period of their incapacity; and
  - (c) the person with whom the arrangement for the provision of the relevant service has been made agrees to accept payment for the service from the person mentioned in subparagraph (b).

#### **Termination of direct payments under section 57(1A) of the 2001 Act**

- 19.**—(1) A responsible authority must stop making direct payments under section 57(1A) of the 2001 Act to S if—
- (a) the person in respect of whom the payments are made (“the beneficiary”) (“*y buddiolwr*”) ceases to—
    - (i) fall within the description of persons prescribed by regulation 4, or
    - (ii) fall within section 57(2)(a) of the 2001 Act; or
  - (b) the responsible authority is no longer satisfied of any of the matters listed in regulation 9(5).
- (2) Subject to paragraphs (4) and (5), a responsible authority must stop making direct payments under section 57(1A) of the 2001 Act to S if the beneficiary no longer falls within section 57(5A) of the 2001 Act or is reasonably believed by the responsible authority no longer to fall within that section.
- (3) A responsible authority may stop making the whole or part of the direct payments to S if any condition imposed under regulation 13 or referred to in section 57(4)(b) of the 2001 Act is not complied with.
- (4) A responsible authority may continue to make direct payments under section 57(1A) of the 2001 Act to S notwithstanding that the beneficiary ceases to fall within section 57(5A) of the 2001 Act, if—
- (a) the authority is reasonably satisfied that the beneficiary’s capacity to consent to the making of direct payments will be temporary; and
  - (b) the direct payments are made subject to the additional condition that S will allow the beneficiary to manage the direct payments themselves for any period in respect of which the responsible authority is satisfied that the beneficiary has capacity to consent to the making of direct payments and is capable of managing such payments.
- (5) Where paragraph (2) applies and a responsible authority reasonably believes that the beneficiary’s capacity to consent is not temporary, before terminating payments under

section 57(1A), the authority must consult the beneficiary with regard to whether the beneficiary consents to the making of direct payments under section 57(1) of the 2001 Act.

(6) Subject to paragraph (7), direct payments under section 57(1A) may not be terminated under paragraph (2) until direct payments under section 57(1) of the 2001 Act are made where, in accordance with paragraph (5), the beneficiary consents to direct payments under section 57(1) of the 2001 Act, if the beneficiary—

- (a) is a prescribed person;
- (b) falls within section 57(2)(a) of the 2001 Act; and
- (c) the condition in regulation 8(2)(a) is met.

(7) Nothing in paragraph (6) affects the responsible authority's discretion not to make direct payments under section 57(1) of the 2001 Act under regulation 8(1)(a) or (b).

### **Revocation**

**20.** The instruments specified in column 1 of Schedule 3 to these Regulations are revoked to the extent specified in column 3 of that Schedule.

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

16 March 2011

## SCHEDULE 1

Regulations 3, 4 and 5

### PERSONS TO WHOM DIRECT PAYMENTS MAY NOT BE MADE

This Schedule applies to a person if that person is—

- (a) subject to a drug rehabilitation requirement, as defined by section 209 of the Criminal Justice Act 2003**(22)**, imposed by a community order within the meaning of section 177 of that Act, or by a suspended sentence of imprisonment, within the meaning of section 189 of that Act;
- (b) subject to an alcohol treatment requirement as defined by section 212 of the Criminal Justice Act 2003, imposed by a community order within the meaning of section 177 of that Act, or by a suspended sentence of imprisonment, within the meaning of section 189 of that Act;
- (c) released on licence under Part 2 of the Criminal Justice Act 1991**(23)**, Chapter 6 of Part 12 of the Criminal Justice Act 2003 or Chapter 2 of the Crime (Sentences) Act 1997**(24)** subject to a non standard licence condition requiring the offender to undertake offending behaviour work to address drug or alcohol related behaviour;
- (d) required to submit to treatment for his or her drug or alcohol dependency by virtue of a community rehabilitation order within the meaning of section 41 of the Powers of Criminal Courts (Sentencing) Act 2000**(25)** or a community punishment and rehabilitation order within the meaning of section 51 of that Act;
- (e) subject to a drug treatment and testing order imposed under section 52 of the Powers of Criminal Courts (Sentencing) Act 2000**(26)**;
- (f) either—
  - (i) required to submit to treatment for his or her drug or alcohol dependency by virtue of a requirement of a probation order within the meaning of sections 228 to 230 of the Criminal Procedure (Scotland) Act 1995**(27)**;
  - (ii) subject to a drug treatment and testing order within the meaning of section 234B of that Act; or
  - (iii) subject to a community payback order under section 227A of that Act imposing requirements relating to drug or alcohol treatment; or
- (g) released on licence under section 22 or 26 of the Prisons (Scotland) Act 1989**(28)** or under section 1 or 1AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993**(29)** and

**(22)** 2003 c. 44 (“the 2003 Act”). Section 209 was amended by paragraph 88 of Schedule 4 to the Criminal Justice and Immigration Act 2008 (c. 4) and by S.I. 2008/912. Section 177 was amended by paragraph 82 of Schedule 4 to that Act. Section 189 was amended by S.I. 2005/643.

**(23)** 1991 c. 53.

**(24)** 1997 c.43.

**(25)** 2000 c. 6. Sections 41 and 51 were repealed, with savings, by section 37 of the 2003 Act.

**(26)** Section 52 was repealed, with saving, by Schedule 37 to the 2003 Act.

**(27)** 1995 c. 46. Section 228 was amended by paragraph 21 of Schedule 1 to the Crime and Punishment (Scotland) Act 1997 (c. 48), by paragraph 1 of Schedule 6 to the Crime and Disorder Act 1998 (c. 37), by paragraph 122 of Schedule 7 to the Criminal Justice and Court Services Act 2000 (c. 43), by sections 42(11) and 89 of the Criminal Justice (Scotland) Act 2003 (asp 7) and by S.I. 1998/2327, 2001/919, 2002/1149 (C.28), 2003/288 and 2008/912. Section 229 was amended by section 49(4) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6). Section 229A was inserted by sections 12(2) and 24 of the Management of Offenders etc (Scotland) Act 2005 (asp 14) and amended by S.S.I. 2006/48. Section 230 was amended by Schedule 6 to the Adults with Incapacity (Scotland) Act 2000 (asp 4), by sections 135, 331 and 333 and paragraph 8 of Schedule 4 and Part 1 of Schedule 5 to the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) and by S.S.I. 2005/161 and S.I. 2009/1182. Section 234B was inserted by section 89 of the Crime and Disorder Act 1998 and amended by S.I. 1998/2327. Section 227A was inserted into the Criminal Procedure (Scotland) Act 1995 by section 14 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13). Section 227A(2)(g) and (h) provide for the imposition of requirements relating to drug and alcohol treatment respectively.

**(28)** Sections 22 and 26 were repealed, with savings, by Schedule 7 to the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c. 9).

subject to a condition that he or she submits to treatment for his or her drug or alcohol dependency.

## SCHEDULE 2

Regulations 8 and 9

### ENACTMENTS UNDER WHICH AN OBLIGATION TO RECEIVE RELEVANT SERVICES MAY BE IMPOSED AND IN RESPECT OF WHICH DIRECT PAYMENTS MAY BE MADE

The enactments referred to regulations 8(1)(a) and 9(4)(a) are—

- (a) Part 1 of Schedule 1A to the Criminal Procedure (Insanity) Act 1964**(30)**;
- (b) section 8, 17 or 17B of the 1983 Act or section 40(2) read with section 8 of that Act**(31)**;
- (c) section 57A of or Schedule 4 to the Criminal Procedure (Scotland) Act 1995**(32)**;
- (d) section 41, 53, 127, 179, 221 or 224 of the Mental Health (Care and Treatment) Scotland Act 2003 or section 66 read with section 64 or 65 of that Act**(33)**;
- (e) section 177 or 189 of the Criminal Justice Act 2003**(34)** insofar as those sections relate to a person who is subject to a mental health treatment requirement as defined by section 207 of that Act;
- (f) section 41 or 51 of the Powers of Criminal Courts (Sentencing) Act 2000 insofar as those sections relate to a person who is required to submit to treatment for his or her mental condition**(35)**;
- (g) sections 228 to 230 of the Criminal Procedure (Scotland) Act 1995 insofar as those conditions relate to a person who is required to submit to treatment for his or her mental condition**(36)**;
- (h) section 22 or 26 of the Prisons (Scotland) Act 1989 insofar as those sections relate to a person who is subject to a condition that he or she submits to treatment for his or her mental condition**(37)**;
- (i) section 12 of the Prisoners and Criminal Proceedings (Scotland) Act 1993**(38)**;
- (j) section 37(4) of the Criminal Justice Act 1991 insofar as it relates to a person who is subject to a condition that he or she submits to treatment for his or her mental condition**(39)**.

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**(29)** Section 1 was amended by paragraph 98 of Schedule 8 to the Crime and Disorder Act 1998, by section 1(2) of the [Convention Rights \(Compliance\) \(Scotland\) Act 2001 \(asp 7\)](#) and by section 15(2) of the [Management of Offenders etc \(Scotland\) Act 2005 \(asp 14\)](#). Section 1AA was inserted by section 15(3) of that Act.

**(30)** 1964 c. 84.

**(31)** 1983 c. 20 (“the 1983 Act” is defined in regulation 2). Section 8 was amended by paragraph 2(b) of Schedule 2 to the Mental Health Act 2007 (c. 12) (“the 2007 Act”). Section 17 was amended by section 3(3) of the Mental Health (Patients in the Community) Act 1995 (c. 52) and by sections 9(3) and 33(2) of the 2007 Act. Section 17B was inserted by section 33(2) of the 2007 Act.

**(32)** 1995 c. 46. Section 57A was inserted by section 133 of the Mental Health (Care and Treatment) Scotland Act 2003. Section 57A was amended by S.S.I. 2005/465. Schedule 4 was amended by paragraph 21 of Schedule 1 to the Crime and Punishment (Scotland) Act 1997 and by S.S.I. 2005/465.

**(33)** 2003 asp 13. Sections 127 and 179 were amended by S.S.I. 2005/465.

**(34)** 2003 c. 44. Section 207 was amended by S.I. 2009/1182.

**(35)** See footnote to paragraph (d) of Schedule 1.

**(36)** See footnote to paragraph (f) of Schedule 1.

**(37)** See footnote to paragraph (g) of Schedule 1.

**(38)** 1993 c. 9. Section 12 was repealed by Schedule 5 to the [Custodial Sentences and Weapons \(Scotland\) Act 2007 \(asp 17\)](#) from a date to be appointed.

**(39)** 1991 c. 53. Section 37 was repealed with savings by Schedule 37 to the Criminal Justice Act 2003 (c. 44).

## SCHEDULE 3

Regulation 20

## REVOCATIONS

<i>Statutory Instrument</i>	<i>Statutory Instrument Number</i>	<i>Extent</i>
The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004	2004/1748 (W.185)	The whole Regulations
The Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005	2005/2078	Paragraph 27 of Schedule 2
The Civil Partnership Act 2004 (Consequential Amendments to Subordinate Legislation) (Wales) Order 2005	2005/3302 (W.256)	Paragraph 28 of the Schedule
The Mental Health Act 2007 (Consequential Amendments) Order 2008	2008/2828	Article 19

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations make provision for the making of direct payments in respect of a person securing the provision of certain social care services. In doing so they revoke and replace the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004.

The services in question are those which would be provided under the community care enactments mentioned in section 46(3) of the National Health Service and Community Care Act 1990, to carers under section 2 of the Carers and Disabled Children Act 2000 or services under section 17 of the Children Act 1989 (provision of services for children in need, their families and others).

Regulations 3, 4 and 5 prescribe the descriptions of persons who may receive direct payments.

Regulation 6 prescribes persons who may act as representatives of persons lacking the capacity to consent to the making of direct payments within the meaning of the Mental Capacity Act 2005 ("persons lacking capacity").

Regulation 7 prescribes powers which a depute or donee must have in order to be a surrogate of a person lacking capacity.

Regulation 8 sets out the circumstances where a responsible authority ("an authority") must, or may, make direct payments to persons who have the capacity to consent to the making of a direct payment.

Regulation 9 sets out the circumstances where an authority must, or may, make direct payments to persons lacking capacity.

Regulations 10 and 11 make provision as to the amount and payment of direct payments to persons who have the capacity to consent and to persons lacking capacity respectively. Direct payments must be made either gross or net of such amount determined by the authority as being due to be contributed by the person in respect of the service. In certain cases a payment may only be made gross. In the case of direct payments to persons who have the capacity to consent, a payment may be made to the prescribed person or to such other person nominated by that person. They specify the circumstances in which an authority is required to determine a person's means in accordance with the Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011.

Regulations 12 and 13 specify conditions which must or may be imposed in respect of direct payments to persons with the capacity to consent and to persons lacking capacity respectively. In particular they prohibit a direct payment from being used to secure a service from certain persons, except in specified circumstances.

Regulation 14 sets out the maximum periods of residential accommodation which may be secured by means of a direct payment and the circumstances in which a direct payment may not be used to secure such accommodation.

Regulation 15 provides that where an authority makes a direct payment it retains the functions as respects the provision of the service. It also provides that an authority is not under any obligation with respect to the provision of the service provided if it is satisfied that the needs of the person will be secured by their own arrangements.

Regulation 16 sets out the circumstances where an authority may require a direct payment to be repaid.

Regulation 17 provides for the authority to review the making of direct payments in certain circumstances.

Regulations 18 and 19 provide for the circumstances where an authority must, or may, stop making direct payments to persons who have the capacity to consent and to persons lacking capacity respectively.

Regulation 20 and Schedule 3 make provision for the revocation of specified regulations.