

Draft Self-directed Support (Direct Payments) (Scotland) Regulations 2013

A public consultation on draft Regulations to accompany the Social Care (Self-directed Support) (Scotland) Act 2013

This document contains draft Regulations to accompany the Social Care (Self-directed Support) (Scotland) Act 2013.

The draft Regulations are published for consultation. The Scottish Government would like to hear from those who receive care and support, carers, social work and health professionals, local authorities, Health Boards and the general public.

Following the consultation the Regulations may be amended. They will then be introduced to the Scottish Parliament.

Alongside the draft Regulations, the Scottish Government invites views on draft Statutory Guidance which will eventually accompany the Regulations and the Self-directed Support Act. Consultees are encouraged to provide their views on both the draft Regulations and the draft Guidance, which are being considered as part of one consultation.

Draft Self-directed Support (Direct Payments) (Scotland) Regulations 2013

A public consultation on draft Regulations to accompany the Social Care
(Self-directed Support) (Scotland) Act 2013

Consultation Paper

Introduction

1. In January 2013 the Social Care (Self-directed Support) (Scotland) Act (“the 2013 Act”) received Royal Assent. The Act makes provision about the way in which certain social care services are provided. In particular, it provides a variety of choices as to how a person wishes to arrange their care and support.

2. During the SDS Bill’s passage through the Scottish Parliament, Scottish Ministers made a commitment to develop statutory guidance and Regulations to accompany the Act, and to consult on the content of the guidance and Regulations. Attached to this consultation paper are a set of draft Regulations to accompany the Act which deal specifically with direct payments. The Scottish Government invites views on the content, purpose and effect of the Regulations. Alongside this, the Scottish Government is inviting views on a detailed statutory guidance document to accompany the Act and the Regulations. This consultation paper provides an explanation of the Regulations and outlines some key consultation questions on which we would like to hear your views.

Calculation, payment and termination of direct payments

3. Part 2 of the Regulations (regulations 3 to 7) sets out a variety of requirements in relation to the charging arrangements for direct payments, the way in which charges are recovered, the basis on which direct payments can be made and the circumstances where a direct payment may be terminated. In particular

- **Regulation 3** sets out the administrative arrangements for any means testing in relation to the direct payment – i.e. the arrangements for the assessment of a person’s ability to pay a charge with respect to their direct payment;
- **Regulation 4** sets out the way in which any charges should be recovered – requiring the authority to make any payment “net” (i.e. with the person’s charge recovered “at source” before the payment is made) except where the service user requests that they payment be paid gross (i.e. where the person is provided with their payment in full and invoiced for their charge at the end of the relevant period);

- **Regulation 5** establishes that a direct payment can be paid in instalments (i.e. in a series of separate payments as opposed to one single payment – though this can also be done)
- **Regulation 6** establishes that a direct payment can be paid to a third party to manage the day to day practicalities under the direction of the supported person.
- **Regulation 7** sets out an exhaustive list of the circumstances under which an authority can terminate a direct payment. These are where the person has become ineligible, where the payment has been used for purposes out-with the person's support plan, where it has been used to secure the provision of support by a family member in circumstances where the family member is not permitted to provide such support or where the money has been used unlawfully. In addition, Regulation 7 imposes certain requirements on the authority when they decide to terminate the direct payment, such as the requirement to inform the person as to the reason why the payment is terminated and the date on which it is to be terminated.

Question 1: What are your views on Part 2 of the draft Regulations (calculation, payment and termination of direct payments)?

Provision of support by family members (Part 3 of the Regulations)

4. Part 3 of the Regulations sets out appropriate and inappropriate circumstances where the supported person, carer and professional are considering the option of employing a close relative as a personal assistant. This Part of the Regulations applies to the use of direct payments by disabled or cared-for adults and children. The rules do not apply to the use of direct payments made to adult or young carers.

5. The Regulations seek to provide a balanced framework for decision-making in relation to this complex and important question. Regulation 9 provides a list of circumstances in which family members may be employed – regulation 9(3)(i) is intended to give professionals the discretion to allow

employment in circumstances other than those specifically listed where he or she considers it appropriate. It is important to note that a family member can only be employed in these circumstances if both the family member and direct payment user agree and the family member is capable (on an objective basis) of meeting the direct payment user's needs. By articulating appropriate circumstances, the regulation seeks to encourage professionals to consider the outcomes and potential benefits of such arrangements. However, even if the circumstances fall within regulation 9, a direct payment user cannot employ a family member in the circumstances set out in regulation 10. By providing "exceptions to the family members rule" it seeks to articulate the circumstances where it would be inappropriate for the authority to allow such arrangements.

Question 2: What are your views on Part 3 of the draft Regulations (appropriate/inappropriate circumstances for the employment of close relatives)?

Circumstances where direct payments are not available

6. Part 4 within the Regulation lists people who are not eligible for direct payments. In addition it lists a range of services that are not appropriate for direct payments. The effect of Part 4 (read with the 2013 Act) is that it removes the obligation on the relevant professionals to offer the direct payment option in relation to certain individuals and in relation to certain circumstances.

Regulation 11: People who are not eligible for direct payments

7. Regulation 11 provides a list of people who, because they are subject to a particular criminal justice order, are deemed to be ineligible for a direct payment. The list does not include people subject to Compulsion Orders or Compulsory Treatment Orders (as defined in current Direct Payment regulations) – in other words, under the new regulations people who are subject to COs or CTOs will be eligible for direct payments and will have a right to request and receive a direct payment. The list does however include a range of other individuals subject to a range of other orders.

Question 3: What are your views on Regulation 11 which deems individuals who are placed under a variety of criminal justice orders to be ineligible to receive direct payments?

For example, is it appropriate to impose the exclusions listed in Regulation 11? Are there any persons not listed in regulation 11 to whom it would be inappropriate to offer the option of a direct payment?

Regulation 12: Services for which direct payments are not available

8. Regulation 12 deals with particular forms of support. Again, it removes the obligation on the relevant professional to offer a direct payment to the supported person under the specific circumstances provided in the Regulations. The forms of support that would lie out-with the scope of direct payments are:

- support for individuals who are homeless as defined in Part II of the Housing (Scotland) Act 1987;
- support for individuals who are fleeing domestic abuse;
- support for individuals in relation to drug or alcohol dependency;
- the provision of residential accommodation, with or without nursing, for a period in excess of four consecutive weeks in any period of twelve months.

Question 4: What are your views on restricting access to direct payments for those who are homeless, those who are fleeing domestic abuse or those who require support in relation to drug or alcohol addiction?

Question 5: What are your views on restricting access to direct payments in relation to the provision of long-term residential care?

This question was raised during the initial consultations on a draft SDS Bill. The Scottish Government would like to invite detailed views before making a final decision prior to the laying of the Regulations before the Scottish Parliament. Should the restriction be removed from the final regulations, thereby allowing direct payments for residential care? Or should it be retained? Please provide reasons as to your support or opposition to requiring authorities to provide direct payments for residential care.

Additional consultation questions

Direct payments, individual services funds and support to children in need under Section 22 of the Children (Scotland) Act 1995 – the duty to impose the 4 options of self-directed support applies to any support provided under Section 22 of the Children (Scotland) Act 1995. Section 22 covers a wide range of support - the Scottish Government invites your views on whether there should be any exceptions to the rule to offer the full range of choices. Any restrictions on choice should be fully justified.

Question 6: The draft Regulations do not specify circumstances where the direct payment option should be unavailable for care and support to children/families. *Should* there be specific restrictions on choice of support in relation to children/families support (i.e. support provided under Section 22 of the Children (Scotland) Act 1995) and should these restrictions apply to the direct payment only, or to other options as well?

Question 7: Do you have any further comments on the draft Regulations?

For example, are there any gaps in terms of the topics covered by the Regulations? Are there any major changes that you would recommend? Are there any topics that are more appropriate for statutory guidance rather than Regulations?

The costs and benefits arising from the Regulations

Question 8 : Do you have any comments on the financial costs or benefits of the Regulations?

Can you identify any financial costs or benefits to individuals, local authorities, health boards, providers or any other person or organisation affected by the Regulations. In considering the costs and benefits you may wish to consult the Business Regulatory Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act available at the following hyperlink:

<http://www.scotland.gov.uk/Publications/2012/03/5525>

We plan to update the BRIA in light of the comments and information from this consultation.

The equality and human rights impacts of the Regulations

Question 9 (a): Do you have any views on the impact of the Regulations on any or all of the following equality categories:

- i) age;**
- ii) disability**
- iii) gender;**
- iv) lesbian, gay, bisexual and transgender;**
- v) race, and;**
- vi) religion and belief**

By “equality impacts” we mean whether or not, and in what ways, the Regulations will affect certain groups, and whether they will impact on those groups in a positive or a negative way. In considering the impacts you may wish to consult the Equality Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act 2013, available at the following hyperlink: <http://www.scotland.gov.uk/Publications/2012/03/9876>
We plan to update the Equality Impact Assessment in light of this consultation.

Question 9 (b): Do you have any views on the impact of the Regulations on human rights?

For more information about human rights please see the Scottish Human Rights Commission’s website at:
<http://www.scottishhumanrights.com/abouthumanrights/whatarehumanrights>

2013 No.

SOCIAL CARE

**The Self-directed Support (Direct Payments) (Scotland)
Regulations 2013**

| | | |
|--------------------------------------------|---------|-----|
| <i>Made</i> | - - - - | *** |
| <i>Laid before the Scottish Parliament</i> | | *** |
| <i>Coming into force</i> | - - | *** |

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 15 and 22(1) of the Social Care (Self-directed Support) (Scotland) Act 2013(a) and all other powers enabling them to do so.

PART 1

Introductory

Citation and commencement

1. These Regulations may be cited as the Self-directed Support (Direct Payments) (Scotland) Regulations 2013 and come into force on [1st April 2014].

Interpretation

2.—(1) In these Regulations—

“the Act” means the Social Care (Self-directed Support)(Scotland) Act 2013;

“direct payment user” means a person who has chosen Option 1 or, so far as relating to that option, Option 4 under section 5, 7 or 8 of the Act.

(2) Any reference to a numbered “Option” is to one of the options for self-directed support detailed in section 4 (options for self-directed support) of the Act.

PART 2

Calculation, payment and termination of direct payments

Means testing for direct payments

3.—(1) A local authority may assess a direct payment user’s ability to contribute to the cost of securing the support to which a direct payment relates (“a means test”).

(a) 2013 asp 1.

(2) If the authority carries out such a means test, the authority must carry it out either—

- (a) before the direct payment is made; or
- (b) as soon as possible after the payment has been made.

(3) Having considered the means test, the authority may require the direct payment user to contribute to the direct payment.

(4) If the means test happens after the payment has been made and the authority decides that the direct payment user should contribute to the payment, the authority may require the direct payment user to repay either—

- (a) part of the payment to reflect that contribution; or
- (b) some lesser amount.

(5) This regulation does not apply in relation to a direct payment user for whom the charge in respect of any service is waived by virtue of the [Carers (Waiving of Charges for Support)(Scotland) Regulations 2014(a).]

Payment net or gross of a direct payment user's contribution

4.—(1) A local authority shall make the direct payment net of any contribution required under regulation 3(3) unless the direct payment user elects to receive the payment gross of any such contribution.

(2) If the direct payment user makes an election under paragraph (1), the local authority shall pay to the direct payment user the relevant amount and the direct payment user shall pay to the local authority any contribution required under regulation 3(3).

Direct payments by instalments

5.A local authority may pay a direct payment to a direct payment user in instalments.

Third party direct payments

6.A local authority may pay all or part of a direct payment to a person other than the direct payment user (a “third party”) if all of the following conditions are met:—

- (a) the direct payment user asks the local authority to make the payment to a third party; and
- (b) the local authority is satisfied that the direct payment user retains total control over how the money is spent.

Circumstances where a direct payment may be terminated

7.—(1) A local authority may terminate a direct payment if—

- (a) a direct payment user becomes ineligible to receive direct payments;
- (b) the direct payment has been used (wholly or partly) for some purpose other than to secure the provision of the support to which it relates;
- (c) the direct payment user has breached the civil or criminal law in relation to the support to which the direct payment relates;
- (d) the direct payment has been used (wholly or partly) to secure the provision of support by a family member in circumstances where the family member is not permitted to provide support under regulations 9 and 10.

(2) Before terminating a direct payment, the local authority must notify the direct payment user of—

- (a) the reason why it has decided to terminate the direct payment;

- (b) the date with effect from which the direct payment will be terminated.
- (3) In determining the date with effect from which the direct payment will be terminated, the local authority must take into account —
 - (a) any contractual obligations entered into by the direct payment user; and
 - (b) the time that will be required to put in place alternative arrangements to meet the person’s assessed needs.
- (4) The local authority must give the notification required by paragraph (2) in writing and, if necessary, in such other form as is appropriate to the needs of the person to whom it is given.

PART 3

Provision of support by family members

Support to which this Part applies

- 8.**—(1) This Part applies to support provided under a direct payment chosen under—
- (a) section 5 of the Act; and
 - (b) subject to paragraph (2), section 8 of the Act.
- (2) But this Part does not apply to support provided under a direct payment chosen under section 8 of the Act where that support is provided to meet needs in relation to the care which a child provides, or intends to provide. to another person.

Circumstances where family member may provide support

- 9.**—(1) A family member may only provide support under a direct payment where paragraph (2) applies.
- (2) This paragraph applies where—
- (a) the family member and direct payment user agree to the family member providing the support;
 - (b) the family member is capable of meeting the direct payment user’s assessed need; and
 - (c) any of the factors in paragraph (3) apply.
- (3) Those factors are—
- (a) there is a limited choice of service providers who could meet the assessed needs of the direct payment user;
 - (b) the direct payment user has difficulty interacting with strangers;
 - (c) the direct payment user has specific communication needs which mean it will be difficult for another provider to meet the assessed needs;
 - (d) the family member will be available to provide support at times where other providers would not reasonably be available;
 - (e) the intimate nature of the support required by the direct payment user makes it preferable to the direct payment user that support is provided by a family member;
 - (f) the direct payment user has religious or cultural beliefs which make the provision of support by a family member preferable to the direct payment user;
 - (g) the direct payment user requires palliative care;
 - (h) the direct payment user has an emergency or short-term necessity for care;
 - (i) there are any other circumstances in place which make it appropriate, in the opinion of the local authority, for that family member to provide the services.
- (4) In this regulation—

“assessed needs” means the needs which a local authority has identified following an assessment under section 12A of the 1968 Act^(a);

“family member” means—

- (a) the spouse or civil partner of the direct payment user;
- (b) a person who lives with the direct payment user as if their spouse or civil partner;
- (c) the direct payment user’s—
 - (i) parent;
 - (ii) child;
 - (iii) brother or sister;
 - (iv) aunt or uncle;
 - (v) nephew or niece;
 - (vi) cousin;
 - (vii) grandparent;
 - (viii) grandchild;
- (d) the spouse or civil partner of any person listed in sub-paragraph (c);
- (e) a person who lives with any person listed in sub-paragraph (c) as if their spouse or civil partner.

Exception to family members rule

10.—(1) Even if regulation 9(2) applies, a family member may not provide support to which a direct payment relates if—

- (a) the local authority determines that either the family member or the direct payment user is under undue pressure to agree to the family member providing support; or
- (b) the family member is a guardian, continuing attorney or welfare attorney with power to make decisions as regards the support to be provided through the direct payment.

(2) In this regulation—

“guardian”—

- (a) means a guardian appointed under the Adults with Incapacity (Scotland) Act 2000^(b) (“the 2000 Act”); and
- (b) includes a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during the adult’s incapacity, if the guardianship is recognised under the law of Scotland;

“continuing attorney”—

- (c) means a continuing attorney within the meaning of section 15 (creation of continuing power of attorney) of the 2000 Act; and
- (d) includes a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter’s property or financial affairs and having continuing effect despite the granter’s incapacity;

“welfare attorney”—

- (a) means a welfare attorney within the meaning of section 16 (creation and exercise of welfare power of attorney) of the 2000 Act^(c); and

(a) “The 1968 Act” is defined in section 24 of the Act as the Social Work (Scotland) Act 1968 (c.49). Section 12A of the 1968 Act was inserted by the National Health Service and Community Care Act 1990 (c. 19), section 55 and was amended by the Carers (Recognition and Services) Act 1995 (c.12), section 2(3) and the Community Care and Health (Scotland) Act 2002 (asp 5), sections 8 and 9.

(b) 2000 asp 4.

(c) Section 16 was amended by the Human Tissue (Scotland) Act 2006 (asp 4), section 57(2)(b) and the Adult Support and Protection (Scotland) Act 2007 (asp 10), section 57(2).

- (b) includes a person granted, under contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the direct payment user's personal welfare and having effect during the direct payment user's incapacity.

PART 4

Circumstances where direct payments are not available

Descriptions of persons who are ineligible to receive a direct payment -

11.—(1) The descriptions of persons specified for the purposes of section 15(2)(a) of the Act (persons who are ineligible to receive direct payments) are—

- (a) a person who is subject to a drug treatment and testing order imposed under section 234B of the Criminal Procedure (Scotland) Act 1995(a);
- (b) a person who is released on licence under—
 - (i) section 22 of the Prisons (Scotland) Act 1989(b);
 - (ii) section 1 or 1AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993(c);
or
 - (iii) section 37(1) of the Criminal Justice Act 1991(d),
who is subject to a condition to submit to treatment for a mental condition or a drug or alcohol dependency;
- (c) a person who is required to submit to treatment for a mental condition or a drug or alcohol dependency by virtue of—
 - (i) a community rehabilitation order within the meaning of section 41 of the Powers of Criminal Courts (Sentencing) Act 2000(e); or
 - (ii) a community punishment and rehabilitation order within the meaning of section 51 of that Act;
- (d) a person subject to a drug treatment and testing order imposed under section 52 of the Powers of Criminal Courts (Sentencing) Act 2000;
- (e) a person whose direct payment has been terminated by a local authority in accordance with regulation 8(b) or (c).

(2) A person who is ineligible to receive direct payments by virtue paragraph (1)(e) ceases to be ineligible if the local authority so determines.

Services for which direct payments are not available

12.—(1) A local authority is not required to give a person the opportunity to choose Option 1 (direct payment) and, so far as relating to that option, Option 4 in the circumstances specified in paragraph (2) and (3).

(2) The circumstances are that the support which the local authority has decided could satisfy the person's needs is—

- (a) support for individuals who are homeless as defined in Part II of the Housing (Scotland) Act 1987(f);
- (b) support for individuals who are fleeing domestic abuse;

(a) 1995 (c. 46). Section 234B was added by the Crime and Disorder Act 1998 (c. 37), section 89.
(b) 1989 (c. 45). Section 22 was amended by the Criminal Justice (Scotland) Act 2003 asp 7, section 3(2).
(c) 1993 (c. 9).
(d) 1991 (c. 53).
(e) 2000 (c. 6).
(f) 1987 c.26.

- (c) support for individuals in relation to drug or alcohol dependency;
- (d) the provision of residential accommodation for a period in excess of four consecutive weeks in any period of twelve months; or
- (e) the provision of residential accommodation with nursing (under section 13A (residential accommodation with nursing) of the 1968 Act^(a)) for a period in excess of four consecutive weeks in any period of twelve months.

Name

Authorised to sign on behalf of the Scottish Ministers

St Andrew's House,
Edinburgh
Date

^(a) Section 13A was inserted by the National Health Service and Community Care Act 1990 (c.19), section 56 and amended by the Immigration and Asylum Act 1999 (c.33), section 120(2) and the Regulation of Care (Scotland) Act 2001 (asp 8), section 72 and schedule 3, paragraph 4.

EXPLANATORY NOTE

(This note is not part of the Regulations)

A public consultation on draft regulations and statutory guidance to accompany the Social Care (Self-directed Support) (Scotland) Act 2013



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Forename

2. Postal Address

| | | |
|----------------------|-------|-------|
| <input type="text"/> | | |
| <input type="text"/> | | |
| <input type="text"/> | | |
| <input type="text"/> | | |
| Postcode | Phone | Email |

3. Permissions - I am responding as...

| | | |
|----------------------------|---|--------------------------|
| Individual | / | Group/Organisation |
| <input type="checkbox"/> | | <input type="checkbox"/> |
| Please tick as appropriate | | |

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

Yes No

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

4. Additional information – I am responding as:

Please tick as appropriate

| | |
|--------------------------------------------------------------------------------|--------------------------|
| 1. Member of the public | <input type="checkbox"/> |
| 2. Individual health/social care professional | <input type="checkbox"/> |
| 3. Central government | <input type="checkbox"/> |
| 4. Local authority | <input type="checkbox"/> |
| 5. Community Health Partnership | <input type="checkbox"/> |
| 6. Health Board | <input type="checkbox"/> |
| 7. Support & information or advocacy organisation | <input type="checkbox"/> |
| 8. Voluntary sector organisation | <input type="checkbox"/> |
| 9. Private Sector organisation (e.g. private social care and support provider) | <input type="checkbox"/> |
| 10. Professional or regulatory body | <input type="checkbox"/> |
| 11. Academic institution | <input type="checkbox"/> |
| 12. Other – please specify | |



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