

COMMUNITY CARE AND HEALTH (SCOTLAND) ACT 2002

EXPLANATORY NOTES

Part 1 – Community Care

Direct payments

Section 7 - Direct payments

35. [Section 7](#) and paragraph 1 of schedule 2 amend sections 12B and 12C of the 1968 Act. Those sections were inserted by section 4 of the Community Care (Direct Payments) Act 1996 and amended by section 70 of the 2001 Act. They give local authorities the power to make direct payments to people of a description specified in regulations under section 12B. These payments are to enable them to arrange and purchase their own community care services, including children’s services available under section 22(1) of the 1995 Act.
36. The [Community Care \(Direct Payments\) \(Scotland\) Regulations 1997 \(S.I. 1997/693\)](#), as amended by the [Community Care \(Direct Payments\) \(Scotland\) Amendment Regulations 2000 \(S.I. 2000/183\)](#) and the [Community Care \(Direct Payments\) \(Scotland\) Amendment Regulations 2001 \(S.I. 2001/447\)](#) specify the people to whom direct payments may be made under the 1968 Act. The regulations allow for direct payments to disabled people (aged 18 and over) for adult community care services and also for direct payments to both disabled people aged 16 and 17 and disabled parents to purchase children’s services.
37. [Section 7](#) of the Act widens the availability of direct payments.
38. [Section 7\(a\)](#) amends section 12B(1) in three ways. Firstly, it removes the requirement that a person must be a “person in need” under section 94 of the 1968 Act to receive direct payments. Secondly, it reverses the present approach in section 12B(1) (b) whereby only persons of a description specified in regulations made under section 12B(1) of the 1968 Act are eligible to receive direct payments. All persons will now be eligible except those specified by such regulations. This enables the scope of the direct payments scheme to be widened, for example, to all community care client groups including people who are frail, require rehabilitation treatment following an accident or operation, are fleeing domestic abuse or are recovering from drug or alcohol addiction. Thirdly it converts what is presently a power on the part of local authorities to offer direct payments to a duty. A local authority will have a duty to offer direct payments as an alternative to arranging services itself.
39. Section 12B(2) of the 1968 Act details how local authorities can make payments on a net basis, i.e. assess the person’s ability to contribute to the cost of the services required and deduct this charge before making the direct payments. However, the new subsection (1A), inserted into section 12B by section 7(b) of the Act, will enable local authorities also to make gross payments to recipients, i.e. without first deducting the

amount a person is assessed as being able to contribute. This will give them equality of treatment with non-recipients of direct payments, who receive the full services required with recovery of their assessed contribution taking place later. While the 1968 Act does not preclude gross payments, section 7(b) (in inserting subsection (1A)) will put it beyond doubt that local authorities can make payments in this way.

40. Local authorities have a power (and will have a duty) to give direct payments only if that person gives his or her consent to the arrangement. No one can be forced to take such payments. At present if it appears to a local authority that a person is unable to consent to the arrangements, the local authority cannot offer that person direct payments. Section 7(b) inserts new subsection (1B) into section 12B, allowing for a person to consent to direct payments arrangements on behalf of a person whom the local authority is satisfied is unable to give consent. That person can then do anything that is required to secure the services needed on behalf of that person. Subsection (1B) also allows for regulations to be made to specify who can receive direct payments on behalf of the person needing the services. This will enable the Scottish Ministers to make regulations to specify that attorneys or guardians can receive direct payments on behalf of someone who may be unable to give consent, for example a person with dementia.
41. Presently recipients are unable to use their direct payments to purchase services from a local authority. Section 7(b) inserts new subsection (1C) to allow services to be bought from any person, including the local authority making the direct payments, provided that authority and the consenting person are in agreement or from any other local authority.
42. [Section 7\(c\)](#) inserts new paragraphs (b) to (e) into section 12B(4) and provides examples of what regulations may include. Paragraph (b) allows for regulations to impose conditions on an authority selling its services. Paragraph (c) enables provisions to specify circumstances, relating either to the person or the service or both, in which the authority is not required to make direct payments. Under paragraph (d) regulations can specify when local authorities must or may discontinue payments. Paragraph (e) enables regulations to authorise payments to be made to another on behalf of the person entitled to them, e.g. to the service provider.
43. An authority can assess a person's ability to contribute towards the cost of the services required. However, there is currently no mechanism in the 1968 Act to allow a local authority to recover that contribution if it has not provided or arranged the services itself. Section 7(b) above will give a local authority the power to make direct payments on a gross basis. Section 7(d) inserts new subsection (5A) to ensure that when direct payments are made on a gross basis, a local authority has a power to recover any amount which it considers appropriate. In recovering the contribution the local authority may require payment from the recipient of an appropriate sum in respect of such contribution as he or she has been assessed as being able to make, or if no assessment has been made, it shall make that assessment and then seek repayment.
44. Subsection (2) of section 12B of the 1968 Act gives a person who receives payments on a net basis the opportunity to seek to satisfy the local authority that he or she is unable reasonably to make up the balance between the amount the authority is willing to pay and the full cost of purchasing the services needed. The local authority may then adjust its payments accordingly. Section 7(d) inserts new subsection (5B) to give a person who receives gross payments the same recourse.