

## Direct Payment Fact Sheet

### Direct Payments & Mental Health Legislation

This information sheet highlights some of the key elements in legislation and national guidance relating to Direct Payments for people receiving mental health services and their carers.

In short, there is a duty at assessment and review where an individual has assessed needs and a written care plan for an offer of Direct Payments to be made to the individual. A conversation is required to explore how Direct Payments may assist in meeting needs identified in the care plan.

- 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 This Act was repealed (in relation to England) by the Health and Social Care Act 2001 ('the 2001 Act') and direct payments are now governed by the 2001 Act and the Children Act 1989 ('the 1989 Act'). 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.
- This guidance 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 ('the 2005 Act') and by the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 ('the Regulations'). From 9 November 2009 the broad effect of the 2001 Act and the Regulations ('the direct payments legislation') 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 ('capacity') to consent to the making of direct payments and to remove the exclusions which currently apply to people who

are subject to various provisions of mental health legislation, particularly the Mental Health Act 1983 ('the 1983 Act'), and to provisions of criminal justice legislation relating to mental disorder.

- People assessed as having eligible needs should not be put off accepting direct payments by a lack of adequate information about how their needs can be met. Putting practical arrangements in place for self-directed support may take longer in some cases, but whether someone opts for direct payments or council-provided services, there should be no significant difference in the ease of the process.
- The Health and Social Care Act 2008 amended the Health and Social Care Act 2001 to extend the scope of direct payments to include adults lacking capacity to consent to their receipt. A number of exclusions previously placed upon individuals subject to mental health legislation and to provisions of criminal justice legislation relating to mental disorder have also been lifted.
- Previously, many people with mental disorders who were subject to compulsory measures under the Mental Health Act 1983 (and similar legislation) were excluded from receiving direct payments. The Regulations remove most of those exclusions, with the result that local authorities will now also be able to make direct payments to people who are subject to such mental health legislation, therefore enabling people previously excluded to benefit from greater choice and control over their support.
- It is expected that, in most cases, people subject to mental health legislation will now enjoy exactly the same rights to direct payments as anyone else. However, in a few cases, councils will have a power (but not a duty) to make direct payments to such people.

- Under the Regulations, councils now have a power (although not a duty) to make direct payments to people ('restricted patients') who are conditionally discharged under the 1983 Act (or the equivalent Scottish legislation). By definition, conditionally discharged restricted patients are offenders who have been detained in hospital under the 1983 Act (or the equivalent Scottish legislation) and who remain liable to recall to hospital if necessary for their own health and safety or the protection of others.
- For example, if it is a condition of a person's community treatment order under the Mental Health Act 1983 that they accept a particular type of Community care service, then the council would have a power, but not a duty, to make direct payments in respect of that service (provided, of course, all the other criteria for making direct payments is met). The provision of a discretionary power is intended to give councils greater flexibility in cases where they are concerned that there may be risks in making direct payments in respect of services which the person concerned may prefer not to receive. The person concerned might not, for example, where additional support is required be as committed to making a success of the service as would normally be the case where people use direct payments to arrange their own care.
- Although the Regulations allow councils to exercise discretion in making direct payments to people subject to conditions relating to mental disorder, councils should be flexible in their approach and prepared to support individuals to take up direct payments wherever possible. Councils will wish to consider what support is available to the service user and where this support can be strengthened by access to support services, information and advice, brokerage and, where appropriate, independent advocacy. It is important to have in place a comprehensive risk management strategy within the support plan, agreed between the service user

and the council, including what arrangements will be put in place for proportionate monitoring and review.

- Where councils decide that it is not appropriate to make direct payments, they should put the reasons for the decision in writing, and make a written record available to the individual. They should also inform the individual about how to access complaints procedures if they are not satisfied with the decision of the council

**Remember, if you are unsure, have any queries or need additional support; please contact the Direct Payments Team here at KDC.**

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