



**THE LAW SOCIETY
of SCOTLAND**
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Consultation Response

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

The Law Society of Scotland's response

July 2013

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Mental Health and Disability sub-committee (the committee) welcomes the opportunity to consider and respond to the Scottish Government's consultation on the draft Self-directed Support (Direct Payments) (Scotland) Regulations 2013. The committee has the following comments to make.

Specific Comments

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

In relation to clause 4 "*Payment net or gross of a direct payments user's contribution*", having considered this, the committee cannot see why, unless there are exceptional circumstances, a direct payment would be made gross to a direct payment user. The committee recommends that the default position of net payment is used at all times. Otherwise, the committee suggests that this could lead to situations where the local authority is paying out money on the one hand and then trying to claw back money for charges on the other.

The committee is pleased to note that clause 7 clearly sets out the circumstances where a direct payment may be terminated.

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

With regard to the list of circumstances in which a family member may provide support, this list would cover most people if they want a direct payment as it recognises that most people

would prefer to have family provide personal care. This could mean a substantial increased cost to local authorities as many more family members could now claim payment via these rules.

The committee agrees to this in principle but suggests that the local authority will have to provide a robust way of assessing there has been no undue influence and that the family member is capable of meeting the person's needs.

With regard to clause 10 "*Exception to family members rule*", the committee notes that by virtue of clause 10(b) a family member will be barred from providing support if they are a guardian or attorney to the deferred payment user. Whilst the committee fully understands that there is an inherent conflict in the family member choosing to hire his or herself, this could mean that the person the direct payment user trusts most in life and has chosen to be an attorney when planning for his future may be prevented from being paid under a direct payment, unlike a more distant relative who could also be exerting undue pressure but which is not transparent to officials looking at this.

The committee suggests that this is perhaps something that should be explained to families when powers or attorney are being drawn up or when guardianships are being applied for so they have to make the choice of being an attorney or a carer who may actually get paid if the time came that the granter of the attorney should need this. The committee would be more than happy to assist with or advise on any training needs in this respect.

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?

The committee is content that direct payments are to be allowed for people under a CO or CTO provided they have the capacity to understand the nature of a direct payment or have a guardian or attorney to manage that for them.

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

This is a difficult question, as in line with the principles of SDS, the committee is in favour of service users having more control over their lives and the services they need to have. However the experience of some of the committee members with the Care Home sector is that if residents are paying themselves they are often charged a different higher rate as they are seen as self-funders who have capital to spend and therefore the Care Home will charge a higher rate than that the local authority would agree to. The committee suggests that this also raises equality and discrimination issues.

If direct payments are to be made, then the committee believes that there would have to be a clear provision in the regulations that the local authority nationally agreed rate for a care home, which is agreed each year, would be a reasonable amount to purchase a 24 hour care home service. Otherwise a resident could try arguing that to use a direct payment to pay for care at their chosen home, the rate needs to be at the level charged by that Home.

It is suggested that this may be unworkable for local authorities.

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

We would refer to the comments above that there may be additional costs to local authorities arising from family members providing care.

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