

Explanatory Memorandum to

The Care and Support (Direct Payment) (Wales) Regulations 2015

This Explanatory Memorandum has been prepared by the Department of Health and Social Services and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Care and Support (Direct Payments) (Wales) Regulations 2015.

Mark Drakeford

Minister for Health and Social Services

21 October 2015

Part 1 – OVERVIEW

1. Description

The Social Services and Well-being (Wales) Act 2014 (the Act) brings together local authorities' duties and functions in relation to improving the well-being of people who need care and support and carers who need support. The Act provides the statutory framework to deliver the Welsh Government's commitment to integrate social services to support people of all ages, and support people as part of families and communities.

The Care and Support (Direct Payments) (Wales) Regulations 2015, set the circumstances when local authorities are either required or allowed to make direct payments under Part 4 of the Social Services and Well-being Wales Act 2014 as a way of meeting a person's needs for care and support.

Direct payments are monetary amounts made available by local authorities to individuals, or their representatives, to enable them to meet their care and support needs to achieve their well-being outcomes and in the case of a carer their support needs to achieve their well-being outcomes. They are an important mechanism which empower and enable people to have a voice and control over the way in which their well-being outcomes are met.

These Regulations revoke The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011 SI2011 831 (W.125).

This Explanatory Memorandum should be read in conjunction with the Explanatory Memorandum to The Care and Support (Eligibility) (Wales) Regulations 2015, The Care and Support (Assessment) (Wales) Regulations 2015, the Care and Support (Care planning) (Wales) Regulations 2015 and Part 4 of the Care and Support (Charging) (Wales) Regulations 2015 (CONTRIBUTIONS AND REIMBURSEMENTS FOR DIRECT PAYMENTS)

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

There are no matters of special interest to note.

3. Legislative background

The powers enabling these Regulations to be made are contained in Part 4 of the Social Services and Well-being (Wales) Act 2014, these regulations are made under section 50, 51, 52 and 53 and provide local authorities with the ability to make a direct payment towards the cost of meeting an adult's need for care and support under section 35 or 36 of the Act; or in the case of a child, for their needs for care and support under sections 37, 38 or 39 of the Act. These provisions also enable a direct payment to be made towards the cost of meeting a carer's needs for support under sections 40, 42 or 45 of the Act.

Under existing legislation (the Health and Social Care Act 2001 and the Children Act 1989), a local authority must provide a direct payment if a person requests one and they are satisfied that making the payment is an appropriate way of meeting the individual's care and support needs and in the case of a carer, their support needs; and that the person is capable of managing the payment (either on their own or with support). Where a person does not have the mental capacity to consent, a direct payment may be made to a 'suitable person' acting in the person's best interests who can receive and manage the payment on the person's behalf

Broadly, the Act and these regulations make the same provision for the making of direct payments as currently exist under the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011 (S.I. 2011/8319W.125) and the Health and Social Care Act 2001 and sections 17A, 104, 104A of the Children Act 1989. This instrument mainly replicates the 2011 framework, it also updates several areas to align with Welsh Government policy on direct payments outlined below in paragraph 4.

The regulatory change will maintain the continuation of direct payments but will enhance their ability to be used in an innovative and creative way as a means of achieving personal well-being outcomes. The revised regulations embrace the whole ethos of the Act of promoting people's independence by giving them a stronger voice and control; equality by removing restrictions of persons able to receive them and quality by the provision of information provided to enable them to make an informed choice.

Regulations under section 50, 51 or 52 can also make provision for the making of direct payments as gross payments (subject to reimbursement of an amount equivalent to the local authority's charge for meeting the person's needs) or net payments (on the basis of a contribution of an amount equivalent to the charge). This provision is contained in Part 4 of the Care and Support (Charging) (Wales) Regulations 2015.

These Regulations are subject to the negative procedure.

4. Purpose & intended effect of the legislation

Direct payments are crucial to achieving the Welsh Governments' aim of improving the well-being of people who need care and support to achieve their well-being outcomes and carers who need support to achieve their well-being outcomes. They provide the mechanism to increase independence, choice and control, and are an enabler of co-production in care planning which affords individuals the freedom to plan flexible and innovative ways to maximise their well-being outcomes.

These regulations provide that a local authority is under a duty to make a direct payment towards the cost of meeting a person's needs for care and support if that person or their representative expresses a wish to receive one and they meet the conditions set in sections 50, 51 or 52 of the Act. One of the conditions is that the local authority must be satisfied that making the payments is an appropriate way of meeting the person's needs.

Direct payments must be seen as an integral part of the assessment and care planning process; they should no longer be viewed as a secondary consideration but as an important means, where appropriate, to meet a person's need for care and support. As such these regulations identify the steps a local authority must take and the information which they must provide to the individual or their representative so they are able to make an informed decision as to whether they wish to receive a direct payment (reg 4).

The 2011 regulations prohibit local authorities from making direct payments to people who are subject to certain aspects of criminal justice legislation relating to substance or alcohol misuse. These Regulations remove the exclusion and enables those with drug or alcohol dependency to access direct payments with suitable safeguards, namely that a suitable person agrees to manage the payments and any employment responsibilities on their behalf.

These Regulations create new provisions designed to make using direct payments more flexible and less bureaucratic. Firstly, they provide that local authorities cannot require a direct payment to be used in a particular way. This is intended to support policy intention for direct payments to be used innovatively and flexibly and to prevent local authorities from stating that a direct payment can only be used with a particular provider. Direct payments may be used for any identified need for care and support which a local authority is to meet. This includes community care and support and short term and long term residential care and support. A recipient is also able to purchase their care and support direct from their local authority if they wish.

The 2011 regulations provide that direct payments cannot be used to pay for care from close family members living in the same household, unless the local authority determines it is absolutely necessary to meet the person's needs. These Regulations retain a similar but far less restrictive provision (regulation 6) where a direct payment will be authorised by the local authority to pay a relative living in the same household for the provision of care and support or help in managing the payments, if appropriate for promoting the well-being of the recipient.

Finally, these Regulations require that the first review of the making of the direct payment is to be made within six months, rather than 12 months as is the case in existing legislation. Reviews will be undertaken at 12 month intervals thereafter unless the local authority deem it appropriate as conditions are not being met or the use of the direct payment is not meeting the individuals needs. The recipient or their suitable person is also able to request a review.

5. Consultation

A 12 week consultation on these regulations ran between 6 November 2014 and 2 February 2015. In order to reach a comprehensive and varied pool of experience and expertise, the consultation contained a mix of digital and face to face meetings and events with the full spectrum of stakeholders Further details on the consultation process are set out in the Regulatory Impact Assessment in Part 2.

The Report and a list of respondents can be founds at:

<http://gov.wales/consultations/healthsocialcare/part-3-and-4/?status=closed&lang=en>

6. Code of Practice

The current statutory guidance will be replaced by a code issued under section 145 of the Act. The code will reflect the changes to the direct payments regime which have been made in the regulations under section 50 to 52 of the Act; the Code will be laid in the Assembly in November 2015. Local authorities are required to act in accordance with any relevant requirements contained in a code and to have regard to any relevant guidelines contained in it.

PART 2 – REGULATORY IMPACT ASSESSMENT

Options

Option 1: Do nothing – maintain the status quo

Cost:

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

Benefits:

This option would provide no further benefits. Variations in what service users can expect in different parts of the country will remain, as evidenced by the Independent Commission on Social Services in Wales and the Care and Social Services Inspectorate for Wales.

Option 2: Extend the availability of Direct Payments

Cost:

Although legislation has been in place since 1996 for the provision of direct payments, there are currently just over 4,000 ¹ recipients in Wales; this represents a modest number in comparison to those in receipt of non residential services ² in Wales. It is anticipated there will be an increase in demand as a result of widening eligibility and accessibility of direct payments, however we would expect the cost of the increase to the local authority to be minimal given that systems are already in place within local authorities for their administration.

The service users currently excluded from being eligible to receive their care and support via a direct payment will already be in receipt of commissioned services from their local authority and hence any costs would be negated. We must remember that direct payments is a mechanism, simply an alternative way of meeting assessed social care needs, and are no more inherently expensive than directly arranged provision.

Direct payments should be seen as an integral part of the assessment, eligibility and care planning process and therefore this RIA should be read in conjunction with the corresponding RIA's. The policy intention for assessment is to simplify the process and provide a more focused based approach which is more appropriate to the needs of the individual. This is in line with the proposed new eligibility criteria and care planning process which will bring greater clarity, consistency and equality of access to care and support. It is considered that these modified approaches which focus on prevention and early intervention to improve a person's well-being outcome will provide long term cost savings as individuals will be assessed at an earlier stage through the Information, Advice and Assistance (IAA) service. It is anticipated that fewer individuals will need to have a full assessment completed as they will be provided with information and advice

¹ <https://statswales.wales.gov.uk/v/hlT>

² <https://statswales.wales.gov.uk/v/hlT>

about preventative well-being services available in their local authority which may have an impact on the number of people eligible and opting to receive a direct payment.

Benefits:

Placing a duty on local authorities to offer direct payments to individuals currently unable to receive them would give those persons greater choice and control over the way the services they receive are delivered. This would lead to increased consumer satisfaction with the services they are provided with; greater co-production and ownership of care; improved health and wellbeing outcomes.

The main groups likely to benefit from extending the availability of direct payments are:

- those subject to certain aspects of criminal justice legislation relating to substance or alcohol misuse
- those with drug or alcohol dependency as long as the payments are managed by a suitable person on their behalf
- people who wish to use their direct payments to cover long term residential care
- and those wishing to employ relatives to provide care and support, or help in managing their payments.

The removal of this blanket exclusion of people will make it possible for people in that position to benefit from direct payments in the same way as others. The current exclusion prohibits people from receiving direct payments denying them the opportunity to be provided with a mechanism which enables a more flexible and innovative approach in meeting their wellbeing outcomes and which helps them to regain their independence and re-integrate into society.

Evidence has been presented by the Law Commission³ which provides sound reasons in principle for extending direct payments to cover residential accommodation. It would give service users greater choice and control over the provision of accommodation, and would mean they no longer have to rely on their preference being acknowledged and implemented by local authority staff. The Law Commission felt there to be no reason for excluding people merely on the basis of the type of service being provided. The Law Commission considered some of the practical questions arising from this extension, including the economics of care home provision. They concluded that the extension would have neutral or positive resource implications.

Provision to allow relatives living in the same household to provide care or manage payments again encompasses the spirit of the Act by enabling service users to have greater personal choice of who and how their care and support needs are provided and managed.

It is also hoped that an increased uptake of direct payments within the residential settings will help improve outcomes in the residential care sector, enhance the quality of care provided in care homes, and improve the experience of care by users and their families; making care providers more responsive to individual needs.

Risk:

³ The Law Commission (LAW COM No 326)(Recommendation 35).

There is an inevitable risk that individuals acting on behalf of those lacking capacity; those acting on behalf of persons subject to requirements imposed in relation to drug or alcohol use; and relatives living in the same household as the direct payment recipient may not act in their best interest. These scenarios have been considered and a number of specific provisions and conditions have been included in the regulations to mitigate that risk.

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

Training

The work of implementing the Act – and through it the new system for social care required by Sustainable Social Services – goes beyond making subordinate legislation, as important as this is. Preparing the workforce and the population is a key element to a smooth transition from the existing to the new system.

The Care Council for Wales, as the lead body for workforce development, is putting in place a national learning and development strategy.. The strategy is critical to the implementation of the Act and will need sustained, deliberate and high-profile leadership, which can reach out across a wide range of organisations and partners beyond the boundaries of the traditional social care sector.

The Care Council has developed this work with key stakeholders to ensure the strategy covers all of those involved in the provision of social care, together with their key partners, and that it is delivered jointly and in collaboration with those partners.

The strategy includes a training deployment plan and a one-stop-shop information hub, playing a key supporting role for the sector in ensuring its own readiness for the changes the Act and its regulations will bring into force. The Care Council for Wales will also update, publish on line and promote the basic awareness raising material as a common tool for use across partners and support, encourage and monitor delivery. The resources and material developed by the Care Council will be made available free of charge to all organisations.

This has been supported by £1m in 2015-16 from the social care workforce development programme. A further £7.1m from the programme, together with the local authority match funding, making a total of some £11m will support the development and implementation of cross-sector regional training plans, which align with both the national strategy and regional implementation plans. This approach ensures coherence across the service and workforce planning for implementation at a national, regional and local level.

To support local government and its partners in making the transition to the new arrangements a Delivering Transformation grant has been made available to the six regional partnerships and selected national partners. In 2015-16 we made £3m available. This is in addition to the £20m already announced this year to carry on the work of projects funded through the Intermediate Care Fund and the £10m increase in

the Revenue Support Grant for Social Services purposes. In order to build on this momentum and ensure that support for implementation of the Act evolves into support for the embedding process post April 2016 a further £3m in grant funding will be made available in 2016-17, subject to budgetary decisions.

Consultation

A 12 week public consultation on these regulations and accompanying Code of Practice ran between 6 November 2014 and 2 February 2015. The documents can be found at:

<http://wales.gov.uk/consultations/healthsocialcare/part2/?lang=en>

Respondents welcomed the changes the legislation and code proposed in regards to the extension of direct payments and supported the view that direct payments must be seen as an integral component in the broader framework of assessment, eligibility and support planning and not viewed as a separate entity. There was concern that appropriate and stringent safeguards were put in place to protect the most vulnerable, especially with the extension of direct payments to people who have drug or alcohol dependencies.

There was significant interest in the consultation question allowing direct payments to be used to employ relatives to manage or provide their care and support. There was some concern that this policy option would pose implementation issues for local authorities especially around the safeguarding issues and wider concern of monitoring while remaining proportionate. Some respondents agreed that it would make direct payments more attractive to people as it enabled and supported continuity of care; recognition of service user's personal choice; greater flexibility and recognition of the role that family carers play in supporting people especially where there are multiple complex needs. It was noted that relatives are often those best placed to ensure early intervention and deal with emotional challenges.

In some cases the direct payment may be substantial, the management and administration of a large payment, along with organising care and support can be a complex and time consuming task. This discretion allows family members performing this task to be paid a proportion of the direct payment in the same way as some direct payment holders pay third party support organisations. This change is intended to allow local authorities to make managing direct payments less onerous, especially where a person may have multiple, complex needs and may have several different care workers to arrange and manage.

Some concern was expressed that this discretion would tip the balance of normal family bonds associated with caring. Local Authorities will need to discuss with the recipient the possibility of such arrangements changing family dynamics and to make clear to both the recipient and their relative the distinction between receiving a nominal amount for providing administrative support and management of the direct payment, and those relatives in the same household being paid for care.

Respondents felt that the regulation as initially drafted did not satisfy the policy intention and would discourage relatives. The regulation was perceived as giving too much scope for local authority discretion and did not conform to the ethos of the Act of co-

production, choice and control. Respondents called for the regulation to reaffirm the potential value of employing relatives and remove negative connotations.

The regulations have been amended to be clear that the views of the recipient are a significant factor featured in the decision making process, to achieve the right balance in addressing the concerns we received.

Competition Assessment

Competition Filter Test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulations do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisations?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

The filter test shows that it is not likely that the regulation will have any detrimental effect on competition; therefore a detailed assessment has not been conducted.

We do not consider it necessary to undertake a competition assessment for these Regulations since they will not affect the business sector in any significant way

Post implementation review

The Social Services and Well-being (Wales) Act 2014 contains provisions to allow the Welsh Ministers to monitor functions of the Act carried out by local authorities and other bodies. The Welsh Ministers may require these bodies to report on their duties in implementing these Regulations.

Additionally, the Welsh Government will continue to monitor the extent to which the regulations support compliance with its duties in regard to the Welsh language, equality, tackling poverty and the United Nations Principles for Older Persons.

As required by the Rights of Children and Young Persons (Wales) Measure 2011, the Welsh Ministers will have due regard to the United Nations Convention on the Rights of the Child (UNCRC) when exercising relevant functions under the Act.