



# SCOTTISH EXECUTIVE

---

Health Department  
Directorate of Service Policy and Planning

Community Care Division 1  
St Andrew's House  
Regent Road  
Edinburgh EH1 3DG

Local Authority Chief Executives  
Local Authority Directors of Social Work/Chief Social Workers  
Local Authority Head of Children's Services  
Local Authority Directors of Housing  
Local Authority Directors of Finance  
Health and Social Work Professional Bodies  
Voluntary Sector Organisations  
Direct Payments Scotland Management Committee  
NHS Board Chief Executives

Telephone: 0131-244 5455  
Fax: 0131-244 5315  
Debi.garft@scotland.gsi.gov.uk  
<http://www.scotland.gov.uk>

Your ref:  
Our ref: DKY 1/5/15

13 March 2003

Dear Colleague

## **SOCIAL WORK (SCOTLAND) ACT 1968 , SECTIONS 12B AND 12C- DIRECT PAYMENTS: DRAFT POLICY AND PRACTICE GUIDANCE**

### **Introduction**

1. This circular provides draft policy and practice guidance to local authorities on implementing the direct payments legislation from 1 June 2003.
2. This guidance is issued under Section 5(1) of the Social Work (Scotland) Act 1968 ("the 1968 Act"). It offers advice to local authorities on how to make payments under sections 12B and 12C of the 1968 Act which now place a **duty** on local authorities to **offer** direct payments to eligible people who wish to receive them for adult community care and children's services.
3. Section 7 of the Community Care and Health (Scotland) Act 2002 ("the 2002 Act") introduces a number of measures which amend section 12B and will help make direct payments more widely available. The legislation requires local authorities to offer direct payments to disabled people who have been assessed as needing community care or children's services. The person receiving the direct payment must give their consent, be able to manage them (with as much assistance as necessary) and must not come within the list of persons excluded by regulations.
4. The guidance sets out the Executive's view of how local authorities should be using the new duty placed on them by sections 12B and C of the 1968 Act and advises on how they might implement this duty. It aims to help local authorities manage a simple but effective system for making direct payments to disabled people.
5. This guidance replaces the policy and practice guidance issued under cover of circular **CCD 8/2002** on 10 July 2002.



## Background

6. The Executive's aim in introducing these measures is to increase the independence of people who use community care or children's services. We believe that direct payments promote a more person-centred approach to service provision giving people more control and choice over the way the services they need are delivered. These provisions were included in the 2001 "Better Care for all our futures" consultation document and were widely welcomed.

### New provisions commencing on 1 June 2003

7. From 1 June 2003 local authorities have a duty to offer direct payments to all who are potentially eligible (as defined by the Community Care (Direct Payments) Scotland Regulations 1997, as amended) to receive them. This means that local authorities can no longer choose to make direct payments available only to certain groups of disabled people nor can they make them available only for certain services.

8. To receive direct payments consent must be given. Where it is clear that the person who requires the services is unable to give the consent required, an attorney or guardian, given specific powers to receive direct payments, may give that consent instead. In the case of disabled child (under the age of 18) who requires services, the parent or a person with parental responsibility for the child, can give that consent.

9. Direct payments recipients can purchase the services they require from any local authority.

10. Direct payments can be made on a 'net' or 'gross' basis. Where they are made on a gross basis the local authority now has a legal mechanism for recovering any amount an individual has been assessed as able to contribute.

### New provisions commencing on 1 April 2004

11. From 1 April 2004 direct payments will be extended beyond disabled people **to all community care and children's services client groups** (with the exception of certain groups of people who may be excluded by regulations). For example this will make direct payments available to people who need community care services because they are frail, fleeing domestic abuse or recovering from drug or alcohol problems.

12. This guidance does not give advice on how a local authority might implement this provision. Further guidance will be issued in March 2004.

### "Direct Payments Scotland"

13. To assist local authorities and local support organisations develop direct payments in their area the Executive committed £530,000 to set up the 2 year project "Direct Payments Scotland" (DPS) in April 2001. A further £650,000 has been made available to extend the project until March 2006. You can contact DPS by calling the helpline on 0131 558 3450 or by E-mail to [info@dpscotland.org.uk](mailto:info@dpscotland.org.uk).

## Action

14. This draft guidance is now distributed for consultation and comments are invited on any aspect of it. Local authorities are asked to distribute this draft guidance as soon as possible to all staff involved with the implementation of direct payments.



15. Comments should be returned to the Executive, by E-mail if possible, to [directpayments@scotland.gsi.gov.uk](mailto:directpayments@scotland.gsi.gov.uk) by 2 May 2003. Alternatively please post your comments to Cameron Ager, Scottish Executive, Health Department, Community Care Division 1, 2 East Rear, St Andrew's House, Regent Road, Edinburgh, EH1 3DG.

### Contact points

16. Enquiries about this circular should be addressed to Debi Garft (Tel: 0131 244 5455) at the above address or by E-mail to [debi.garft@scotland.gsi.gov.uk](mailto:debi.garft@scotland.gsi.gov.uk).

17. Copies of this consultation are available to other interested parties by contacting Richard Park 0131 244 3523 (E-mail address [richard.park@scotland.gsi.gov.uk](mailto:richard.park@scotland.gsi.gov.uk)) or on the Executive's consultation website at <http://www.scotland.gov.uk/views/views.asp>.

Yours sincerely

*Thea S. Teale*

**MISS THEA S TEALE**

**DRAFT**

# **DIRECT PAYMENTS**

## **SOCIAL WORK (SCOTLAND) ACT 1968: SECTIONS 12B AND C**

### **POLICY AND PRACTICE**

### **GUIDANCE**

**The Scottish Executive  
Community Care Division: 1**

**March 2003**

# CONTENTS

## **Part 1: Introduction**

Purpose	5
Context, policy aims and objectives	7

## **Part 2: The Community Care and Health (Scotland) Act 2002**

New provisions commencing on 1 June 2003	9
New provisions commencing on 1 April 2004	10

## **Part 3: Scope of Sections 12B and C of the Social Work (Scotland) Act 1968**

Who can receive direct payments?	11
Who cannot receive direct payments?	12
Direct payments for adult community care services	13
Free personal care	13
Community care assessments	14
Direct payments for children's services	15
Disabled parents	16
Disabled 16 and 17 year olds	16
People with parental responsibility for disabled children	17
Direct payments for housing support services	19
Direct payments for equipment and adaptations	20
Direct payments to purchase local authority services	20
Health services	21
Residential care	22

Employing close relatives	23
Giving consent	23
The service user	25
Attorneys and guardians	26
Parents	28
Managing payments	28
Emergency assistance	33

## **Part 4: Consultation, information and support**

Consultation	34
Information	35
Support	36
Supported decision making	37
Independent advocacy	38

## **Part 5: Direct payments in practice**

Assessment for direct payments	40
Carers and assessments	41
Deciding how direct payments are to be used	42
Best value	45
Calculating the amount of direct payments	45
Assessing a service user contribution	47
Making payments	48
Monitoring direct payments	49
Reviews and reassessments	51

When difficulties arise	51
Seeking repayment	54
Discontinuing direct payments	55
Complaints procedures	57
Resources	58
Statistical monitoring	58
<b>Annex A:</b> Checklist for care/personal plan for direct payments	59
<b>Annex B:</b> Support organisation details	60
<b>Annex C:</b> Other sources of information	62
<b>Annex D:</b> F1 Statistical Return Form	64

# **SOCIAL WORK (SCOTLAND) ACT 1968: SECTIONS 12B AND C: DIRECT PAYMENTS**

## **POLICY AND PRACTICE GUIDANCE**

### **Part 1: Introduction**

#### **Purpose**

1. This guidance is issued under Section 5(1) of the Social Work (Scotland) Act 1968 (“the 1968 Act”) and takes effect from 1 June 2003. It sets out the Executive’s view of how local authorities can make the most of the new duty placed on them to offer direct payments by Sections 12B and C of the 1968 Act and advises on how they might implement this duty. It aims to offer advice and help local authorities set up a simple but effective direct payments system which contains safeguards which are not unnecessarily bureaucratic or time consuming.

2. This guidance replaces the policy and practice guidance issued under cover of circular **CCD: 8/2002** on 10 July 2002 and advises on how the direct payments legislation can be applied from 1 June 2003.

3. The Community Care (Direct Payments) Act 1996 (“the 1996 Act”) inserts sections 12B and 12C into the 1968 Act. These sections are further amended by section 70 of the Regulation of Care (Scotland) Act 2001 (“the 2001 Act”) and section 7 of the Community Care and Health (Scotland) Act 2002 (“the 2002 Act”). They give local authorities, the power to make payments to people of a description specified in regulations under section 12B, enabling them to arrange and purchase the community care or children's services they have been assessed as needing. The Community Care (Direct Payments) (Scotland) Regulations 1997 (“the 1997 Regulations”), as amended by the Amendment Regulations 2000, 2001 and 2003 specify who cannot receive direct payments and certain conditions attached to their use.

4. A direct payment is a cash payment made by a local authority to an individual (or in certain circumstances his or her representative) who has been assessed as needing **community care or children’s services**. The local authority makes the payment instead of arranging the services it has assessed the person as needing. The payment is then used to

secure the relevant services. So long as the local authority is satisfied that the person's assessed needs will be met through the arrangements made using the direct payments, it is relieved of its responsibility to arrange those services for that person.

5. We know that direct payments present an opportunity to bring about improvements in the quality of life of people, **adults and children**, who choose to receive direct payments to manage their own services. It is inevitable that local authorities' control over this money is less direct than where they provide or purchase services directly and there are risks involved. On the other hand, day-to-day control of the money is passing to the person who has the strongest incentive to ensure that it is spent properly on the necessary services and is best placed to judge how to match the available resources to his or her needs.

6. Research<sup>1</sup> shows that there are few disadvantages associated with direct payments and that they can benefit not only the service user but also family members and the local authority. It also suggests that people's fears and anxieties are largely dissipated once they start direct payments and ways are found to overcome the barriers associated with their use.

7. Operating direct payments effectively can involve handling some complex issues, and it is worth taking time to think through all the areas covered in this guidance. It aims to give advice to enable local authorities to carry out their duty effectively whilst minimising the risks involved. Local authorities may find it helpful to designate a contact point within the authority, for individuals and organisations involved with direct payments, with responsibility for answering queries and for identifying and addressing any problems that arise.

8. Direct payments are a different way of fulfilling existing responsibilities to people who require community care and children's services and this guidance is intended to supplement existing guidance to explain how the Executive sees direct payments fitting into the wider community care and children's services arena. This guidance should also be read in conjunction with "*Five Steps: A Guide for Local Authorities to Implementing Direct Payments*" devised by Direct Payments Scotland<sup>2</sup> and issued to local authorities in April 2002. (Further copies are available from Direct Payments Scotland. See Annex B for contact details.)

---

<sup>1</sup> Direct Payments: The impact on choice and control for disabled people- (Witcher et al 2000) published by the Scottish Executive and Direct payments for people with mental health support needs- (Heslop 2001).

<sup>2</sup> See website at [www.dpscotland.org.uk](http://www.dpscotland.org.uk)

9. In this guidance the term ‘carer’ is used to refer to someone providing assistance in an informal or unpaid capacity. It does not therefore, include people whom the individual pays to provide services using direct payments.

10. Direct payments can be made in lieu of community care services. **For the purposes of the direct payments legislation** "community care" services are defined by section 5A of the 1968 Act as "...services, which a local authority are under a duty or have a power to provide, or to secure the provision of, under Part II of the Act or section 7 (functions of local authorities), 8 (provision of after-care services) or 11 (training and occupation of the mentally handicapped) of the Mental Health (Scotland) Act 1984". This definition includes housing support services. Since December 2001 direct payments have also been available to certain people for services provided under section 22(1) of the Children (Scotland) Act 1995.

11. At present direct payments are only available to **adults and children** who meet the definition of disabled in section 94(1) of the 1968 Act "persons in need" subsection (b) i.e. persons who suffer from illness or mental disorder or are substantially handicapped by any deformity or disability..".

## **Context, policy aims and objectives**

12. The Executive’s aim, in placing a duty on local authorities to offer direct payments, is to increase the independence of disabled adults and children by giving them more choice and control over the way the services they require are delivered. The Executive believes that direct payments not only aid social inclusion but can also help deliver a more person-centred approach to the provision of services. It has therefore legislated to ensure that all local authorities offer direct payments to eligible people. This means that local authorities must make eligible people aware that there is an alternative to more traditional service delivery and that they have a choice.

13. Local authorities should seek to leave as much choice as possible in the hands of the individual, allowing people to address their own needs in innovative ways, whilst the local authority continues to satisfy itself that the person’s assessed needs are being met, and that the money is being spent appropriately and cost-effectively. Ultimately direct payments are

about promoting independence, and this is achieved most effectively when they are introduced in a spirit of partnership between the local authority and the person who requires the service.

14. It is important to say at the outset, that by promoting direct payments the Executive is not advocating for traditional forms of service delivery to be abandoned. We recognise the high quality of the services arranged by local authorities. Furthermore, direct payments are not the only way in which local authorities can promote independence and give people more influence over the way the community care services they need are provided. It is important that local authorities continue to develop ways of making their services more person-centred and responsive to the needs and wishes of service users. We acknowledge that for a variety of reasons, many service users will prefer to receive directly provided services rather than receive direct payments to make private arrangements themselves. Some people may however wish to use direct payments to purchase services from a local authority thereby giving them more control over the delivery of those services (See paragraph 59 to 62). Alternatively they may wish a combination of local authority services and direct payments. What is essential however, is that people are given the opportunity to decide this for themselves.

15. Local authorities should not treat people who receive direct payments any more or any less favourably than people who receive services arranged by them directly.

## **Part 2: The Community Care and Health (Scotland) Act 2002**

16. Section 7 of the Community Care and Health (Scotland) Act 2002 introduces a number of provisions, which amend section 12B of the 1968 Act. These provisions will help make direct payments more widely available and increase take up amongst people who use community care and children's services.

### **New provisions commencing on 1 June 2003**

17. From 1 June 2003 local authorities can no longer choose whether or not to make direct payments available to disabled people and children who live in their area. Instead that discretion is replaced by a duty to offer direct payments to all who are potentially eligible (as defined by the Community Care (Direct Payments) Scotland Regulations 1997, as amended) to receive them. In essence this means that local authorities can no longer choose to make direct payments available only to certain groups of disabled people nor can they make them available only for certain services.

18. To receive direct payments consent must be given. Where it is clear that the person who requires the services is unable to give the consent required, an attorney or guardian, given specific powers to receive direct payments, may give that consent instead. In the case of a disabled child (under the age of 18) who requires services, the parent or a person with parental responsibility for the child, can give that consent.

19. Direct payments recipients can purchase the services they require from any local authority.

20. Direct payments can be made on a 'net' or 'gross' basis. Where they are made on a gross basis the local authority now has a legal mechanism for recovering any amount an individual has been assessed as being able to contribute.

## **New provisions commencing on 1 April 2004**

21. From 1 April 2004 direct payments will be extended beyond disabled people **to all community care and children's services client groups** (with the exception of certain groups of people who may be excluded by regulations). This will make direct payments available to people who need community care services because of frailty as well as people covered by the 'Supporting People' initiative e.g. women fleeing domestic abuse, people recovering from drug or alcohol problems, homeless people.

22. This guidance does not give advice on how a local authority might implement this provision. Further guidance will be issued in March 2004.

## **Part 3: Scope of Sections 12B and C of the Social Work (Scotland) Act 1968**

23. Sections 12B and C of the 1968 Act place a duty on local authorities to make direct payments available to eligible adults and children who wish to receive them. The legislation requires local authorities to make direct payments to people who have been assessed as needing services, who give their consent (or in certain circumstances, consent is given on their behalf), who are able to manage them (with as much assistance as necessary) and who do not come within the list of persons excluded by regulations.

24. Direct payments are an alternative to local authority arranged services and should therefore only be offered at the point where the local authority would normally have agreed to provide the services.

### **Who can receive direct payments?**

25. Not everyone who is eligible for community care or children's services will be eligible for direct payments. The Community Care (Direct Payments) (Scotland) Regulations 1997 ("the 1997 Regulations"), as amended by the Amendment Regulations 2000, 2001 and 2003 (made under Section 12B(1)(b) of the 1968 Act) specify which groups of people cannot receive direct payments.

26. Those eligible to receive direct payments are defined as certain persons, assessed as in need of services, who are capable of managing direct payments, with or without assistance. However, before receiving direct payments the person requiring the service must give his or her consent. Where a person is unable to give consent, or is under the age of 16, section XX of the Regulations specifies certain categories of people who are able to give consent on behalf of the service user. Namely, parents and attorneys and guardians who have been given powers to accept direct payments.

27. The Regulations define a "person in need" by reference to the definition in Section 94(1)(b) of the 1968 Act. This might include people (adults or children) with any kind of disability for example, those with physical, including sensory disabilities, learning

disabilities and people who are disabled by illness (for example those affected by mental illness, arthritis, cancer or by HIV/AIDS). Everyone to whom direct payments are made must give their consent (see paragraphs 72 to 89) to receiving direct payments. They must also be able to manage them alone or with assistance (see paragraphs 90 to 104). The following groups of people are eligible to receive direct payments:

- (a) Disabled adults to purchase community care services;
- (b) Disabled people aged 16 and 17 to purchase children's services;
- (c) Disabled people with parental responsibility to purchase children's services;
- (d) People with parental responsibility for a disabled child to purchase the services their children have been assessed as needing;
- (e) Disabled people (including children) to purchase housing support services; and
- (f) Attorneys and guardians, with the relevant powers can receive direct payments on behalf of disabled people who are unable to give consent to arranging their own services.

### **Who cannot receive direct payments?**

28. The regulations in force specify that direct payments may not be offered to certain people whose liberty to arrange services is restricted by certain mental health or criminal justice legislation as follows:

- (a) patients subject to after-care under a community care order under the mental health legislation;
- (b) patients detained under mental health legislation who are on leave of absence from hospital;
- (c) restricted patients conditionally discharged under mental health or criminal justice legislation;

- (d) offenders serving a probation order subject to an additional requirement to undergo treatment for a mental health condition or for drug or alcohol dependency;
- (e) offenders released on licence subject to an additional requirement to undergo treatment for a mental health condition or for drug or alcohol dependency; or
- (f) people subject to equivalent mental health or criminal justice legislation applicable in England, Wales.

29. People in these groups are required to receive specific community care services. Offering them direct payments in lieu of those services would not give a sufficient guarantee that the person would receive the services required. Further details of restrictions are given in section 2(2) of the 1997 Regulations, as amended.

### **Direct payments for adult community care services**

30. Direct payments may only be offered to disabled adults who under section 12A of the 1968 Act, have been assessed as needing community care services.

31. Existing direct payments recipients have used them to secure assistance with personal tasks such as getting in and out of bed, dressing, or having a bath. They can also be used to employ someone to help prepare a meal, do housework and laundry, go shopping, or to provide services such as translation and signing. Other examples have included assistance to enable an informal carer to take a break or enabling a deafblind person to secure the services of a guide-communicator.

### **Free personal care**

32. Disabled people aged 65 and over may request direct payments to cover the element of personal care (at home) which is provided free of charge. Local authorities should refer to Executive Circular CCD4/2002: Free Personal and Nursing Care<sup>1</sup> for further information. As

---

<sup>1</sup> See website at <http://www.show.scot.nhs.uk/sehd/ccd.asp>

with all direct payments recipients the local authority cannot insist that an individual only contracts with regulated service providers.

### **Community care assessments**

33. Assessment is a crucial process. Getting the assessment right is the key to making direct payments work. To improve the results for people using community care services, the Executive introduced single, shared assessments. (Policy and practice guidance is set out in Circular CCD 8/2001: Guidance on Single, Shared Assessment of Community Care Needs<sup>1</sup>.) . Local authorities are expected to implement single, shared assessment for older people by 1 April 2003 and other community care groups by 1 April 2004.

34. The needs assessment process will be the same regardless of whether the person being assessed is likely to receive services or direct payments. There is no difference in the assessment of needs; the difference is in the delivery of the services required. It is important that local authorities make this clear to individuals. In particular, it is important that the needs-led focus of the assessment is retained and that the individual and, with his or her agreement, any informal carer should be involved throughout the assessment process. The greater involvement the individual has in the assessment process and in the decisions reached about direct payments, the more likely it is that the direct payments will be a success. The assessment of needs and decisions about how these needs should be met should be part of one process.

35. A needs-led focus of assessment also considers how direct payments might aid preventative and rehabilitative strategies. A timely provision of direct payments can forestall the need for a more extensive provision of services in the future. Consideration should be given to how people could use direct payments to regain or retain their independence, and live in their own home, for as long as possible.

---

<sup>1</sup> See Website at <http://www.show.scot.nhs.uk/sehd/publications/DC20011129CCD8single.pdf>

## Direct payments for children's Services

36. Section 22(1) of the 1995 Act relates to the provision of services for children in need. For this part of the 1995 Act a child is defined as being under the age of 18. It imposes certain duties on local authorities to safeguard and promote the welfare of children and where it is consistent with those duties to promote the upbringing of those children by their families. They should fulfil these duties by providing a range and level of services appropriate to the children's needs. Section 22(3)(b) allows local authorities to make cash payments in lieu of children's services, but only in '**exceptional circumstances**'. In general, local authorities use this to provide money in emergencies rather than on an ongoing basis. This power is not well suited to the needs of people who wish to receive payments to arrange services themselves.

37. Whether they are arranging services or making direct payments, local authorities are reminded that they should not be providing services for children, under Section 22(1), unless they can be defined as being in need. The definition of a child in need is very broad. It includes children who are disabled themselves, those who are affected adversely by the disability of any other person in the family, or those children whose health or development may be impaired or below a reasonable standard without services from the local authority. While the focus of services provided under Section 22 is to support the child, services may be provided to the wider family if those services help to safeguard or promote the welfare.

38. Section 22(1) does not define the type of services which local authorities can deliver. Rather it refers to providing a range and level of services to safeguard and promote the welfare of children in need and to promote the upbringing of such children by their families. Families and children are likely to have a wide range of needs and problems and therefore the services which will be required to meet those needs are likely to be wide-ranging. It is for each local authority to decide which services it should provide and in which circumstances, and this will not change as a result of the introduction of direct payments.

39. Local authorities are reminded that direct payments can only be used for services under section 22(1) of the 1995 Act and not for services under any other sections of that Act nor services provided by local authorities under the Education (Scotland) Act 1980.

40. Direct payments can also be used to purchase short breaks with a specialist carer. Where the local authority is satisfied that the respite care bought with the direct payments will safeguard and promote the welfare of the child, that child does not become "looked after" under the terms of section 25 of the 1995 Act.

### **Disabled parents**

41. Disabled people who are parents can receive direct payments for services available under section 22(1) of the 1995 Act to assist them in their parenting role i.e. their child can be seen as a child in need due to the disabilities of their parent(s), as well as services under section 12 of the 1968 Act. This means that direct payments can be used to meet all the social care needs of them and their families that arise from their disability. Although two different pieces of legislation are involved it is important that the needs of the disabled person and their family are looked at in a joined up way. In the interest of the family and to avoid duplication, councils should ensure the assessment process is streamlined and co-ordinated between adult and children's services and other relevant departments such as education.

42. It is important that local authorities work in partnership with families to provide those services that will best meet the needs of the children. The needs of the child should not be looked at in isolation but within the context of the family situation. The provision of services that assist disabled parents who need practical help in bringing up their children is often the most effective means of promoting the welfare of their children. This applies equally in terms of direct payments.

### **Disabled 16 and 17 year olds**

43. Disabled 16 and 17 year olds are able to take advantage of the flexibility of direct payments enabling them to make more decisions for themselves and to provide opportunities for them to have more control over their lives. Direct payments may only be used to purchase services the disabled 16 or 17 year old has been assessed as needing and not those services identified in the assessment to support other members of the disabled young person's family.

44. In making the decision to make a direct payment to a disabled 16 or 17 year old, the local authority should balance (as they do in relation to providing direct services) the young

person's wishes and feelings and the views of those with parental responsibility. However it is important that local authorities look to the young person before his or her parents when gaining consent for direct payments. The overriding requirement is that the intervention of the local authority, whether by providing a service or a direct payment, should promote and safeguard the welfare of the young person.

45. Where there is a difference of views between parents and disabled young people aged 16 and 17 and provided that the young people have sufficient understanding to make informed decisions, local authorities should give precedence to their views. Young people should be made aware that independent advocacy may be of help to them in these circumstances. It follows that there may be situations where it would be right for a young person to receive a direct payment whether the parents agree or not. For example a young woman with a physical impairment or learning disability may move away from home to go to college and may want to engage her own personal assistant to help her get ready for college in the mornings, rather than rely on the local authority service. Parents may have their own genuine reasons for not supporting their daughter's decision. For example they may have concerns about her leaving home. But decisions about a young woman's personal care should be for her to make, provided that implementing these decisions will promote her welfare.

46. There may be situations where disabled young people will express their wish to manage direct payments themselves but it is apparent to their parents and to the local authority that they do not at the moment have the capacity to do so in a way which will promote their welfare. This may be for a number of reasons, and may not be as straightforward as dealing with issues such as employment and accounts. If this is the case there may be the need to make appropriate arrangements to have payments managed for them by a suitable representative. (See sections on managing direct payments and support systems available.)

### **People with parental responsibility for disabled children**

47. Disabled children and their families may find it more arduous to access mainstream services, for example childcare, after school clubs and leisure activities. Sometimes by working with local authorities these difficulties may be overcome and children can access mainstream services. However at times families with disabled children may not consider

existing services provided or commissioned by their local authority suitable for their child and believe that they can make arrangements themselves, which will be more beneficial. Direct payments can enable people with parental responsibility for a disabled child to make such arrangements. Services for disabled children should be designed to maximise the child's abilities and give disabled children the opportunity to lead lives that are as normal as possible. Direct payments to people with parental responsibility for a disabled child are provided within the framework of section 22(1) of the 1995 Act, which requires local authorities to provide a range of services to promote and safeguard the welfare of children in need.

48. Existing guidance accompanying the 1995 Act, on the integrated planning for children's services and recent publications such as the *For Scotland's Children*<sup>1</sup> emphasise the importance of:

- Promoting the upbringing of children within their families so far as this is consistent with safeguarding and promoting their welfare;
- local authorities working in partnership with families;
- listening to children and taking into account their views; actively involving children and parents where appropriate in assessments and decision-making; and
- having regard to issues of race, language, religion and culture.

49. Local authorities should work in partnership with parents in accordance with this guidance. Local authorities should only arrange direct payments when they are satisfied that the parent is a person who will make arrangements that are designed to safeguard and promote the welfare of the child. So long as the local authority is satisfied that the assessed needs of the disabled child and family will be met through the arrangements the parent is making using the direct payments, the local authority is relieved of its responsibility to arrange those services. Local authorities retain their responsibilities under the 1995 Act to assess and, where appropriate, review the needs of disabled children and their families in the normal way.

50. Local councils should make clear the steps that people with parental responsibility for a disabled child ought to take to satisfy themselves that the person offering help with the care

---

<sup>1</sup> <http://www.scotland.gov.uk/library3/education/fcsr-00.asp>

of their child is a suitable person. *Working Together to Safeguard Children* (Department of Health et al, 1999), paragraph 6.27, comments that “the available UK evidence on the extent of abuse among disabled children suggests that disabled children are at increased risk of abuse.” It is important that people with parental responsibility for disabled children are fully alerted to any risks of abuse and provided with advice to minimise those risks. (See paragraph 171 for information about enhanced police record checks.)

51. The views of children should be listened to and taken into account in determining issues on direct payment. Children should be given appropriate help to express their views and wishes and should have access to independent advocacy when appropriate. Local authorities will need to handle such issues sensitively in terms of the family situation where there may be parental conflict with the views of the child.

52. Direct payments may be used by parents to purchase services of an intimate nature to meet the assessed needs of their disabled children. However, as children mature local councils should encourage parents to give greater weight to the child’s views about how their intimate care needs are to be met.

### **Direct payments for housing support services**

53. Supporting People<sup>1</sup>, a new policy and funding framework for the provision of housing support services, came into effect on 1 April 2003. Housing support services are services other than care or housing management services that enable a person to establish or maintain occupancy of a dwelling. These services are provided to help people live as independently as possible in their own homes. Housing support services come within the definition of community care services and therefore the 1968 Act allows disabled people to use direct payments to purchase these services. Housing support services might include services to help with home safety and security or to set up a new tenancy.

54. Disabled 16 and 17 year olds and disabled parents can access housing support services for children under section 22(1) of the 1995 Act.

---

<sup>1</sup> More information about Supporting People can be found on the Scottish Executive Supporting People website at: <http://www.scotland.gov.uk/housing/supportingpeople>

55. If no needs other than housing support needs are identified a "Simple Assessment" should be carried out looking only at the level and type of housing support service required.

### **Direct payments for equipment and adaptations**

56. The 1968 Act also allows local authorities to make direct payments to enable disabled people to purchase for themselves equipment and adaptations, which come within the legal definition of community care services and so would otherwise be provided by the local authority. This includes equipment and adaptations relating to a sensory impairment. Equipment and adaptations relate to people of all ages and will usually involve a single/one off payment (unless after care or maintenance services are required).

57. When making direct payments for an individual to purchase equipment or adaptations, the local authority will need to bear in mind the specialist expertise that may be needed to ensure that equipment purchased is safe and appropriate. Local authorities should also clarify, with the individual, the ownership of any equipment, and where responsibility lies for its service, maintenance and repair. Careful consideration of all these points will need to be given when direct payments are used to purchase complex and expensive pieces of equipment. Direct payments cannot be used as a substitute for Home Improvement Grants for adaptations for disabled people or for any adaptation that would normally be provided by a landlord. Nor can they be used to purchase equipment that would normally be provided by the NHS.

58. Direct payments can be used to purchase equipment and adaptations from a local authority (see below).

### **Direct payments to purchase local authority services**

59. People might wish to use their direct payments to contract directly with an agency/private provider/voluntary organisation for the services required, employ staff to provide the services or purchase the services from a local authority. An individual may approach any local authority to secure the services he or she has been assessed as needing. This is intended to enable people to have more control over the services they receive, particularly in remote or rural areas, where the local authority might be the sole provider of

the services required. It also opens up the possibility of adjacent local authorities working together to develop 'shared' services.

60. There is no duty placed on a local authority to sell services. Instead they can choose whether or not to sell services in any particular case. However, buying local authority services must not be a precondition of making direct payments.

61. The local authority should consider the request to purchase local authority services in the context of existing demands on its resources, ensuring first that the needs of the people to whom it has an obligation to arrange services are fully met. The services should be 'sold' at no more or no less than the full cost to the local authority of providing the services. Local authorities should have an appropriate accounting system in place to monitor sales as part of its financial monitoring arrangements for audit purposes. (See paragraphs 154 to 162 on monitoring.)

62. Local authorities are not obliged to build in extra costs, for example additional travel expenses, which a person might incur as a result of purchasing services from another local authority.

## **Health services**

63. Research has shown there can be distinct advantages for disabled people when they are able to manage their needs holistically. While direct payments cannot be used to purchase health services they can be made by the local authority where jointly commissioned services include certain aspects of continuing health care, such as skincare, the management of pressure sores, the administration of percussive physiotherapy. The Executive encourages local authorities to work with their NHS partners to provide a joint direct payments package wherever possible, covering health and social care. The flexibilities in Part 2 of the Community Care and Health (Scotland) Act 2002 such as pooled budgets provide a convenient way of funding needs holistically, subject to joint outcomes from the pooled fund being agreed in advance of establishing the fund.

64. Where it is not possible for direct payments to be made in lieu of health care, local authorities should work with their NHS partners to ensure that the arrangements for the

delivery of health care are compatible with the increased independence which direct payments facilitate.

65. Where the direct payments package covers continuing health services local authorities will need to develop protocols around the assessment and monitoring of direct payments arrangements in liaison with the NHS. For effective monitoring to be carried out, those involved need to have the necessary expertise to judge whether the assessed needs are being adequately met. In most instances this will mean that health care staff will need to monitor the fulfilment of healthcare needs.

## **Residential care**

66. Direct payments may not be used to purchase long term residential care. They may however, be used to purchase short breaks (or respite care) subject to the maximum period specified by regulations made under section 12B(4) of the 1968 Act in a care home. For children this might take the form of a short break with a specialist carer. Local authorities should check the latest Regulations, but currently the Regulations specify that where two periods of residential care are less than 4 weeks apart, they should be added together to make a cumulative total. If the two periods are more than 4 weeks apart they are not added together. The cumulative total, calculated in this way, cannot be more than 4 weeks in any twelve-month period.

67. For example, someone might have one week of residential care every 6 weeks. Because each week in residential care is more than 4 weeks apart, they are not added together. The cumulative total is only one week and the 4-week limit is never reached. Another person might have three weeks in residential care, 2 weeks at home, and then another week in residential care. The 2 episodes of residential care are added together to make 4 weeks, so the person cannot use their direct payments to purchase any more residential care within a 12-month period.

68. People can receive additional residential care once they have reached the 4-week maximum. They cannot purchase the residential care using their direct payments, but if the local authority considers that further residential care is needed, it can still arrange and fund

residential care for the person in the traditional way. There is no restriction on the length of time for which the local authority may arrange residential care for someone.

69. Local authorities should consider how direct payments could assist people leaving residential care. Local authorities may make them available before the person leaves the care home to assist them during the transition from a care home to their own home.

### **Employing close relatives**

70. Regulations made under Section 12B(3) of the 1968 Act prevent people using direct payments to secure services from their partner (i.e. the other member of a married or unmarried couple), including same sex couples, or a close relative living in the same household. A close relative in this context is a parent, parent-in-law, aunt, uncle, grandparent, son, daughter, son-in-law, daughter-in-law, stepson or daughter, brother, sister or the spouse or partner of any of the foregoing.

71. In addition, local authorities should not allow people to use direct payments to secure services from a close relative living elsewhere or from someone else living in the same household as the direct payments recipient. This restriction is not intended to prevent people using their direct payments to employ a live-in personal assistant (provided that that person is not someone who would be excluded automatically by the regulations). The restriction applies where the relationship between the two people is primarily personal rather than contractual; e.g. if the people concerned would be living together regardless of any employment relationship. A local authority may decide that an exception to this general rule is justified, if it is satisfied that that is the most appropriate way of securing the relevant services.

### **Giving consent**

72. The 1968 Act authorises local authorities to make direct payments only with the consent of the person who will be in control of the payments. This will usually be the service user but could also be an attorney or guardian or parent. (Paragraphs 72 to 79 therefore refer to the person giving the consent, who may or may not be service user). Direct payments give disabled people greater control and independence, but this increased freedom is inevitably

accompanied by increased responsibilities. When people consent to direct payments, whether for themselves or the person they are representing, they take on the responsibility for arranging and purchasing the services to which the payments relate. This involves ensuring that the person who needs the services receives the appropriate services to an acceptable quality. It can also involve taking on legal responsibilities (e.g. as an employer, or by contracting with an agency). The individual (either on their own or with assistance) is also accountable to the local authority for the way in which the money is spent. These responsibilities may involve a substantial commitment in terms of time and energy, and should not be underestimated. Local authorities will wish to establish that each person appreciates what is involved and believes that he or she would be able to manage the direct payments, whether alone or with help. (See paragraphs 90 to 104 on managing direct payments.)

73. Local authorities should only make direct payments to a person they are satisfied appreciates and accepts the responsibilities involved. However local authorities should note that an individual may receive as much assistance as he or she may require for understanding and giving consent to direct payments.

74. Local authorities should explain what is involved as fully as they can to people who wish to consider receiving direct payments. They should not expect people to commit themselves to accepting direct payments before full information is available; for example before the person has been informed how much money they would receive or what information they would be expected to record for monitoring purposes (see also paragraphs 154 to 162).

75. In particular, authorities should draw people's attention to the fact that any contract they make for the provision of services will involve legal responsibilities, and that if the person contracts directly with an individual they will be regarded as an employer. Local authorities should make clear to each person that it is his or her own responsibility to ensure that he or she is aware of, and complies with, any legal responsibilities.

76. The only contracts which are binding on minors are contracts for "necessaries" i.e. necessary goods and services. It is ultimately for the court to decide, but services purchased by disabled 16 or 17 year olds to meet their assessed needs for social services support are likely to be deemed as "necessaries". Therefore contracts of employment entered into by

them using direct payments would therefore be enforceable in the same way as any others. The responsibilities of employers set out in employment legislation (e.g. the national Minimum Wage Act 1998) apply regardless of the employer's age.

77. The local authority should also make clear that it would arrange services in the normal way if someone decides not to accept direct payments. Having offered someone direct payments, the local authority should make sure that the person appreciates that he or she is under no obligation to accept them. It should be made clear at every stage that the person has the option of withdrawing his or her consent to receive direct payments at any time. Local authorities should discuss with a person who is to receive direct payments what he or she should do if he or she no longer wishes to receive them.

78. Situations may arise where people will refuse to accept direct payments because they object to a specific aspect of the terms on which the payments are offered, for example the amount or the conditions attached. People may ask a local independent support organisation for help to resolve the matter. If it is not possible to resolve these matters through discussion, local authorities should remind people in this situation of their right to use the complaint procedure.

79. People may need some time to consider the implications of taking on direct payments and the responsibilities involved. Local authorities may therefore want to give people the opportunity to reconsider a decision not to accept direct payments or to stop receiving direct payments, particularly if they change their minds as a result of a change in their circumstances. If someone who had initially expressed an interest in receiving direct payments decides not to accept them, the local authority may wish to discuss with him or her the reasons for that decision.

### **The service user**

80. In judging that the service user appreciates what is involved, the local authority needs to be satisfied that the individual knows that he or she has a choice and that he or she can receive help from others to make that choice.

81. Local authorities must not exclude whole groups of people from being deemed competent to consent to direct payments. Instead, they should start from the premise that

each person has the capacity to consent to direct payments, and that they may require being given suitable support. In particular local authorities are reminded that, under the Adults With Incapacity (Scotland) Act 2000, they should not make decisions about an individual's capacity to consent to direct payments on the basis of the individual's capacity to give consent in other areas of his or her life.

82. Where an individual's capacity to understand and accept the responsibilities of direct payments is called into question, local authorities should first endeavour to ensure that the individual has access to ongoing supported decision-making mechanisms. This could take the form of a User Controlled Trust<sup>1</sup>, a 'Circle of Support'<sup>2</sup>, or advocacy (see paragraphs 122 and 123). Local authorities should then consider whether the support available to people could enable them to appreciate what direct payments could mean for them, and whether the support could enable them to manage direct payments. At the same time the individual should remain the person who is in control. Giving direct payments need not depend on the person being able to say, "I understand", but on the evidence that they will be in control of the use to which the direct payments are put. Only once such support is known to be unavailable and reasonable doubts can be shown to remain, should the local authority consider refusing direct payments to the service user.

### **Attorneys and guardians**

83. Where a local authority has followed the guidance above and is satisfied that the person who requires the services cannot give consent to receiving direct payments, the person's attorney or guardian may consent to receive them on their behalf. This should be seen as a 'last resort' after every attempt has been made to support the person to make that decision him or herself.

84. This means that people, who have never had the capacity to consent to direct payments, as well as those, whose capacity changes, can now benefit from them. It may be that an individual's assessed needs change and he or she is no longer able to give consent to

---

<sup>1</sup> A User Controlled Trust or Independent Living Trust is an obligation binding a trustee to deal with property or money in a particular way, for the benefit of one or more beneficiaries. The Trust is witnessed, and registered with the Inland Revenue.

<sup>2</sup> A Circle of Support is a group of supporters who help an individual achieve their goals. It is not a professional entity; its members are people who have a strong commitment to that individual.

receive direct payments in lieu of the new services. It is envisaged that the new powers for attorneys and guardians to consent to direct payments will be of most help to the disabled person in these circumstances because, rather than cease direct payments, the attorney or guardian may give the consent needed for the new payments arrangements to continue. This means that direct payments can continue when a person's condition fluctuates or deteriorates to the point that they are no longer in control of the direct payments.

85. Attorneys and guardians must act within the general principles of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") which are that all decisions made on behalf of an adult with impaired capacity must:

- Benefit the adult;
- Take account of the adult's wishes, if these can be ascertained;
- Take account of the views of relevant others, as far as it is reasonable and practical to do so;
- Restrict the adult's freedom as little as possible while still achieving the desired benefit, and
- Encourage the adult to use existing skills or develop new skills.

86. Local authorities should not make direct payments to an attorney or guardian unless they are satisfied that he or she appreciates and accepts the responsibilities he or she has to the individual receiving the services and the local authority.

87. Direct payments should only be made to attorneys and guardians who have been granted the relevant powers, under the 2000 Act, to act on a client's behalf. These powers are strictly interpreted and this means that when it comes to legal interpretation of the powers, there is no possibility of deducing implied powers. For attorneys, this means that the granter, while capable, has to give the attorney specific powers in relation to consenting to and receiving direct payments. Therefore local authorities will need to ensure that the attorney does in fact have the necessary powers to act on a person's behalf in relation to receiving direct payments. Likewise the local authority must ensure that guardians have both powers relating to personal welfare and financial matters.

88. The Public Guardian has a duty to receive and investigate all complaints regarding the exercise of functions relating to the property or financial affairs of an adult made in relation

to guardians or continuing attorneys. Local authorities have a responsibility to investigate complaints in relation to welfare and the Mental Welfare Commission has a role in protecting the interests of adults with incapacity where the incapacity is as a result of mental disorder.

### **Parents**

89. A person who has parental responsibility for a child may give consent to receiving direct payments to purchase the services the child has been assessed as needing. Local authorities must however satisfy themselves that the parent giving the consent will make arrangements that will ensure the safety of the child and promote his or her welfare. (Paragraph 36 to 52 gives details of direct payments for children's services.)

### **Managing payments**

90. Local authorities should only offer direct payments to people whom they consider will be able to manage them, either alone or with assistance. This applies regardless of whether they are received by the person who requires the service, a parent or an attorney or guardian. The judgement as to whether someone is able to manage must be made on an individual basis, taking into account the views of the individual him or herself. As with all assessments, professionals from other fields may be involved where appropriate.

91. People may receive as much assistance as they require with managing the money but they remain accountable for the way it is spent. People may ask carers, family members, Trusts, Circles of Support or other third parties to help them manage direct payments. They might also choose to buy in assistance, e.g. using a payroll service. There is no restriction on who may help a person in this way, although the restrictions on paying relatives described in paragraphs 70 and 71 will apply if the local authority has agreed that the direct payments can be used to pay someone to help in this way. The payments may be made to a third party acting for the person, but the person who gives consent to the payments must retain control over how it is spent. This does not necessarily mean that the person to whom the direct payments are made must authorise every transaction. People may express a preference about how a service is to be provided, and delegate the details to a third party. However, it must be open to the individual to overrule any decisions made by the third party. Direct payments are intended to facilitate independent living, not to switch from dependence on the local authority to dependence on a third party. Local authorities should satisfy themselves that the

relationship between the individual and the third party has been discussed and agreed before direct payments begin.

92. If the authority concludes that someone could only manage direct payments with help, it should satisfy itself that adequate help is available over a sustained period before deciding to offer direct payments. Where significant help is being provided, the local authority will need to ensure that any monitoring and review procedures involve direct contact with the individual for whom the payments are made, if necessary in the absence of the person who is helping him or her. This is to ensure that the individual is content with the way in which the direct payments are being used. Both local authorities and people receiving direct payments should also be aware of the potential conflict of interest if the individual secures services from the same person who is helping him or her to manage the direct payments. The same applies where an attorney or guardian intends to provide services for the individual. For that reason the Executive advises that the person helping to manage the direct payments or giving consent to direct payments on behalf of the service user should not be the provider of the service being paid for by the direct payments.

93. Some people who initially need help to manage their direct payments will in time be able to manage on their own. However, it is possible that not everyone will be able to do so. There is no restriction on the length of time that a person may receive help to manage direct payments. People who require help on a permanent or indefinite basis still come within the eligible group of people to whom local authorities are permitted to offer direct payments.

94. When looking at a young person's ability to manage, the degree of responsibility involved will depend on the size of the support package. For example, a young person may be able to manage part of their support package via direct payments but would not be able to manage the full package. The ability to manage may change as the young person gains more experience. The local authority may want to make transitional arrangements whereby initially the young person manages only a small proportion of their support with a direct payment. This proportion could increase as the young person matures with the objective of full management of the support package at age 18.

95. Some people with fluctuating conditions, such as mental health service users, may only require help at certain times. It is important that local authorities satisfy themselves that individuals have support in place when they need it.

96. Local authorities should ensure that they handle sensitively discussions about a person's ability to manage direct payments, and to include their carer, family and supporters wherever necessary. This is particularly important where the authority decides not to offer someone direct payments because it does not consider that, even with assistance, the individual will be able to manage them.

97. The judgement as to whether someone is able to manage direct payments and how much help is appropriate will need to be made on an individual basis.

98. If a local authority has any doubts about a person's ability to:

- express their personal choices and preferences (with assistance to communicate their views or preferences if necessary) between different types of service;
- (with assistance) be able to keep the necessary records;
- (with assistance) appreciate and cope with the legal responsibilities that may arise if he or she becomes an employer;
- ensure that he or she receives services he or she has paid for; or
- to manage direct payments on an ongoing basis (as opposed to having a fluctuating or deteriorating condition which may affect his or her ability to manage),

then they should consider what assistance would enable the person to manage that aspect. They should not take it as an automatic indication that the person is unable to manage. For example, the Executive envisages that people might receive assistance with keeping records, management of day-to-day relationships with staff or operation of PAYE. If someone does not have access to the help he or she needs, the local authority should put the person in touch with a local support organisation who will be able to arrange assistance. It may also wish to consider offering to arrange training to assist direct payments recipients to manage. Local authorities must, however, ensure that they 'step back' from the day to day management of the direct payments and service provision or they could be considered responsible for employment issues.

99. It is a key principle of direct payments that it is the person who gives consent to direct payments who controls the money. Local authorities need to satisfy themselves that the person giving the consent is in fact in control of how the money is spent and that control does not pass to the third party, (for example the person helping to manage the payments). This may need delicate negotiation, particularly where the third party is a carer, close relative or friend who may be making sacrifices in order to provide assistance, or who might have their own interest in the way direct payments are used. Allowing more time for the assessment process may help the authority to ascertain who will be in control. Ensuring that the local authority talks to the person on their own, or if an interpreter is needed that he or she is not the person who would be helping to manage the direct payments, is also likely to help this decision.

100. Local authorities will need to consider how to treat someone with a fluctuating condition, for example a mental health service user, which affects his or her ability to manage direct payments. In these circumstances there is a need to plan ahead and make arrangements whereby a designated person or group of people (i.e. circle of support, trustees) can be given permission by the user to take over during period when he or she is unable to manage. Having some form of advance planning or advance directive should be considered an essential component of direct payments for people whose condition may fluctuate or deteriorate over time. This would ensure that when they become ill they retain as much control and choice as possible of the arrangements and are able to regain full control if they become well again. This type of advance along with 'Living Wills' or User Controlled Trusts may help prevent a recipient reverting to local authority provision. Advance Directives allow people with mental health support needs to state in writing what needs they have if they become particularly distressed or unable to manage. For example a person could write down what a support worker should do if they have a crisis, or write guidelines for how to assess risk, or a list of useful telephone numbers that the support worker could phone for advice or information if necessary. (For more information on advance directives see *Direct payments for mental health users/ survivors: A guide to some key issues*)<sup>1</sup>.

---

<sup>1</sup> Published by the National Centre for Independent Living.

101. If the person's condition is likely to deteriorate to the point where he or she is unable to manage even with assistance, the local authority might consider ways of enabling the person to receive direct payments while able to manage. A back-up system controlled by the local authority must be set up and triggered during periods when the person is unable to manage. Equally, local authorities might decide to offer direct payments to people whose condition means that they are likely, at some point in the future, to lose the ability to manage permanently. In those circumstances they will still need to satisfy themselves that safeguards are in place to alert them in such circumstances. People whose condition is likely to fluctuate or deteriorate permanently should be given an opportunity to explore any worries they may have about their ongoing ability to manage direct payments.

102. There may be cases where the local authority has doubts about a person's ongoing ability to manage although he or she appears to appreciate what is involved and be willing to take it on. It is the local authority's decision whether to offer direct payments in such cases. It may be appropriate to set up a formal trial period to give people the opportunity to demonstrate their ability to manage. However, the fact that the person cannot count on receiving the payments beyond the trial period may make it more difficult for that person to manage. For example, he or she may have difficulty recruiting staff for a short period.

103. If the local authority concludes that someone would not be able to manage direct payments, it is good practice to discuss the reasons for the decision with the person, particularly if he or she disagrees. Although the person may continue to be unhappy with the decision, the offer of an explanation is an important indication that the matter has been considered seriously. The authority should also make the individual aware that they can use the complaints procedure (see paragraph 181) to challenge the local authority's decision not to offer direct payments.

104. **Direct Payments Scotland** can offer advice and put disabled people and local authorities in touch with local support organisations. They have been set up with funding from the Scottish Executive to:

- increase awareness of direct payments amongst community care and children's services users, local authority staff and service providers;
- establish and develop local user-led support organisations;
- establish a national information service and provide good practice exchange, and

- identify and address training needs for support organisations and local authority staff.
- develop a model to help local authorities manage increased take up of direct payments.

See Annex B for further contact details.

## **Emergency assistance**

105. Making direct payments, rather than arranging actual services, does not affect a local authority's function of providing emergency assistance under Section 12 of the 1968 Act or Section 22 of the 1995 Act. If the authority considers the circumstances to be so exceptional as to require such assistance, they may provide it in respect of the services to which the direct payments relate (see Section 12C (3) of the 1968 Act).

## **Part 4: Consultation, information and support**

### **Consultation**

106. Local authorities are required to seek the views of representatives of people who use community care and children's services when preparing their Community Care or Children's Services Plans. This should include representatives of people who receive or are likely to receive direct payments and their carers.

107. The purpose of direct payments is to put more control in the hands of people who need the services and this should start right at the beginning of the process. It is important that local people should be consulted fully as local arrangements for direct payments are set up. Local authorities should consult representatives of people who might wish to receive direct payments and others with an interest, including local support organisations and service providers, when considering how to implement the direct payments provisions in sections 12B and C of the 1968 Act. They should also take care to avoid focusing on one group of potential users to the exclusion of other groups and should not make the assumption that organised groups necessarily represent the views of all users or carers in the locality.

108. In particular, care should be taken to include the views of people with different types of impairments, people from black and minority ethnic backgrounds and people of different ages. Local authorities should consult older people, parents of disabled children and people aged 16 and 17 who have previously been unable to access direct payments and seek their views on implementing them. They should also consult people with the kinds of disabilities that have not yet been fully encompassed within many schemes, for example people with learning disabilities or sensory impairments or people who are mental health services users. The views of informal carers and of potential providers will also be important. Whatever form the consultation takes, it is important that people who have been consulted receive feedback about what has happened, and how their views were taken into account. It is also important that the lines of communication remain open, so that the local authority remains responsive to users' views over time.

## Information

109. People should be made aware that there is an alternative to local authority arranged community care and children's services. Direct payments should, therefore, be included in the information about the services available which local authorities already provide. More detailed information about direct payments should be made available separately in formats that are accessible to people with different forms of disability and to people whose first language is not English. Consulting a user-led support organisation might be helpful to ensure that information is presented in accessible formats.

110. Some people may have little real knowledge about their current services, how they operate, who pays for the services or who controls the spending. Information about direct payments may be meaningless if people do not understand the system that they replace. Information provided should also give details of the support available to people locally and nationally. It should include details of how to get in touch with the Business Support Team at the Inland Revenue<sup>1</sup> who can offer support with employing staff.

111. A guide<sup>2</sup> for people who would like more information about receiving direct payments is available from the Executive or Direct Payments Scotland. This should be made available to people as an introduction to direct payments. An Executive booklet to help people with learning disabilities will also be available in the summer of 2003.

112. The Executive would expect to see information about direct payments in local authority Community Care Plans. We would also expect Partnership in Practice agreements (PiPs) to set out how the local authority will help people with learning disabilities access direct payments. PiP agreements contain plans to put in place local area co-ordinators to promote direct payments for people with learning disabilities. Local area co-ordinators will get to know people with learning disabilities and their families in their local communities and help identify their needs and get their needs met. They should be able to help people with learning disabilities access direct payments.

---

<sup>1</sup> Business Support Team can be contacted on XXX.

<sup>2</sup> A Guide to receiving Direct Payments – Scottish Executive (2002).

113. **Direct Payments Scotland** has produced a Five Steps Guide<sup>1</sup>, which helps local authorities to plan and set up direct payments. (See Annex B for contact details.)

## Support

114. Research<sup>2</sup> shows that developing a support system is a prerequisite of a successful scheme. Research also shows that the existence of a local support organisation reduces the work of the local authority. It is therefore imperative that local authorities arrange for people to have access to this type of support particularly in the early stages. A support service helps to produce better outcomes for both direct payments recipients and local authorities. The level of investment a support system needs will partly depend on the type of service provided. It also needs to be proportionate to the expected number of people receiving direct payments - the more people that receive direct payments, the more support workers will be needed. It is important that the support comes from a user led organisation which involves services users either as employees or on its management committee.

115. This section should be read in conjunction with *Five Steps - A Guide to Providing Direct Payments Support Services (2002)* produced by **Direct Payments Scotland**. It has also produced a fact sheet on *The Role of the Support Organisation*. (See Annex B for contact details.)

116. People who receive direct payments may need particular support when they first take on responsibility for managing their own services. People who are becoming employers for the first time may benefit from having access to someone with expertise in employment issues, or to a payroll service which will assist them with tax, National Insurance or other matters. A user-led support service may also be able to provide practical assistance. For example it could hold a list of local agencies, help contracting with agencies, help people to draft advertisements, job descriptions and contracts, provide rooms for interviews and assistance with interviewing, or act as an address for responses to advertisements. A support service might also arrange training, for example in budgeting or assertiveness skills. Scottish

---

<sup>1</sup> Five Steps: A guide for local authorities implementing direct payments (2002)

<sup>2</sup> Direct Payments: the impact on choice and control for disabled people - Witcher et al - Scottish Executive (2000)

Personal Assistants Employers Network (SPAEN) can also provide advice and information about employing personal assistants. (See Annex B for contact details.)

117. People who receive direct payments may also find it helpful to have access to advocacy support. A support service may be well placed also to act as an advocate for local users as a group, particularly when the local authority is considering changes to the scheme. However it may well be preferable to separate any support role from an advocacy role on behalf of individuals, to avoid any conflict of interest. (See paragraphs 122 and 123 for more details.)

118. Local authorities should also consider whether it would be helpful for other people to have access to any support service. For example, carers may need advice about how direct payments work, particularly if they are assisting their friend or relative with managing the payments. Attorneys and guardians might find this helpful as well. People who are self-funding their services may also welcome the advice of a support service. It may also be helpful for employees of people receiving direct payments to have access to training or support.

## **Supported Decision Making**

119. The Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") starts from the premise that everyone has the capacity to consent until proved otherwise. Under the 2000 Act a person cannot be deemed incompetent to consent to direct payments purely on the basis that they have, or are suspected of having a learning difficulty. Similarly, an individual cannot be deemed incompetent to make a decision about one aspect of their life, simply because they have been deemed incompetent in other areas.

120. Each decision relating to capacity can only relate to that particular decision making area. Local authorities need to be clear about what choices and decisions are involved in consenting to direct payments. For example are they consenting to stay in their own home, or to be able to choose their own support worker, or to go on a college course one day a week instead of to the day centre? An assessment about capacity to consent needs to be clear about an individual's ability to express preferences about all areas of their life in order for a

judgement to be made about the choice and control an individual has over the decision to have direct payments and what this will mean for them.

121. Research<sup>1</sup> has shown that people with learning difficulties, when given the right support, can exercise control over their own services enabling them to achieve a better quality of life. If a service is right for an individual and works successfully, the consent issue is unlikely to be challenged. It is important to put in place appropriate safeguards (i.e. supported decision making in the form of a Trust, 'Circle of Support', or advocate) so that people who might be regarded as being vulnerable are not exposed to risk from abuse. It is also necessary to ensure that control does not slip or pass to third parties. Local authorities should satisfy themselves that the support structure is appropriate and that adequate time is allowed for the relationship to develop between the individual and the people providing the support. Supported decision making is the best way to ensure an individual is able to consent to and exercise appropriate choice and control over direct payments. This approach emphasises the right of people to whatever assistance they need in order to be self-determining. It also highlights the process of making decisions. Further information on this is available in Values Into Action publications<sup>2</sup>.

## **Independent Advocacy**

122. The role that independent advocacy can play in the successful operation of the direct payments system should be considered by local authorities. In general, independent advocacy can help to:

- promote respect for the rights, freedoms and dignity of people, both individually and collectively;
- ensure people receive the care or services to which they are entitled, and which they wish to receive;
- enhance people's autonomy;

---

<sup>1</sup> Making Decisions – Values Into Action (2001) and Funding Freedom 2000 - Values Into Action (1999).

<sup>2</sup> (1) Trusting Independence: A Practical Guide to Independent Living Trusts; (2) Making Decisions: best practice and new ideas for supporting people with high support needs to make decisions, and (3) Funding Freedom: People with Learning difficulties Using Direct Payments.

- assist people to live as independently as possible and in the least restrictive environment; and
- help protect disadvantaged people from abuse and exploitation.

123. The Minister for Health and Community Care has been explicit in his expectation that all NHS Boards, in partnership with their local authority planning partners, should ensure that independent advocacy is available to all those that need it. Further assistance and copies of the guidance<sup>1</sup> are available from the Advocacy Safeguards Agency (see Annex B for details).

---

<sup>1</sup> Advocacy: A Guide to Good Practice; Independent Advocacy: A Guide to Commissioners and Independent and Advocacy: A Guide to Commissioners, Supplement.

## **Part 5: Direct payments in practice**

### **Assessment for direct payments**

124. Direct payments can only be offered to someone who has been assessed as needing either community care or children's services (or in the case of parents, where their children have been assessed as in need of services). The decision to offer direct payments therefore follows the assessment of an individual's needs and capacity.

125. In addition to the local authority's assessment of the person's needs, if the person has expressed an interest in receiving direct payments and is eligible then the process will need to include an assessment of whether direct payments are appropriate. In particular, it will be necessary to build in time to assess whether the person is able to manage them. The person also needs time (and possibly support- see paragraphs 114 to 118) to think through the implications of taking on direct payments and to consider whether this is what he or she wants. They should make the person (and their supporter(s) or representative(s)) aware of the possibility of receiving direct payments at an early stage to give as much time as possible to think about it. Local authorities should also give the person as much information as possible about what receiving direct payments will involve, before asking the person to make their decision.

126. Some people may already have clear views about the activities with which they need assistance. Others may need help or encouragement to play a more active part in the process. This may mean practical assistance, such as providing interpreters for those who are unable or find it difficult to communicate in spoken English, more intensive advocacy support to help people to think through and ask for what they need, or simply allowing them more time. In some areas, self-assessment forms designed by user groups have been used to prompt people to think through the tasks with which they need assistance before their needs are assessed by the local authority.

## **Carers and assessments**

127. It is already good practice for local authorities to involve carers wherever appropriate in the assessment of the person they care for. The 2002 Act now formally requires local authorities to take account of the contribution of carers who provide (or intend to provide) "a substantial amount of care on a regular basis", and the views of the carer and the person they care for before deciding what services to provide to the cared-for person. Carers should be consulted and taken into account in the assessment of the cared-for person, irrespective of whether the person being assessed is likely to be offered direct payments or services after the assessment.

128. Carers are also entitled to an assessment in their own right of their ability to care. Local authorities have a duty to carry out an assessment of a carer's ability to care, if the carer requests this and is providing "a substantial amount of care on a regular basis" (under section 12A of the 1968 Act, as amended by the 2002 Act). The 2002 Act also gives local authorities a duty to inform carers that they may be entitled to such an assessment. A carer's assessment may be carried out separately, or combined with the assessment of the cared-for person.

129. The 2002 Act does not however, give carers an entitlement to receive services or direct payments in their own right. The purpose of any "carer's assessment" is to establish what level of care the carer is able or willing to provide, and establish what resources the carer needs to help them in their caring role, and maintain their own health and well being. Since carers have extensive experience and knowledge of the person they care for, an important aspect of the assessment is to seek the carer's views on the support needs of the person they care for.

130. The local authority must take account of the results of a carer's assessment, whether it is carried out separately, or as part of the assessment of the person they care for, in making decisions about the services to be provided to the cared-for person. This duty is not affected by the possibility that the person may be offered direct payments instead of services. The

Executive issued draft guidance in November 2002 about carers' rights to assessment following the 2002 Act<sup>1</sup>.

## **Deciding how direct payments are to be used**

131. In order to satisfy itself that the person's assessed needs will be met, each local authority should discuss with anyone to whom it proposes to offer direct payments, how that person intends to secure the assessed services. Local authorities should make clear to people, before they start to receive direct payments, what the money may or may not be spent on, the conditions attached and how much flexibility the person has over the way the money is spent. Local authority will wish to bear in mind that the aim of the policy is to give people more choice and control over the provision of the services they are assessed as needing. To achieve this, some flexibility over the way the money is spent will be necessary. They will need to bear in mind the regulations which prevent people from using direct payments to secure services from their spouse, partner or a close relative living in the same household (paragraphs 70 and 71 refer).

132. Local authorities need to be satisfied, on an ongoing basis, that the person's assessed needs are being met, and that the money is being spent appropriately. (This should be included in any periodic review of the individual's needs and direct payments' arrangements - see paragraphs 163 and 164). They may set conditions on the direct payments to ensure this but they should not set conditions that are not necessary for the successful implementation of the Executive's policy in relation to direct payments or the discharge of local authority responsibilities (e.g. to ensure the proper use of public funds). Apart from the prohibitions set out in regulations or this guidance, local authorities should allow people to purchase services from any provider who is able to provide an adequate service to meet the individual's assessed needs. They cannot insist that a person contracts only with a provider who is registered with the Scottish Commission for the Regulation of Care.

133. Following the 2001 Act, certain community care services are subject to independent inspection against national standards by the Scottish Commission for the Regulation of Care (the Care Commission). Local authorities should make individuals aware that inspection

---

<sup>1</sup> Guidance is available at: <http://www.scotland.gov.uk/consultations/health/supportingcarers.asp>

reports on registered care services, including any conditions on the registration, will be made available to the general public by a variety of means including through the Internet<sup>1</sup>. The Care Commission has been regulating day care provided by local authorities and independent and voluntary agencies (along with a range of other community care services) since 1 April 2002. Housing support service providers have been registered since 1 April 2003. Home care services will fall to be regulated - for the first time - from a later date, as will some other services such as offender accommodation, adult placement, adoption and fostering. An individual who wishes to purchase a registered service will be able to find out about its quality from an independent source. However it should be made clear to individuals that the new regulatory system does not cover situations where an individual employs a person directly (i.e. not through an agency) whether paid for through direct payments or otherwise. In these circumstances the responsibility for ensuring the quality of service rests with the individual.

134. It is possible for a local authority to agree to take over day to day responsibility of the direct payments from the individual, but it can only do so if the services are purchased from a registered service provider.

135. Local authorities are reminded of existing guidance<sup>2</sup>, which states that services to be provided or arranged and the objectives of any intervention should be agreed in the form of a care/personal plan, a written copy of which should be given to the individual. Similarly when planning services for a child, a local authority should draw up a plan in writing with the family. This guidance applies equally where direct payments are provided in lieu of services.

136. Care/personal plans in relation to direct payments will need to cover all the areas discussed between the authority and the individual and set out clearly what has been decided. The plan should make clear to the individual what the money may or may not be spent on and how much flexibility he or she has in the way in which the money is spent. It should also include the type of variations to the package of services which the local authority would expect to be asked to approve in advance, the information the individual will be expected to provide for audit purposes and any other conditions which the local authority has set.

---

<sup>1</sup> See website at [www.carecommission.com](http://www.carecommission.com)

<sup>2</sup> Circular SWSG 11/91 Community Care in Scotland - Assessment and Care Management. See website at <http://www.scotland.gov.uk/library/swsg/index-f/c087.htm>

Annex A to this guidance contains a checklist of points, which should be sorted out before direct payments start and which should be covered in the care/personal plan.

137. Local authorities will also wish to consider whether a legal contract with the individual is appropriate. This document should set out, in easy to understand language, the duties of the local authority as well as the individual. Local authorities should discuss the need for such a contract with their legal advisers.

138. Some people may already have ideas about how they would use direct payments, and may have discussed these with the care manager at the assessment stage. Other people may need advice or advocacy to help them think through the alternatives. The local authority could help people to obtain accurate information about local services that they might purchase. If it has not already done so, it might also consider at this stage whether there is a local support organisation with which it could put the person in touch.

139. In considering whether people's proposed arrangements will be adequate, local authorities should not be constrained by existing patterns of service provision. By exploring innovative and creative options, it may be possible to identify alternatives that both cost less and meet the individual's needs more effectively. Where the individual's needs fluctuate over time, it will be important to discuss in advance how the direct payments will be used to secure a package of assistance which varies according to need. Local authorities may also wish to consider offering someone a combination of direct payments and services, whether for an initial trial period or on a longer term basis.

140. While arranging and purchasing services from an agency or a local authority gives the individual more control than receiving local authority arranged services, many people will prefer to use direct payments to take on their own personal assistants as direct employees. This option gives them the most direct control over the assistance they receive, but it also carries the most responsibility (for example, to pay tax, national insurance contributions and statutory sick and maternity pay), so it will not be everyone's choice. However it is important to make people aware that this type of work can be handed over to a support organisation. Others may choose to contract with self-employed individuals or with independent agencies.

## **Best Value**

141. Local authorities are reminded that they are required to operate within the principles of long-term best value. A local authority should consider carefully the cost-effectiveness of making direct payments against the services or equipment and adaptations that it would otherwise arrange. For example, a preventative strategy may necessitate a slightly higher investment to achieve long-term benefits and savings. In any comparison between the cost of direct payments and the cost of a service, the local authority should use the full cost of each, taking account of any administrative costs and other overheads. Local authorities may, if they choose, make direct payments at a greater cost than the cost of arranging the equivalent service. However, they must be satisfied that this is still at least as cost-effective as arranging the services. In considering whether the increased cost is justified, the local authority should take into account such factors as whether the person would be able to do more or to have a higher quality life or live more independently with direct payments. It is important for local authorities to recognise that there may be start up cost especially if the person decides to employ his or her own staff which may decrease once arrangements are in place.

## **Calculating the amount of direct payments**

142. It is up to each local authority to decide on the amount of direct payments and on what they are supposed to cover. The Executive is not setting any limit on the maximum or minimum amount of payment, either in the amount of services it is intended to purchase, or on the value of the direct payments. The 1968 Act requires local authorities to make direct payments at a rate which, taken with any financial contribution from the person concerned (see paragraphs 148 to 152), is equal to the authority's estimate of the reasonable cost of his or her securing the provision of the service concerned. This means that direct payments must be sufficient to enable the recipient legally to secure a service of a standard that the local authority considers adequate to fulfil the needs for which the payment is made. Local authorities should consider the arrangements which each individual proposes to make when deciding on the value of payments. Local authorities will need to discuss with the individual the arrangements that he or she is planning to make and the costs that may be associated with this (e.g. National Insurance, sick pay, maternity pay, employers' liability insurance, public liability insurance, VAT). However, the local authority cannot be required to make direct

payments to cover specific costs where there is a more cost-effective way of securing the service (whilst still enabling the individual to meet any legal requirements). Nor is the local authority obliged to fund particular costs which are incurred by the individual on a discretionary basis, which are not therefore essential in order to secure the service. Local authorities have discretion to decide whether to include an amount in the direct payments for costs, which they are not obliged to cover.

143. The local authority should also consider whether there are start up costs for the recipient, for example recruitment costs, and adjust initial payments accordingly.

144. There may be cases where an individual thinks that the total value of the direct payments should be greater than the local authority proposes and/or that his or her contribution should be less than the local authority proposes. In such cases, the local authority is under no obligation to increase the amount offered above the level which it considers reasonable to enable the recipient to secure the relevant services, taking account of the individual's contribution. The authority may decide to increase the amount nevertheless so as to enable the person to secure his or her preferred service if it is satisfied that the benefits of doing so outweigh the costs and that it is still cost-effective in comparison with services arranged by the local authority. Where these cases cannot be resolved through discussion, local authorities should advise the individual that he or she might pursue the matter through the authority's complaints procedure (see paragraph 181).

145. The local authority should give individuals as much notice as possible of the value of direct payments, and the contribution they will be expected to make to the cost of the service package before the payments begins, or its level is changed. This gives an opportunity for any dispute over the level to be resolved before the payments begin or the change takes effect. If that is not possible, then while any complaint is being considered, people may choose to manage on the amount of direct payments being offered, without prejudice to their complaint that it is inadequate. Alternatively they may choose to refuse to accept the direct payments, in which case the local authority must arrange the relevant services instead. If the local authority is satisfied that it would be a proper and cost-effective use of its resources, it may decide to pay direct payments at a higher rate than it had originally intended, until the dispute is resolved. This is entirely the local authority's decision; as always, it is up to the authority to decide on the appropriate level of payment.

146. Direct payments recipients can use their own resources to purchase additional, or better quality, services to those in their care/personal plan if they wish to do so for example ILF or Access to Work monies.

147. "Direct Payments Scotland" has produced a factsheet (number 6) offering advice on how to calculate the amount of a direct payment.

### **Assessing a service user contribution**

148. Since 1 July 2002, disabled people aged 65 and over, have been able to request direct payments to cover the element of personal care (at home) which are now provided free of charge. Local authorities should refer to Executive circular CCD4/2002: Free Personal and Nursing Care<sup>1</sup>, particularly Section 5: Payment Mechanisms.

149. The 1968 Act enables the local authority to require the individual to make a financial contribution to the cost of the community care services he or she requires, by making direct payments of less than its estimate of the reasonable cost of securing the provision of the service concerned. Direct payments can therefore be made net of the contribution which the individual is expected to make. This is equivalent to local authorities' power under section 87 of the 1968 Act to levy a charge for services that they arrange. There should always be fair and equitable treatment between service users and direct payments recipients. Therefore, in considering whether, and if so how, to ask individuals to make a financial contribution, local authorities should treat people who receive direct payments as they would have treated them under the authority's charging policy if those people were receiving the equivalent services.

150. Alternatively payments may be made for the full cost of the service and the individual's assessed contribution can be recovered at a later date. Local authorities should take into account the views of users before deciding which approach to adopt.

---

<sup>1</sup> See website at <http://www.show.scot.nhs.uk/sehd/ccd.asp>

151. In seeking to apply their charging policies fairly and equivalently to people who receive services and people who receive direct payments, local authorities should refer to the Executive's circular No: SWSG 1/97: Charging for Adult Non-residential Sector Care<sup>1</sup> and CoSLA's guidance to local authorities on charging for non-residential care. While this is relevant in respect of housing support services it should be noted that people in receipt of housing benefit and those receiving housing support services on a short-term basis (up to 2 years) will receive these services free of charge. Details can be found in the Supporting People Charging and Financial Assessment guidance<sup>2</sup>.

152. Under section 22(4) of the 1995 Act, local authorities have discretionary powers to charge contributions for children's services where the means of the family are sufficient.

## **Making payments**

153. It is up to local authorities to decide how frequently payments should be made and whether in advance or arrears. It is important that where direct payments are financed from more than one local authority budget the individual receives one single payment to cover all the services he or she has been assessed as needing. Local authorities will need to set up mechanisms that enable them to monitor payments which are made and which minimise the risk of money being misspent. In considering what procedures to put in place, local authorities should bear in mind the likely effect of different alternatives on the circumstances of people who are likely to receive direct payments. Local authorities should bear in mind that making payments in advance would ensure that people are in a position to pay for services as they are received. Whatever the arrangements for payment, they will need to be reliable, as late or incorrect payments may put at risk the persons' ability to secure the services they need. The local authority may also need to set up procedures for making additional payments in emergencies, for example if needs change or regular payments go astray. Local authorities should tell people, before direct payments begin, how and when the payments will be made.

---

<sup>1</sup> See website at <http://www.scotland.gov.uk/library/swsg/index-f/c172.htm>

<sup>2</sup> [http://www.scotland.gov.uk/housing/supportingpeople/charging\\_financial\\_assess.asp](http://www.scotland.gov.uk/housing/supportingpeople/charging_financial_assess.asp)

## **Monitoring direct payments**

154. Consenting to receive direct payments means the individual taking on the responsibility for securing services to a standard which both the individual and the local authority consider is adequate. The local authority is relieved of its responsibility to arrange services for that person, so long as it is satisfied that the needs to which the payments relate will be met through the arrangements made with the payments. However local authorities should not make assumptions that someone who is not receiving services to their satisfaction cannot manage direct payments. It follows that the local authority will need to set up monitoring arrangements so as to satisfy itself that arrangements are meeting needs.

155. Monitoring arrangements should be consistent both with the requirement of the local authority to be satisfied that the person's needs are being met and with the aim of the policy to increase choice and independence. Local authorities should seek to focus on whether the person's needs are being met, rather than on the service being delivered in a certain way. The authority should discuss with people what steps it intends to take to fulfil its responsibilities in this area, and may also wish to discuss how it might support them in securing adequate quality of services.

156. Each local authority will need to ask itself how it would know if someone was experiencing difficulty managing direct payments. It may be appropriate to rely on someone who has been managing his or her own services for some time to ask for extra help if he or she needs it. However, local authorities should not rely on people asking for help, particularly when someone begins to receive direct payments for the first time. Regular reviews should be arranged to ensure that the local authority has an opportunity to discuss the direct payment's arrangement with the individual (see paragraphs 163 and 164). Where a local authority wishes to ask the person whether he or she is satisfied with the services he or she is securing, it should ensure that it communicates directly with the person wherever possible. In particular, it may need to use a different interpreter if the person may wish to comment on the services of his or her usual interpreter. Local authorities should seek to ensure that people do not feel inhibited from expressing reservations about the services they are purchasing, or about any other problems they are having in managing their direct payments, by a concern that their direct payments will be stopped automatically or arbitrarily.

A local independent support organisation or independent advocacy service may help some people raise issues, which are giving concern.

157. Direct payments packages which include health services will require to be monitored by personnel with the necessary expertise to judge whether these particular assessed needs are being adequately met. In most instances this will mean that health care staff will need to be involved in the monitoring process.

158. Each local authority should also set up financial monitoring arrangements for audit purposes, to fulfil its responsibility to ensure that public funds are spent on the intended services. CIPFA have produced guidance for local authorities on this point and local authorities should ensure that up to date advice is being used.

159. Some independent living schemes have found spot checks helpful for this purpose and as a means of guarding against fraud (by the individual, their employees, or any person providing assistance to the individual to manage the direct payment). However, local authorities, which are thinking of using spot checks, will need to consider this very carefully and to bear in mind the need to respect the privacy of people who receive direct payments.

160. For direct payments to work, it is essential that these two forms of monitoring are co-ordinated. If they are not to be carried out by the same person, local authorities should ensure that information is exchanged and that all those involved understand the purpose of direct payments, and the role that the authority's monitoring plays in the successful operation of the policy. In particular, information from both forms of monitoring should be considered in any decision to change the level of, or to stop, direct payments.

161. As well as monitoring how well direct payments are meeting the needs of individuals, local authorities will wish to monitor how direct payments are working overall. In doing so, authorities should actively seek the comments and suggestions of people who receive direct payments or who have considered receiving them.

162. Local authorities should discuss with recipients the information they will be expected to provide and the way in which monitoring will be carried out. Direct payments should not

begin until the recipient has agreed to any conditions, which are necessary for monitoring purposes.

## **Reviews and reassessments**

163. The fact that the local authority is making direct payments rather than arranging services itself does not affect its responsibility to review the services the person receives at regular intervals. The projected timing of the first review should be set when direct payments begin. People should be made aware that they might request a review sooner if their circumstances change. The purpose of the review remains to establish whether the objectives set in the original care/personal plan are being met. However at review time the local authority will also wish to be satisfied that the individual is protected from exploitation and abuse. It may be helpful to consider first whether the person's needs have changed, before moving on to review how he or she is managing direct payments and how well direct payments are working.

164. Local authorities should follow existing guidance on carrying out reviews. Following the review, the amount of direct payments may need to be increased or reduced.

## **When difficulties arise**

165. Difficulties can be minimised by good assessments, clarity (e.g. about what the money can be used for), monitoring, effective support arrangements (where these are necessary) and by discussing potential areas of difficulty, and how they will be handled, with the individual before direct payments begin.

166. Local authorities should discuss with each person what arrangements he or she will make for emergencies. Local authorities must ensure that the person receives the services he or she needs if the usual arrangements break down, e.g. through sickness of one of the person's personal assistants. It is reasonable for a local authority to expect the person to have contingency plans and these should be clarified at the outset. However if a local authority becomes aware that someone is unable to secure services to meet his or her needs, then its responsibility to arrange services for that person is the same as if it had not made any direct payments. The local authority will need to be prepared to respond in these circumstances just

as it would with any other service user. It may decide to step in and arrange the necessary services, but it should first consider providing assistance to enable the person to continue to manage his or her own services.

167. Examples of contingency plans which people who receive direct payments might make include making arrangements with independent agencies for emergency cover, or recruiting personal assistants who are prepared to work additional shifts at short notice when necessary. However, it remains possible that difficulties will arise which have not been anticipated and which cannot be covered by the arrangements the individual has made. In these circumstances, it will be helpful if the direct payments recipient knows they can contact a named individual in the local authority or a local support service whom they can ask for help.

168. If the local authority's monitoring or review process reveals that the person's needs are not being met, or if the person contacts the authority to seek emergency assistance, the local authority will need to consider what action it should take. Good communication between the different parts of the local authority involved will be very important at this stage. This may mean helping people to make other arrangements, or it may mean arranging services directly until they are able to make their own arrangements once more.

169. When difficulties arise, the authority will wish to ask itself the following questions:

- *Have the person's needs changed?* If so, the person's needs should be reassessed and the level of direct payments should be reviewed.
- *Is the amount of money sufficient to enable the person to secure the relevant services?* It may be that experience shows that there are other costs which were not taken into account when the cost was calculated initially, or that anticipated costs have not, in fact, arisen. It may be necessary to review the level of direct payments.
- *Is the person still able to manage direct payments?* Local authorities need to continue to be satisfied that people can manage direct payments. However, difficulties will not necessarily mean the person cannot manage. There is inevitably a learning process

when people begin to receive direct payments and people may make mistakes, but still be capable of managing direct payments in the longer term. Even experienced direct payments recipients may have problems at times but with some support, be capable of overcoming them.

- *Does the person wish to continue receiving direct payments?* As long as the local authority considers direct payments are appropriate, it should attempt to enable people to overcome difficulties and prevent them becoming discouraged when they experience difficulties. However if someone has decided that he or she no longer wishes to receive direct payments, then the local authority should enable him or her to switch to services.
- *Has all the money been spent on the services for which it was intended?* If the money has been diverted to other purposes there may be a case for considering seeking repayment. There may be a case for requiring repayment of some of the money even where the person has secured services to meet his or her needs, for example if he or she has secured the service for less than the expected cost and so there is a surplus. However the local authority should bear in mind that there might be a good reason for a recipient to build up a surplus, e.g. to pay his or her employee's quarterly PAYE. The local authority should explain before someone begins to receive direct payments the circumstances in which it would seek repayment.
- *Have services for which the person has paid been received?* If not, then it is the responsibility of the individual to seek a refund from the service provider. If the local authority has made further provision for services to meet the same needs or if the services were not received because they were no longer required, then it may wish to consider requiring repayment of the direct payment from the individual.
- *Has the money been spent wisely?* If not, the person may need more support to enable him or her to manage, or the authority may decide that he or she is not capable of continuing to manage direct payments and should receive services instead.

170. Since the introduction of direct payments concerns have been raised about local authorities being perceived as being liable for the actions of the recipient (e.g. the way in which recipients treats their employees). (Local authorities, which are concerned on legal liability, should also discuss this with their legal advisers.) Local authorities should also discuss this issue, and how it might be handled, with recipients and carers as part of their overall planning, monitoring and reviewing of the way in which they operate direct payments. In particular a local authority will wish to stress that it cannot help directly with the recruitment of staff (i.e. advertising, interviewing and selection), or get involved with terms or conditions of employment.

171. The Executive is working with “Direct Payments Scotland” to establish a mechanism for direct payments recipients to access enhanced criminal record checks on the people they are about to employ if they so wish. However it should be stressed that police checks alone do not guarantee that a person is suitable to provide children's services. Potential employers should be advised of the importance of having a rigorous recruitment procedure in place where the taking up of references is essential. The local authority should ensure that individuals are made aware of organisations that can offer help with these services and that the individual has all the assistance he or she needs.

### **Seeking repayment**

172. The 1968 Act enables local authorities to require some or all of the money they have paid out to be repaid if they are not satisfied that it has been used to secure the provision of the service to which it relates. They may also require repayment if the person has not met any condition, which the authority has properly, imposed, and those imposed by the regulations. Local authorities which decide to require repayment by someone who they know is also receiving payments from the Independent Living Funds (ILFs) should inform the ILFs as soon as possible and should seek to agree if possible a common approach if the ILFs are also seeking recovery.

173. It is up to the local authority to decide when it is appropriate to seek recovery. However local authorities should bear in mind that this power is intended to enable them to recover money which has been diverted from the purpose for which it was intended, or which has simply not been spent at all. It should not be used to penalise honest mistakes. Local

authorities should be satisfied before they start to make direct payments, that people who receive them understand all of the conditions they will be required to meet. Additional conditions should only be imposed insofar as they are necessary to ensure that the objectives of the Executive's policy in relation to direct payments are met and that the local authority's responsibilities (e.g. to monitor the use to which public funds are put) are discharged. Local authorities should take into account hardship considerations in deciding whether to seek repayments. When considering whether to recover unspent funds, local authorities should also bear in mind that there may be legitimate reasons for a recipient to build up an apparent surplus. This might involve outstanding legal liabilities, for example to pay an employee's quarterly PAYE, contingency funds to cover such eventualities as sick leave or to pay outstanding bills from an agency.

174. Local authorities should discuss with individuals, before direct payments begin, the circumstances in which it might wish to consider seeking repayment.

### **Discontinuing direct payments**

175. Local authorities should not automatically assume when problems arise that the solution is to discontinue direct payments. If the local authority does decide to withdraw direct payments then it will need to arrange the relevant services instead, unless the withdrawal was following a reassessment after which it concluded that the services were no longer needed.

176. Either the local authority or the individual may decide at any time that they no longer wish to continue with direct payments. For example direct payments may be discontinued because:

- the local authority is not satisfied that the person's needs are, in fact, being met;
- the person is no longer able to manage direct payments;
- the person no longer requires a service, or
- the local authority has had cause to seek repayment of funds and has reason to fear that further payments may be misspent.

177. Clearly, wherever possible, the decision to discontinue should follow discussion with the individual and any carer, and the local authority should, in any case, keep the individual informed throughout the process. The local authority may also need to keep in touch with the Independent Living Funds (ILFs) and share information where appropriate in cases where the individual is also receiving ILF funding.

178. The local authority should inform people as soon as possible if it is considering discontinuing direct payments, and if appropriate give them an opportunity to demonstrate that they can continue to manage direct payments. Local authorities should set a minimum period of notice, which will normally be given before direct payments are discontinued, and include it in the information to be provided to people who are considering direct payments. It may be necessary in exceptional circumstances to discontinue direct payments without giving notice. For example where a child is the service user and it is clear that his or her welfare is in not being safeguarded. In considering this course of action, local authorities will first need to take account of the individual's contractual responsibilities with a service provider or an employee. They will also have to take into consideration any outstanding financial liabilities the individual may have. Local authorities should explain to people, before they begin to receive direct payments, the circumstances in which they might be discontinued with no notice and discuss with them the implications this has for the arrangements that people might make.

179. There may be circumstances in which the local authority wishes to discontinue direct payments temporarily. For example when a person does not require assistance for a short period because he or she is in hospital, or because his or her condition improves. Similarly when a person is temporarily unable to manage direct payments (perhaps again due to fluctuation in his or her condition or the support available). In these cases, the local authority will need to discuss with the person how best to manage. The aim should be to enable the person to resume responsibility for his or her own services after the interruption, if that remains his or her wish. The local authority might decide to take over the management of the person's arrangements in the interim. In considering whether it is practical, desirable and cost-effective to maintain the person's arrangements, the local authority should bear in mind any contracts into which the person has entered. For example it will not be able to contract with a service provider which is not registered with the Care Commission. Likewise it may not be practicable for the local authority to take over the employment of a personal assistant

(see paragraph 134). How this situation is handled is an issue that the authority should discuss with the person before starting to make direct payments.

180. Where direct payments are discontinued, some people may find themselves with ongoing contractual responsibilities or having to terminate contracts for services (including possibly making employees redundant). The local authority will wish to discuss this with people before they begin to receive direct payments and agree how this would be handled. Local authorities should also consider how to recover unspent direct payments if the recipient dies. For example, if someone wishes to pay an agency in advance for its services, the local authority should bear in mind that it may be difficult to recover money paid for services which were not in fact delivered. Local authorities should also consider, if unspent funds are to be recovered, that before his or her death, the recipient may have incurred liabilities which should legitimately be paid for using the direct payments (e.g. he or she received services for which payment had not been made at the time of death). There may also be occasions where additional funding is required to settle liabilities in full.

## **Complaints procedures**

181. Local authorities are required to operate a procedure for considering any representations (including any complaints) which are made to them with respect to the discharge of their functions or about any failure to discharge those functions. People who receive, or consider receiving, direct payments are entitled to have access to this procedure in the same way as anyone else for whom the local authority has a power or a duty to provide a service. It is important to ensure that people are aware of the complaint procedure, particularly when they are informed of a decision they may not welcome. People may make complaints about any action, decision or apparent failing of the local authority, but not about services which they have secured from independent providers (including people they employ directly) using direct payments. People should address any complaints that they have about the services they receive to the service providers. Alternatively, a complaint can be made to the Care Commission about any registered service or, indeed, about the actions of the Care Commission itself.

## **Resources**

182. Direct payments are an alternative to services which would otherwise be arranged by the local authority, so direct payments must be met from within existing overall resources. Direct Payments Scotland is working with four local authorities to carry out a finance action research project to consider how they might manage an increased take up of direct payments from 1 June 2003. In particular the work will focus on how existing budgets can be made more flexible and how a move towards direct payments might affect local authorities fixed resources. The project will conclude in autumn 2003 and the findings will be made available to all local authorities.

## **Statistical monitoring**

183. The Executive will continue to monitor the progress of direct payments on a local authority basis. In particular it will be monitoring whether local authorities are carrying out their duty to offer direct payments to eligible people. Statistical Form F1 will be issued at the end of March each year for this purpose. A copy of the current form can be found in Annex D. Local authorities are advised to make sure that this information is collected throughout the year to ensure that the form can be completed in April each year.

## **Annex A: Checklist for care/personal plan for direct payments**

- What are the person's needs, as identified in the assessment?
- To which of these needs do the direct payments relate?
- How will the person secure the appropriate services?
- What variations to the way in which the direct payments are used does the local authority expect to be asked in advance to approve?
- What support (if any) does the person need to manage their direct payments?
- How will this support be made available to the person?
- What arrangements has the person made to cover emergencies?
- What arrangements will the local authority make when the person's emergency cover breaks down?
- How much money (giving a breakdown) does the local authority consider necessary to secure the appropriate services?
- How much of this total will the local authority contribute in direct payments, and how much is the person expected to contribute?
- How often and in what form will payments be made?
- What arrangements does the local authority propose for monitoring? How often? What information should the person provide? What access will be required to the person's home or financial records?
- What information does the local authority require for audit purposes, and when?
- When will the next review take place?
- What should the person do if he or she wants to stop receiving direct payments?
- In what circumstances will the local authority consider discontinuing direct payments (permanently or temporarily)?
- How will the local authority and individual handle any temporary gap in direct payments being made?
- How much notice will be given if the local authority discontinues?
- How will any outstanding commitments be handled if direct payments are discontinued?
- In what circumstances would direct payments be withdrawn with no notice?
- In what circumstances would the local authority seek repayment?
- Has the client been made aware of the local authority's complaints procedure?

## **Annex B: Support organisation details**

The following organisations may be able to give you information:

### **Direct Payments Scotland**

27 Beaverhall Road

Edinburgh

EH7 4JE

Telephone Helpline: 0131 558 3450; Fax: 0131 558 5201; Minicom: 0131 558 5202

Email: [info@dpscotland.org.uk](mailto:info@dpscotland.org.uk) ; [www.dpscotland.org.uk](http://www.dpscotland.org.uk)

### **National Centre for Independent Living**

250 Kennington Lane

London

SE22 5RD

Telephone: 0207 587 1663; Fax: 0207 582 2469

Email: [ncil@ncil.org.uk](mailto:ncil@ncil.org.uk) ; [www.ncil.org.uk](http://www.ncil.org.uk)

### **Scottish Personal Assistants Employers Network (SPAEN)**

117-127 Brook Street

GLASGOW

G40 3AP

Telephone: 0141 550 4455; Fax: 0141 550 4858 Minicom: 0141 554 6482

### **Values Into Action**

Oxford House

Derbyshire Street

London

E2 6HG

Telephone: 0207 729 5436; Fax: 0207 729 7797

E-mail: [general@viauk.org](mailto:general@viauk.org) ; <http://www.viauk.org>

### **People First (Scotland)**

34b Haddington Place

Edinburgh

EH7 4AG

Telephone: 0131 478 7707; Fax: 0131 478 7404

E-mail: [P1stScotland@aol.com](mailto:P1stScotland@aol.com)

### **Lothian Centre for Integrated Living (LCIL)**

Norton Park

57 Albion Road

Edinburgh

EH7 5QY

Telephone: 0131 475 2350; Fax: 0131 475 2392

E-mail: [lcil@lothiancil.demon.co.uk](mailto:lcil@lothiancil.demon.co.uk); <http://www.lothiancil.org.uk>

**Centre for Independent Living in Glasgow (CILIG)**

117-127 Brook Street

Bridgeton

Glasgow

G40 3AP

Telephone: 0141 550 4455; Fax: 0141 550 4838; Minicom: 0141 554 6482

**UPDATE**

27 Beaverhall Road

Edinburgh

EH7 4JE

Telephone: 0131 558 5200; Fax: 0131 558 5201; Minicom: 0131 558 5202

E-mail: [info@update.org.uk](mailto:info@update.org.uk)

**Advocacy Safeguards Agency**

91 Hanover Street

Edinburgh

EH2 1DJ

Telephone: 0131 718 4373; Fax: 0131 718 4374

E-mail: [jsnell@advocacysafeguards.org](mailto:jsnell@advocacysafeguards.org)

**Scottish Consortium for Learning Disability**

Room 16, Adelphi Centre

Commercial Road

Glasgow G5

Telephone: 0141 418 5420 (fax 0141 429 1142)

E-mail: [administrator@sclld.co.uk](mailto:administrator@sclld.co.uk); <http://www.sclld.co.uk>

## **Annex C: Other sources of information**

Local authorities may also find the following publications useful sources of additional information:

**Direct Routes to Independence: A guide to local authority implementation and management of direct payments** – published by the Policy Studies Institute (1999)

**Five Steps: A guide to local authorities implementing direct payments** – published by Direct Payments Scotland (2002)

**5 Steps: A Guide to Providing Direct Payments Support Services**– published by Direct Payments Scotland (2002)

**Everything you Need to Know about getting and Receiving direct payments** – published by the National Centre for Independent Living (3<sup>rd</sup> edition 2001)

**A Guide to Receiving Direct Payments** – published by the Scottish Executive (2002)

**An easy guide to receiving direct payments** – published by the Department of Health (2000)

**A Rough Guide to managing Personal Assistants** – published by the National Centre for Independent Living

**Direct Payments: The impact on choice and control for disabled people** - published by the Scottish Executive (2000)

**Direct what? – a study of direct payments to mental health service users** – published by the Scottish Executive (2002)

**Direct Payments for mental health users/ survivors: A guide to some key issues** – published by the National Centre for Independent Living

**Making Decisions: Best practice and new ideas for supporting people with high support needs to make decisions** – published by Values Into Action (2001)

**Funding Freedom 2000: People with Learning Difficulties Using Direct Payments** – published by Values Into Action (1999)

**Trusting Independence: A practical guide to independent living trusts** – published by Values Into Action (2001)

**Ways to work – converting day services** – published by SHS Trust

**Your Right to Independent Living** - A guide to Independent Living, Direct Payments, ILF, and being an employer has template forms, guides on self assessment etc.– published by Lothian Centre for Integrated Living, (2nd edition 2001, 3rd edition summer 2002)

**The same as you?** – published by Scottish Executive (2000) available at <http://www.scotland.gov.uk/ldsr>

**Direct Payments: Frequently asked Questions** – published by Scottish Consortium for Learning Disability (2002) - available from Direct Payments Scotland

**Trusting Independence** – published by Values Into Action

For further details about these publications please contact Direct Payments Scotland.

## Annex D: F1 Statistical return form

# THE SCOTTISH EXECUTIVE

Social Work Statistics Unit

*FINANCIAL PROVISION 2003*

Name of Local Authority:	
Contact name:	
Telephone number:	

**Completed forms should be emailed to:**

SWStat@scotland.gsi.gov.uk

**Or sent directly to:**

The Scottish Executive Health Department  
Social Work Statistics Unit  
Room 2N:08  
St Andrews House  
EDINBURGH  
EH1 3DG

**Complete forms are required by 27 April 2003.**  
**If you have any queries, please contact Steven Gillespie on (0131) 244 3777.**

**A: FINANCIAL PROVISION**

Details of financial assistance given in period 1st April 2002 to 31st March 2003 (cash or vouchers). This should **only** include payments made under Section 12 of the Social Work (Scotland) Act 1968.

**Table 1: Payments made under section 12 of the Social Work (Scotland) Act 1968**

Details of Financial Provision	Number of Payments	Amount of Grant/ Loan	Amount Recovered
Energy			
Rent			
Travel			
Food			
Asylum Seekers			
Other			
TOTAL			

Details of financial assistance given in period 1st April 2002 to 31st March 2003 (cash or vouchers). This should **only** include payments made under Section 22 and 25 of the Children (Scotland) Act 1995.

**Table 2: Payments made under section 22 and 25 of the Children (Scotland) Act 1995**

Details of Financial Provision	Number of Payments		Amount of Grant/ Loan	Amount Recovered
	Section 22	Section 25		
Energy				
Rent				
Travel				
Food				
Day Care for Children in need				
Asylum Seekers				
Other				
TOTAL				

## B: DIRECT PAYMENTS

Section B refers to payments made under the Section 12B of the Social Work (Scotland) Act 1968. Direct payments are cash payments made directly by the Local Authority to a disabled person to purchase services the Local Authority would normally arrange. That person has complete control of the payments and responsibility for how they are spent.

Please include details of direct payments made in period 1st April 2002 to 31st March 2003.

### Number of Clients

Client Group	Age			
	16-17 years	18-64 years	65 + years	Total
People with Physical Disabilities				
People with Learning Disabilities				
People with Mental Health Problems				
Disabled Parents *				
Other, please specify below				
Total				

\* See Community Care circular number CCD9/2001 for further information. From 20<sup>th</sup> December 2001, disabled parents were able to access direct payments to purchase Children's services.

### Value of Payments

Client Group	Age			
	16-17 years	18-64 years	65 + years	Total
People with Physical Disabilities				
People with Learning Disabilities				
People with Mental Health Problems				
Disabled Parents *				
Other, please specify below				
Total				

If you have included any payments in the 'Other' client group category then please specify the reason for making the direct payment below: