

2009 No. 1887

SOCIAL SERVICES, ENGLAND

**The Community Care, Services for Carers and Children's
Services (Direct Payments) (England) Regulations 2009**

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| <i>Made</i> - - - - | <i>13th July 2009</i> |
| <i>Laid before Parliament</i> | <i>20th July 2009</i> |
| <i>Coming into force</i> - - | <i>9th November 2009</i> |

The Secretary of State for Health makes the following Regulations in exercise of the powers conferred by sections 57(1), (1A), (3), (5B), (5C), (6) and (7) and 64(6) and (8) of the Health and Social Care Act 2001(a) and sections 17A(1), (3) and (4) and 104(4) of the Children Act 1989(b).

Citation, commencement, interpretation and application

1.—(1) These Regulations may be cited as the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 and shall come into force on 9th November 2009.

(2) In these Regulations—

“the 1983 Act” means the Mental Health Act 1983(c);

“the 1989 Act” means the Children Act 1989;

“the 1990 Act” means the National Health Service and Community Care Act 1990(d);

“the 2001 Act” means the Health and Social Care Act 2001;

“direct payment” has the meaning given in regulation 7 or 8;

“prescribed person” means a person falling within the description prescribed by regulation 2 or 4 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 3 who falls within subsection (2)(a) of section 57 of the 2001 Act and subsection (5A)(e) of that section or is reasonably believed by the responsible authority(f) to fall within that subsection;

“relevant service” means—

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- (a) 2001 c.15; section 57 was amended by section 146 of the Health and Social Care Act 2008 (c.14) (“the 2008 Act”). Sections 57(1A), (5B) and (5C) were inserted by section 146(2) and (6) of that Act. *See* section 57(8) for the definition of “prescribed” and section 66 for the definitions of “regulations” and “the relevant authority”. *See* section 170(1) for the commencement of the amended powers to make these Regulations.
- (b) 1989 c.41; section 17A was substituted by section 58 of the Health and Social Care Act 2001 (“the 2001 Act”). Section 17A was 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 and by Schedule 4 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”.
- (c) 1983 c.20.
- (d) 1990 c.19.
- (e) Section 57(5A) was inserted by section 146(6) of the 2008 Act.
- (f) *See* section 57(2) of the 2001 Act for the definition of “responsible authority”.

- (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(a),
 - (ii) a service under section 2 of the Carers and Disabled Children Act 2000(b) (services for carers), or
 - (iii) a service which the responsible authority(c) may provide in exercise of functions under section 17 of the 1989 Act(d) (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 8(1).
- (3) These Regulations apply in relation to England.

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

2. For the purposes of section 57(1) of the 2001 Act a person is of a prescribed description if they are—
- (a) a person who appears to the responsible authority to be capable of managing a direct payment by themselves or with such assistance as may be available to them;
 - (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

3. 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

4. For the purposes of section 17A(1) of the 1989 Act a person is of a prescribed description if they are—
- (a) a person who appears to the responsible authority to be capable of managing a direct payment by themselves or with such assistance as may be available to them; and
 - (b) not a person to whom Schedule 1 applies.

Persons prescribed as representatives

5. 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(e); or

(a) 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).

(b) 2000 c.16.

(c) See section 17A(2) of the Children Act 1989 (“the 1989 Act”) for the definition of “responsible authority”.

(d) 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), 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 CYP Act and by paragraph 1 of Schedule 1, paragraphs 1 and 2 of Schedule 3 and by Schedule 4 to that Act.

(e) 2005 c.9.

- (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

6. For the purposes of section 57(5C) of the 2001 Act (which provides that a “surrogate”, 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

- 7.—(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 9 (“direct payments”) in respect of the prescribed person securing the provision of a relevant service which the person is 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(a) or who is a patient who has been conditionally discharged under section 193(7) of the Mental Health (Care and Treatment) (Scotland) Act 2003(b), 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 are 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 1(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

8.—(1) The responsible authority must take the steps in paragraph (2) before they 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(c) (“S”) in respect of S securing the provision of a relevant service for a person falling within the description prescribed by regulation 3 (“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,

(a) Section 75 was amended by section 41 of the Mental Health Act 2007 (c.12) and by S.I. 2008/2833.

(b) 2003 asp 13.

(c) See section 57(1C) of the 2001 Act for the definition of “suitable person”. Section 57(1C) was inserted by section 146(2) of the 2008 Act.

- (ii) anyone engaged in caring for P or interested in P’s welfare, and
- (iii) any representative or surrogate of P(a);
- (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(b), 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 a criminal record certificate issued under section 113B of the Police Act 1997(c)—
 - (i) in respect of S where S is an individual and 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.
- (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 are satisfied of the matters listed in paragraph (5), the responsible authority—
 - (a) may, with the requisite consent(d), make such payments under section 57(1A) of the 2001 Act as are determined in accordance with regulation 10 (“direct payments”) 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

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

(b) 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.

(c) 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 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.

(d) 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 2008 Act.

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;
- (b) S—
 - (i) will act in the best interests, within the meaning of the Mental Capacity Act 2005(a), 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 themselves or with such assistance as may be available to them, 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

9.—(1) Subject to paragraphs (3) and (4), a direct payment under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act shall be made as a gross payment(b) unless the responsible authority decide it shall be made as a net payment(c).

(2) For the purpose of making the payment referred to in paragraph (1), the responsible authority shall 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)(d).

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

- (a) the payment shall 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 shall not apply.

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

- (a) the payment shall 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 shall not apply.

(5) 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.

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

10.—(1) A direct payment under section 57(1A) of the 2001 Act shall be made to S as a gross payment unless the responsible authority decide it shall be made as a net payment.

(a) See section 4 of that Act for the best interests principle.

(b) See section 57(4) of the 2001 Act, as amended by section 146(4) of the 2008 Act, for the definition of "gross payments".

(c) See section 57(5) of the 2001 Act, as amended by section 146(5) of the 2008 Act, for the definition of "net payments".

(d) Subsection (3) of section 17A of the 1989 Act applies subsections (3) to (5) of section 57 of the 2001 Act to regulations made under section 17A of the 1989 Act.

(e) Section 117 was amended by paragraph 107 of Schedule 1 to the Health Authorities Act 1995 (c.17), by paragraph 15 of Schedule 1 to the Mental Health (Patients in the Community) Act 1995 (c.52), by paragraph 12 of Schedule 4 to the Crime (Sentences) Act 1997 (c.43), by paragraph 47 of Schedule 2 to the National Health Service Reform and Health Care Professions Act 2002 (c.17), by paragraph 24 of Schedule 3 to the Mental Health Act 2007 and by S.I. 2007/961.

(2) For the purpose of making the payment referred to in paragraph (1), the responsible authority shall 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) 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 shall 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 shall not apply.

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

11.—(1) A direct payment under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act shall be subject to the condition that the service in respect of which it is made shall not be secured from a person mentioned in paragraph (2) unless the responsible authority are 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 1(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 1(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 they think fit.

(5) The conditions referred to in paragraph (4) may, in particular, require that the payee—

- (a) shall not secure the relevant service from a particular person; and
- (b) shall provide such information to the responsible authority as the authority consider necessary in connection with the direct payment.

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

12.—(1) A direct payment under section 57(1A) of the 2001 Act shall be 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 shall not be secured from a person mentioned in paragraph (3) unless the responsible authority are satisfied that securing the service from such a person is necessary to meet satisfactorily P's need for that service; and
- (b) S shall—
 - (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 consider necessary in connection with the direct payment,
 - (iii) if S is an individual mentioned in regulation 8(2)(c)(i) or a body corporate or an unincorporated body of persons, obtain a criminal record certificate issued under section 113B of the Police Act 1997, 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 they think fit.

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

13.—(1) Subject to paragraph (2), a direct payment may not be made in respect of a person who falls within regulation 2 or 3 for the provision to that person of residential accommodation for a period in excess of 4 consecutive weeks in any period of 12 months.

(2) In calculating the period of 4 weeks mentioned in paragraph (1) a period in residential accommodation of less than 4 weeks shall be added to any succeeding period in residential

accommodation where the two periods are separated by a period of less than 4 weeks but not otherwise.

(3) A direct payment may not be made in respect of a person who falls within regulation 4 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.

Displaced functions and obligations of the responsible authority

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

(2) Where a responsible authority make a direct payment, they shall not be under any obligation with respect to the provision under the relevant enactment of the service to which the payment relates as long as they are 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

15.—(1) A responsible authority which have made a direct payment may require the payment or part of the payment to be repaid where they are 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 11 or 12 has not been complied with.

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

Review

16.—(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 consider, 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 8(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 consider, 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

17.—(1) Subject to paragraph (3), a responsible authority must terminate the making of 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 7(2) ceases to be met.

(2) A responsible authority may terminate the making of 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 11 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 consider it appropriate to terminate the making of direct payments.

(3) A responsible authority may continue to make direct payments to a person who ceases to satisfy regulation 2(b) who would otherwise be a prescribed person if—

- (a) the authority are 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 sub-paragraph (b).

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

18.—(1) A responsible authority must terminate the making of 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”) ceases to—
 - (i) fall within the description of persons prescribed by regulation 3, or
 - (ii) fall within section 57(2)(a) of the 2001 Act; or
- (b) the responsible authority are no longer satisfied of any of the matters listed in regulation 8(5).

(2) Subject to paragraphs (4) and (5), a responsible authority must terminate the making of 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 terminate the making of the whole or part of the direct payments to S if any condition imposed under regulation 12 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 are 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 shall allow the beneficiary to manage the direct payments themselves for any period in respect of which the responsible authority are 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 believe that the beneficiary's capacity to consent is not temporary, before terminating payments under section

57(1A), the authority shall 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) shall 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 7(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 7(1)(a) or (b).

Consequential amendments

19. In regulation 19(b) of the Community Legal Service (Financial) Regulations 2000(a) and regulation 2(1) of the Criminal Defence Service (Financial Eligibility) Regulations 2006(b) for the words from “the Community Care, Services for Carers and Children’s Services (Direct Payments) (England) Regulations 2003” to the end substitute “regulations made under section 57 of the Health and Social Care Act 2001 (direct payments) or section 17A of the Children Act 1989 (direct payments)”.

Revocation

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

Signed by authority of the Secretary of State for Health.

13th July 2009

Phil Hope
Minister of State,
Department of Health

SCHEDULE 1

Regulations 2, 3 and 4

PERSONS EXCLUDED FROM DIRECT PAYMENTS

This Schedule applies to a person if they are—

- (a) subject to a drug rehabilitation requirement, as defined by section 209 of the Criminal Justice Act 2003(c), 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;

(a) S.I. 2000/516, amended by S.I. 2007/906; there are other amending instruments but none is relevant.

(b) S.I. 2006/2492, to which there are amendments not relevant to these Regulations.

(c) 2003 c.44. 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.

- (c) released on licence under Part 2 of the Criminal Justice Act 1991(a), Chapter 6 of Part 12 of the Criminal Justice Act 2003 or Chapter 2 of the Crime (Sentences) Act 1997(b) 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 their 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 or a community punishment and rehabilitation order within the meaning of section 51 of that Act(c);
- (e) subject to a drug treatment and testing order imposed under section 52 of the Powers of Criminal Courts (Sentencing) Act 2000(d);
- (f) required to submit to treatment for their 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 or subject to a drug treatment and testing order within the meaning of section 234B of that Act(e); or
- (g) released on licence under section 22 or 26 of the Prisons (Scotland) Act 1989(f) or under section 1 or 1AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993(g) and subject to a condition that they submit to treatment for their drug or alcohol dependency.

SCHEDULE 2

Regulations 7 and 8

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 in regulations 7(1)(a) and 8(4)(a) are —

- (a) Part 1 of Schedule 1A to the Criminal Procedure (Insanity) Act 1964(h);
- (b) section 8, 17 or 17B of the 1983 Act or section 40(2) read with section 8 of that Act(i);
- (c) section 57A of or Schedule 4 to the Criminal Procedure (Scotland) Act 1995(j);
- (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(k);

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- (a) 1991 c.53.
 - (b) 1997 c.43.
 - (c) 2000 c.6. Sections 41 and 51 were repealed, with savings, by Schedule 37 to the Criminal Justice Act 2003 (c.44) (“the 2003 Act”).
 - (d) Section 52 was repealed, with savings, by Schedule 37 to the 2003 Act.
 - (e) 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 section 42(11) of the Criminal Justice (Scotland) Act 2003 (asp 7) and by S.I. 2001/1149 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 section 12(2) of the Management of Offenders etc (Scotland) Act 2005 (asp 14) (“MOSA”). Section 230 was amended by Schedule 6 to the Adults with Incapacity (Scotland) Act 2000 (asp 4), by section 135, paragraph 8 of Schedule 4 and Schedule 5 to the Mental Health (Care and Treatment) Scotland Act 2003 (asp 13) and by S.I. 2009/1182. Section 234B was inserted by section 89 of the Crime and Disorder Act 1998.
 - (f) 1989 c.45. Sections 22 and 26 were repealed, with savings, by Schedule 7 to the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9).
 - (g) 1993 c.9. 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 MOSA. Section 1AA was inserted by section 15(3) of MOSA.
 - (h) 1964 c.84.
 - (i) 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 32(2) of the 2007 Act.
 - (j) 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.
 - (k) 2003 asp 13. Sections 127 and 179 were amended by S.S.I. 2005/465.

- (e) section 177 or 189 of the Criminal Justice Act 2003 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(a);
- (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 their mental condition;
- (g) sections 228 to 230 of the Criminal Procedure (Scotland) Act 1995 insofar as they relate to a person who is required to submit to treatment for their mental condition;
- (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 they submit to treatment for their mental condition;
- (i) section 12 of the Prisoners and Criminal Proceedings (Scotland) Act 1993(b) insofar it relates to a person who is subject to a condition that they submit to treatment for their mental condition; and
- (j) section 37(4) of the Criminal Justice Act 1991 insofar as it relates to a person who is subject to a condition that they submit to treatment for their mental condition(c).

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) (England) Regulations 2003 | 2003/762 | The whole Regulations |
| The Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 | 2005/2078 | Paragraph 25 of Schedule 2 |
| The Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order 2005 | 2005/2114 | In Article 2(4) the words, “, and amendment of the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003” Paragraph 5 of Schedule 4 |
| The Mental Health Act 2007 (Consequential Amendments) Order 2008 | 2008/2828 | Article 18 |

(a) Section 207 was amended by S.I. 2009/1182.

(b) Section 12 was repealed by Schedule 5 to the Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) with effect from a date to be appointed.

(c) Section 37 was repealed, with savings, by Schedule 37 to the 2003 Act.

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) (England) Regulations 2003.

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 2, 3 and 4 prescribe the descriptions of persons who may receive direct payments.

Regulation 5 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 6 prescribes powers which a depute or donee must have in order to be a surrogate of a person lacking capacity.

Regulation 7 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 8 sets out the circumstances where an authority must, or may, make direct payments to persons lacking capacity.

Regulations 9 and 10 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 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.

Regulations 11 and 12 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 13 sets out the maximum periods of residential accommodation which may be secured by means of a direct payment.

Regulation 14 provides that where an authority make a direct payment they retain the functions as respects the provision of the service. It also provides that an authority are not under any obligation with respect to the provision of the service provided they are satisfied that the needs of the person will be secured by their own arrangements.

Regulation 15 sets out the circumstances where an authority may require a direct payment to be repaid.

Regulation 16 provides for the authority to review the making of direct payments in certain circumstances.

Regulations 17 and 18 provide for the circumstances where an authority must, or may, terminate direct payments to persons who have the capacity to consent and to persons lacking capacity respectively.

Regulation 19 makes amendments to various regulations pursuant to the enactment of these Regulations.

Regulation 20 revokes various regulations.

An impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available from the Department of Health, Room 118, Wellington House, 133-155 Wellington Road, London SE1 8UG (telephone number: 020 7972 4086). The impact assessment is also annexed to the Explanatory Memorandum which is available alongside the instrument on the OPSI website www.opsi.gov.uk.

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STATUTORY INSTRUMENTS

2009 No. 1887

SOCIAL SERVICES, ENGLAND

The Community Care, Services for Carers and Children's
Services (Direct Payments) (England) Regulations 2009

£5.50