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SCOTTISH STATUTORY INSTRUMENTS

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**2014 No. 25**

**SOCIAL CARE**

**The Self-directed Support (Direct Payments) (Scotland) Regulations 2014**

*Made* - - - - 27th January 2014  
*Laid before the Scottish Parliament* - - - - 29th January 2014  
*Coming into force* - - 1st April 2014

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<sup>(1)</sup> 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 2014 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; and

“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 in these Regulations to a numbered “Option” is to one of the options for self-directed support 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").

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

- (a) before the direct payment is made; or
- (b) as soon as possible and not later than one year after the direct 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 direct payment has been made and the authority decides that the direct payment user should contribute to the direct payment, the authority may require the direct payment user to repay either—

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

#### Direct payments by instalments

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

#### Third party direct payments

5. 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—

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

#### Circumstances where a direct payment may be terminated

6. (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 local authority considers on reasonable grounds that the direct payment user has breached the criminal law or a civil law obligation in relation to the support to which the direct payment relates; or
- (d) the direct payment has been used (wholly or partly) to secure the provision of support by a family member other than in circumstances where the family member is permitted to provide support by regulation 8 (as read with regulation 9).

(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; and
- (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 provide the support to which the direct payment relates.

(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

7. (1) This Part applies to support to which a direct payment relates under—

- (a) section 5 of the Act; and
- (b) subject to paragraph (2), section 8 of the Act.

(2) This Part does not apply to support to which a direct payment relates under section 8 of the Act where that support is provided in relation to the care which a child provides, or intends to provide, to another person.

#### Circumstances where family member may provide support

8. (1) A family member may only provide support to which a direct payment relates in the circumstances specified in paragraph (2).

(2) The circumstances are—

- (a) the family member, direct payment user and local authority agree to the family member providing the support;
- (b) the family member is capable of providing the support; and
- (c) any of the factors in paragraph (3) apply.

(3) The factors are—

- (a) there is a limited choice of service providers who could provide the support;
- (b) the direct payment user has specific communication needs which mean it will be difficult for another provider to provide the support;
- (c) the support is required at times at which the family member will be available to provide it and where other providers would not reasonably be so available;
- (d) 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;
- (e) 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;
- (f) the direct payment user requires palliative care;
- (g) the direct payment user has an emergency or short-term necessity for care; or
- (h) there are other factors in place which make it appropriate, in the opinion of the local authority, for that family member to provide the support.

(4) In this regulation—

“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**

9. (1) Even if regulation 8(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<sup>(2)</sup> (“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”—

- (a) means a continuing attorney within the meaning of section 15 (creation of continuing power of attorney) of the 2000 Act<sup>(3)</sup>; and
- (b) 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; and

“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<sup>(4)</sup>; and

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<sup>(2)</sup> 2000 asp 4.

<sup>(3)</sup> Section 15 was amended by the Adult Support and Protection (Scotland) Act 2007 (asp 10), section 57(1).

<sup>(4)</sup> 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 granter's personal welfare and having effect during the granter's incapacity.

## PART 4

### Persons ineligible to receive direct payments

**10.** The description of persons specified for the purposes of section 15(2)(a) of the Act (persons who are ineligible to receive direct payments) are persons to whom a local authority has decided to provide (or arrange for the provision of)—

- (a) residential accommodation; or
- (b) residential accommodation with nursing (under section 13A (residential accommodation with nursing) of the 1968 Act<sup>(5)</sup>),

for a period in excess of 4 consecutive weeks in any period of 12 months.

## PART 5

### Circumstances in which local authorities are not required to give the opportunity to choose a direct payment

**11.** (1) A local authority is not required under section 5, 7 or 8 of the Act to give a person the opportunity to choose Option 1 and, so far as relating to that option, Option 4 in the circumstances specified in paragraph (2).

(2) The circumstances are that—

- (a) a local authority has previously terminated a direct payment made to the person under regulation 6(1)(b), (c) or (d); or
- (b) the making of a direct payment is likely to put the safety of the person to whom the support is to be provided at risk.

St Andrew's House, Edinburgh  
27th January 2014

*MICHAEL MATHESON*  
Authorised to sign by the Scottish Ministers

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<sup>(5)</sup> 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)*

These Regulations are made under section 15 of the Social Care (Self-directed Support) (Scotland) Act 2013 (“the Act”) and make further provision about direct payments.

Sections 5, 7 and 8 of the Act require local authorities providing support to an adult, adult carer or child or member of a child’s family to give the supported person the opportunity to choose one of the options set out in section 4 of the Act as to how that support is provided. Option 1 is the making of a direct payment by the local authority to the supported person to enable the person to arrange for the provision of support.

Regulation 3 provides in relation to means testing for direct payments including providing that any means test must be carried out either before the direct payment is made or if later not more than one year after payment is made.

Regulation 4 allows local authorities to pay in instalments.

Regulation 5 allows local authorities to pay a direct payment to a third party but only if requested to do so by the direct payment user and if they are satisfied that the direct payment user retains control of the payment.

Regulation 6 sets out circumstances in which local authorities can terminate a direct payment. This includes where there is a change in the direct payment user’s circumstances such as going into residential care (and so becoming ineligible to receive direct payments). The local authority first has to notify the person.

Part 3 of the Regulations sets out the circumstances in which family members can provide the support to which a direct payment relates. This Part does not apply to support to adult carers under section 3 of the Act or to services under section 22 of the Children (Scotland) Act 1995 where the support relates to care a child (young carer) provides to another person.

Regulation 8 provides that a family member can only provide the support to which a direct payment relates if the family member, the direct payment user and the local authority agree, the family member is capable of meeting the direct payment user’s needs and at least one of the factors in regulation 8(3) applies.

Regulation 9 sets out exceptions to the provision in regulation 8 allowing family members to provide support.

Part 4 (regulation 10) provides that certain persons are ineligible to receive direct payments. These are persons to whom a local authority is providing support in the form of residential accommodation. If a person is ineligible, in terms of the Act, the local authority cannot offer the option of a direct payment but must give the person the opportunity to choose one of the other options for self-directed support.

Part 5 (regulation 11) specifies circumstances in which local authorities have discretion as to whether they offer the option of a direct payment.

A Business and Regulatory Impact Assessment has been prepared and placed in the Scottish Parliament Information Centre. Copies may be obtained from the Adult Care and Support Policy Team, Scottish Government, St Andrew’s House, Edinburgh.