

## **Explanatory Memorandum to Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011**

This Explanatory Memorandum has been prepared by Department of Health and Social Services and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

### **Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011.

I am satisfied that the benefits outweigh any costs.

Gwenda Thomas AM, Deputy Minister for Social Services

16 March 2011

## **1. Description**

Direct Payments are cash payments made by local authorities to individuals, to meet their own assessed community care needs. Currently the direct payments legislation contained in Section 57 of the Health and Social Care Act 2001 requires a person to give their consent to a direct payments arrangement. This means that any person who lacks capacity to give such consent cannot participate in a direct payments arrangement. Section 57 (1A) of the Health and Social Care Act 2001, as inserted by section 146 of the Health and Social Care Act 2008, contains regulation-making powers for Welsh Ministers to extend the availability of direct payments to people who lack capacity through the intervention of a 'suitable person' who can consent on behalf of the person who lacks capacity.

## **2. Matters of special interest to the Constitutional Affairs Committee**

None.

## **3. Legislative background**

Existing powers for the community care Direct Payments Scheme are contained in Section 57 of the Health and Social Care Act 2001 and section 17A of the Children Act 1989 and have been implemented through the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004. The regulatory powers for Welsh Ministers to extend direct payments to people who lack capacity are contained in section 57 (1A) of the Health and Social Care Act 2001, as inserted by section 146 of the Health and Social Care Act 2008

The Statutory Instrument follows the negative resolution procedure.

## **4. Purpose & intended effect of the legislation**

Currently a direct payment can only be made to an individual who has the capacity to consent to have one, and who is able to manage the payment (with help if necessary). In addition, a number of groups are also currently excluded from receiving direct payments as they are subject to various sections of the Mental Health Act 1983. This means that individuals who lack capacity to consent or are excluded due to restrictions under Mental Health legislation are unable to benefit from the flexibility that direct payments offer. Legislative changes are required to widen the scope of direct payments.

This would then enable individuals lacking in capacity (through the intervention of 'suitable individuals' acting on their behalf) and those subject to certain provisions of the Mental Health Act 1983:

- Greater choice and control over the way the services they receive are delivered;
- Increased consumer satisfaction;

- Greater consumer participation in and ownership of care; and
- Improved health and well being outcomes.

## **5. Consultation**

Details of consultation undertaken are included in the RIA below.

### **Regulatory Impact Assessment (RIA)**

#### **Options**

##### Option1: Do nothing

Cost: There would be no new cost implications to local authorities from this option.

Benefits: This option would provide no new benefits.

##### Option2: Extend the availability of Direct Payments

Cost: Increased demand for direct payments may occur as a result of widening eligibility. This will potentially increase costs for local authorities however, we would expect these one-off set up costs to be minimal given that the systems to administer and support direct payments are already in place in local authorities.

It is also the case that most individuals who are currently excluded from receiving direct payments will be in receipt of alternative packages of care.

Benefits: Giving local authorities a duty or a power to offer direct payments to service users currently unable to receive them would give those users greater choice and control over the way the services they receive are delivered. This would lead to increased consumer satisfaction with the services they are provided with; greater consumer participation in and ownership of care; improved health and wellbeing outcomes.

One of the main groups likely to benefit from extending the availability of direct payments to those lacking the capacity to consent are severely disabled children approaching adulthood. Currently, parents of disabled children are able to receive and manage a direct payment on their child's behalf. Children who turn 18 and lack the mental capacity to consent to a direct payment cannot however, currently retain their direct payment following the transition to adult services. By extending direct payments to people who lack capacity will mean that these individuals can remain in receipt of their direct payments upon turning 18 and their families can continue to arrange care in the way that suits them best.

The removal of the blanket exclusion for people subject to certain provisions of mental health and criminal justice legislation will make it possible for people in that position to benefit from direct payments in the same way as other

people. The current exclusions mean that no one in these groups, whatever their circumstances, can benefit from direct payments. This can work against the interests of those individuals where direct payments could help them to regain their independence and to re-integrate into society after a period of detention in hospital.

In theory, there is a risk that individuals acting on behalf of those lacking capacity will not act in the best interests of the person lacking in capacity. We have included various provisions in the regulations to mitigate this risk. This includes the obligation for anyone receiving direct payments on behalf of someone lacking capacity to act with regard to the best interests of that person, with the meaning of the Mental Capacity Act 2005.

We expect benefits to individuals and families to outweigh costs. Individuals (or individuals acting on their behalf) who opt for direct payments may expect to receive greater benefits in terms of independence, choice and control, for the same public expenditure.

## **Consultation**

A 16 week public consultation on the draft regulations and proposed policy and practice guidance was undertaken during 2010. Over 50 responses were received and included responses from Local Authorities, voluntary sector organisations, health and social services professionals and individual members of the public. An analysis of the responses is attached including a summary of how the responses will inform the final regulations and guidance.

Following the launch of the consultation, direct payment stakeholders were also invited to comment on a proposal to remove the requirement for local authorities to carry out a financial assessment when determining what amount is reasonably practicable for a direct payment recipient to pay towards securing the provision of short-term residential accommodation. The aim is to relieve local authorities of the disproportionate administrative burden of having to carry out means assessments where direct payments are made for short stays in care homes, in line with the situation where temporary residential accommodation is directly provided by a local authority.

A further amendment has been required to the list of people who are excluded from receiving a direct payment in order to reflect changes made by the Criminal Justice and Licensing (Scotland) Act 2010. Section 14 of that Act introduced a new type of community disposal called a Community Payback Order (CPO). CPO's will replace probation orders, community sentences and supervised attendance orders. We have amended the regulations and guidance to take account of this change.

Where appropriate and to ensure consistency changes have been made to take into account the Charging for Homecare and Other Non-Residential Social Services regulations.

### **Competition Assessment**

Not applicable.

### **Post Implementation Review**

The effect of the changes will be monitored by officials via their regular contact with the Direct Payments Overview Group, All Wales Local Authority Direct Payments Forum & the Support Scheme Network.