

EXPLANATORY MEMORANDUM TO
THE CARE AND SUPPORT (DIRECT PAYMENTS) REGULATIONS 2014

2014 No. 2871

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1. This instrument replaces existing legislation on social care direct payments. These are cash payments given to people in lieu of care and support that would otherwise have been arranged for them by local authorities.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None.

4. Legislative Context

4.1. Sections 31 and 32 of the Care Act 2014 require, in most cases and circumstances, that local authorities meet a person's needs for care and support by making direct payments, provided the person requests that their needs be met in this way and other conditions specified in those sections are met.

4.2. These regulations make provision as to who is not permitted to have their needs met by direct payments and as to conditions which must or may apply in relation to the making of direct payments (including the steps a local authority must take before making a direct payment under section 32 of the Act in respect of a person who lacks the capacity to request that their needs are met by the making of a direct payment).

4.3. Broadly, the 2014 Act and these regulations make the same provision for the making of direct payments as currently exist under The Community Care, Services (Direct Payments) (England) Regulations 2009 (S.I. 2009/1887) as amended by S.I. 2013/2270 and the Health and Social Care Act 2011. This instrument mainly replicates the 2009 framework, minus aspects that are now in primary legislation, and updating several areas to align with Government policy on direct payments and self-directed support (outlined below in policy background, section 7).

5. Territorial Extent and Application

5.1. This instrument applies to England only.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1. Direct payments are crucial to achieving the Government's aim to increase independence, choice and control for service users and their carers through allowing them the opportunity to arrange their own personalised care. They give people the freedom to plan flexible and innovative ways to meet care and support needs, resulting in better outcomes for both the service user and their carer. They are a key part of the reform of adult social care as set out in the *Caring for Our Future* White Paper. This instrument largely replicates the existing regulatory framework set out in the 2009 Direct Payment Regulations.
- 7.2. As is the case under the 2009 regulations, local authorities are prohibited from making direct payments to people who are subject to certain aspects of criminal justice legislation relating to substance or alcohol misuse (schedule 1 of this instrument). This is considered appropriate because of the nature and purpose of the regime to which they are subject, in that providing direct payments to meet needs carries a real risk of unintended consequences (such as encouraging further substance misuse). There is nothing to suggest that the prohibition should not continue to apply.
- 7.3. This instrument does bring in some changes from the 2009 Regulations. These are as follows.
- 7.4. The 2009 regulations provide that direct payments cannot be used to pay for care from close family members living in the same household, unless the local authority determines this is necessary to meet needs. This instrument retains this provision, but introduces a related provision to allow a direct payments to be used to pay a close family member living in the same household for administration and management support, or services for the purpose of enabling the person to whom direct payments are made to comply with their legal obligations, such as duties owed to an employee (if they employ, for example a personal assistant), or to monitor their receipt and expenditure of the direct payments. Again, this is only allowed if the local authority considers it is necessary to pay a close family member to provide such services. This change is intended to allow local authorities to make managing direct payments less onerous by allowing a nominal payment to be paid to a family carer, similar to the way direct payment holders can pay agencies to manage aspects of the payment on their behalf. This can be helpful where a person may have multiple, complex needs and may have several different care workers to arrange and manage.
- 7.5. This instrument also creates new provisions designed to make using direct payments more flexible and less bureaucratic. Firstly, this instrument provides that local authorities cannot require a direct payment to be used by any particular person. This is intended to support the policy intention for direct payments to be used innovatively and flexibly, and to prevent local authorities from stating that a direct payment can only be used with a particular provider. Secondly, the local authority cannot require the direct payment holder to provide information more frequently and in more detail than is reasonably required by the authority to enable it to ensure that payment is being used appropriately and that any conditions are being complied with. This is to ensure that the local authority processes of monitoring how direct payments are used is proportionate and as streamlined as possible, while still allowing local authorities to satisfy their statutory obligations to ensure the direct payment is used to meet care and support needs.

- 7.6. This instrument also makes a slight change to the circumstances in which direct payments may be made for residential accommodation. The existing prohibition on making direct payments for residential accommodation for a period in excess of 4 consecutive weeks in any period of 12 months currently applies to all residential accommodation. An exception to this was made by S.I 2013/2270 so that an authority listed in Schedule 2A to the 2009 Regulations may be made for the provision of residential accommodation together with nursing or personal care the provision of which is a regulated activity within the meaning of Chapter 2 of Part 1 of the Health and Social Care Act 2008).
- 7.7. By these regulations the restriction now only applies in the case of accommodation which is provided in a care home as defined in section 3 of the Care Standards Act 2000. The local authorities who are permitted to make direct payments for accommodation in a care home are listed in Schedule 2..
- 7.8. Integration of health with care and support is a key priority for Government, and can increase user satisfaction. This instrument requires local authorities to take reasonable steps to coordinate social care direct payments with payments made under the National Health Service Act 2006, with the view to minimising administrative burdens on the direct payment holder.
- 7.9. Finally, this instrument requires the first review of the making of the direct payment to be made within six months, rather than 12 months as is the case under the existing legislation. It applies this in all cases, rather than is the case under the current legislation to cases where the direct payment is made for a person who lacks capacity. Many local authorities choose to initially review the direct payment arrangement much sooner than twelve months in practice, and with changes outlined above, it is agreed that the direct payment should be initially reviewed sooner than a maximum of twelve months in order to identify any potential issues with the management or use of the payment. Following the initial six month review, the instrument provides that the direct payment be reviewed no later than every twelve months. Statutory guidance sets out this should be combined with the general review of the care and support plan to avoid unnecessary duplication. This new provision would only apply to direct payments made under the Care Act, not to existing direct payments.

8. Consultation outcome

- 8.1 The consultation on the package of regulations relating to Part One of the Care Act was published on 5 June 2014, and ran for ten weeks to 15 August. In order to reach a comprehensive and varied pool of experience and expertise, the consultation contained a mix of digital and face-to-face meetings and events with the full spectrum of stakeholders, including: people receiving care and support and their carers; social workers and other frontline practitioners; local authority finance managers, commissioners and elected members; voluntary and private social care providers; national representative groups and other charities and trusts; and NHS agencies, housing departments, DWP Job Centre Plus and other key partners involved in the reforms. In total, the consultation drew over 4,000 responses from many different sources. Responses were carefully analysed and, where appropriate, changes were made to regulations.

- 8.2 There was significant interest in the consultation question regarding allowing direct payments to be used to pay close family members to provide administration and management support. Responses were split almost equally between whether this policy option would increase uptake of direct payments, or pose implementation issues for local authorities. Some respondents agreed that it would make direct payments more attractive to people, provide people with greater flexibility and recognise the role that carers play in supporting people. However, there was greater concern, even from respondents that agreed it may increase uptake, about safeguarding issues, and wider concerns from many respondents that additional monitoring and accountability processes would need to be in place which could undermine the policy intention to ensure these arrangements are kept light touch and proportionate.
- 8.3 The Department therefore amended the regulation to allow this payment for administrative support in cases where the local authority determines it ‘necessary to do so’, rather than ‘giving prior consent’. We feel this strengthening of the regulatory power achieves the right balance in addressing the concerns we received, whilst still making this a viable option available for individuals in some circumstances. The guidance has been updated to include examples of where this option could work in practice.
- 8.4 The consultation also received many comments relating to the proposal to amend the review of the direct payment from 12 months to 6 months, with many of these commenting on extra pressure or the associated burden in complying with this change.
- 8.5 The proposed change is only intended to be relevant for the first review after the making of the direct payment, and thus would only apply to new direct payments. After that point the review period is set at every 12 months, with guidance suggesting that local authorities align this with the review of the care and support plan, or support plan. Furthermore, the guidance stresses that local authorities may wish to perform the initial 6 month review of the direct payment as part of the light-touch review of the care plan 8 weeks or so after sign off.
- 8.6 The Department accepted that the consultation document may not have made this distinction clear, and the Department heard through the consultation engagement period that many local authorities already conduct light-touch reviews as best practice. The Department therefore do not view this change as an additional burden, and do not propose any change to the consultation version of the direct payment regulations.
- 8.7 The Government response to the consultation was published on 23 October and can be found here:
- <https://www.gov.uk/government/consultations/updating-our-care-and-support-system-draft-regulations-and-guidance>

9. Guidance

- 9.1 Statutory guidance to support implementation of Part One of the Care Act was subject to public consultation as part of the consultation on regulations under that part. The guidance was published at <https://www.gov.uk/government/publications/care-act->

[2014-statutory-guidance-for-implementation](#) on 23 October. This guidance is not itself the subject of parliamentary scrutiny.

9.2 Guidance on direct payments has historically been available to local authorities since they were first introduced in 1997 and has been updated and expanded as their use has developed and increased.

10. Impact

10.1. A separate impact assessment has not been prepared for these Regulations. These Regulations are part of a package of legislative measures and the relevant impact assessment can be requested via careactconsultation@dh.gsi.gov.uk or Department of Health, Richmond House, 79 Whitehall, London SW1A 2NS and is available online at <http://www.legislation.gov.uk/ukpga/2014/23/resources>

10.2. As the impact assessment sets out, these regulations are not expected to represent an additional cost burden for either the public or private sector. As set out in the “Legislative Context” section above, they are a replacement for previous legislation, updated to reflect the new context of the Care Act.

11. Regulating small business

11.1. The Order will have no bearing on the regulation of existing small businesses.

12. Monitoring and review

12.1. The Government has committed to keeping the impact of the package of regulations under review. We will monitor the impacts of implementation of the policies contained within the Act and regulations under it on an ongoing basis. This will include continuing to work closely with local government to understand the impact of implementation of the reforms.

13. Contact

Kevin Kitching at the Department of Health Tel: 0113 254 6745 or e-mail: Kevin.kitching@dh.gsi.gov.uk can answer any queries regarding the instrument.