

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)