

## **Briefing Note:**

**New Guidance on Direct Payments Applicable in England with effect from 9<sup>th</sup> November 2009**

**SI 2009/1887 and the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009**

Mike Hurst - 17<sup>th</sup> September 2009

The guidance and regulations have been written to reflect the changes introduced by the Mental Capacity Act 2005, the Health and Social Care Act 2008 and the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009.

From 9<sup>th</sup> November 2009, the broad effect of these changes is to extend the system of Direct Payments to include people who lack the capacity to consent to the making of Direct Payments and to remove the exclusions that currently apply to people who are subject to various provisions of the Mental Health Legislation.

The guidance aims to reflect the Government's commitment to supporting independence, choice and control, as set out in 'Putting People First'; 'A Shared Vision and Commitment of the Transformation of Adult Social Care' and 'Aiming High for Disabled Children'. The guidance and regulations apply both to Children's and to Adult Services and is issued under Section 7 of the Local Authority and Social Services Act 1970, replacing Community Care, Services for Carers and Children's Services (Direct Payments) guidance, which was issued in 2003.

Direct Payments were introduced in relation to Social Care Services for Adults through the Community Care (Direct Payments) Act 1996. This Act was repealed in relation to (England) by the Health and Social Care Act 2001 and Direct Payments are now governed by the 2001 Act and the Children Act 1989. From April 2003, Councils were required to offer Direct Payments to certain persons in order to enable them to obtain for themselves, the services that they were assessed as needing.

The power to make Direct Payments to people with Parental Responsibility for disabled children and to disabled 16 and 17 year olds was created by The Carers and Disabled Children Act 2000. Section 17A of the 1989 Act, inserted by the 2001 Act, gave Councils a duty to offer Direct Payments for Children's Services.

The guidance and regulations has been written to reflect the changes introduced mainly by amendments made to Section 57 of the 2001 Act by Section 146 of the Health and Social Care Act 2008, and also changes introduced by the Mental Capacity Act 2005 and by the Community Care Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009.

From 9<sup>th</sup> November 2009 the broad effect of the 2001 Act and the regulations is to extend the current system of Direct Payments to include people who lack the capacity, within the meaning of the Mental Capacity Act 2005, to consent to the making of Direct Payments. In addition, the legislation removes the exclusions which currently apply to people who are subject to various provisions of the Mental Health Legislation, particularly the Mental Health Act 1983 and to the provisions of the Criminal Justice Legislation relating to mental disorders.

In general terms, the guidance aims to reflect the Government's current direction of policy for Adult Social Care, which is to promote personalised support characterised by the ability to exercise choice and control by the individual including of course people who currently lack the capacity to consent to a Direct Payment.

The scope of the Direct Payment Legislation is that Council's have a duty to offer Direct Payments to:-

- Older people and disabled people aged 16 and over;
- A person with the parental responsibility for a child;
- Carers aged 16 years and over; and
- An appointed 'suitable person'.

In terms of an appointed 'suitable person' this means a person appointed to receive and manage Direct Payments on behalf of someone who lacks capacity to consent to the making of the Direct Payments. The 'suitable person' would often, but not always, have been given a Lasting Power of Attorney or have been appointed by the Court of Protection as a Deputy under the Mental Capacity Act 2005 and can also include existing Enduring Powers of Attorney.

In a great majority of cases therefore, it is expected that Councils will have a duty to make Direct Payments to people with eligible needs. However, there are some exceptions in respect of certain people subject to Mental Health Legislation or aspects of the Criminal Justice Legislation where Councils may have a power rather than a duty to make Direct Payments.

Under the Regulations, the exceptions where Councils now have the power rather than a duty to make Direct Payments are essentially:-

- Patients conditionally discharged under the 1983 Mental Health Act (Restricted Patients); and
- Clients who are under obligations to accept as a result of any of the provisions of the 1983 Act, the Criminal Procedure (Insanity) Act 1964, the 1991 and 2003 Criminal Justice Acts. In addition, certain clients who are subject to alcohol and substance misuse also come under similar restrictions.



Practitioners may have been aware in the past that some Councils have been making Direct Payments to individuals who lacked capacity, which was of course technically illegal. Indeed some high profile personal injury litigation cases also raised the issue of Local Authorities refusing to make Direct Payments to individuals who lacked capacity.

Clearly these issues have finally been resolved in England and the guidance and regulations lay out the exact process as to how a Direct Payment can now be made available to persons who lack capacity.

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