WELSH STATUTORY INSTRUMENTS

2011 No. 831 (W.125)

SOCIAL SERVICES, WALES

The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011

Made - - - -	*16 March 2011*
Laid before the National Assembly for Wales - -	*18 March 2011*
Coming into force - -	*11 April 2011*

The Welsh Ministers make the following Regulations in exercise of the powers conferred by sections 57(1), (1A) (3), (5B), (5C), (6) , (7) and (7B) and 64(4A), (6) and (8) of the Health and Social Care Act 2001(**1**) and sections 17A(1), (3) and (4) and 104(4) and 104A of the Children Act 1989(**2**).

Title, commencement and application

1.—(1) The title of these Regulations is the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011 and they come into force on 11 April 2011.

(2) These Regulations apply in relation to Wales.

Interpretation

2. In these Regulations—

"the 1983 Act" ("*Deddf 1983*") means the Mental Health Act 1983(**3**);

"the 1989 Act" ("*Deddf 1989*") means the Children Act 1989;

"the 1990 Act" ("*Deddf 1990*") means the National Health Service and Community Care Act 1990(**4**);

(**1**) 2001 c. 15 ("the Act"). Section 57 of the Act was amended by section 146 of the Health and Social Care Act 2008 (c. 14) ("the 2008 Act"). Sections 57(1A), (5B) and (5C) of the Act were inserted by section 146(2) and (6) of the 2008 Act and section 57(7B) was inserted by section 16 of the Social Care Charges (Wales) Measure 2010 (nawm 2). *See* section 57(8) of the Act for the definition of "prescribed" and section 66 for the definitions of "regulations" and "the relevant authority". The functions of the National Assembly for Wales under the Act were transferred to the Welsh Ministers in accordance with paragraph 30 of Schedule 11 to the Government of Wales Act 2006 (c. 32).

(**2**) 1989 c. 41. Section 17A was substituted by section 58 of the Act, and amended by paragraph 3 of Schedule 3 to the Children and Young Persons Act 2008 (c. 23) ("the CYPA"). Section 104 was amended by paragraph 25 of Schedule 3 to the CYPA and section 104A was inserted by paragraph 26 of Schedule 3 to the CYPA. *See* section 17A(6) for the definition of "prescribed" and section 30A (as inserted by paragraph 22 of Schedule 3 to the CYPA) for the definition of "appropriate national authority".

(**3**) 1983 c. 20.

(**4**) 1990 c. 19.

"the 2001 Act" ("*Deddf 2001*") means the Health and Social Care Act 2001;

"chargeable service" ("*gwasanaeth y caniateir codi ffioedd amdano*") has the meaning set out in section 13 of the Social Care Charges (Wales) Measure 2010(**5**);

"direct payment" ("*taliad uniongyrchol*") has the meaning given in regulation 8 or 9;

"prescribed person" ("*person rhagnodedig*") means a person falling within the description prescribed by regulation 3 or 5 who falls within section 57(2) of the 2001 Act or section 17A(2) of the 1989 Act;

"P" means a person falling within the description prescribed by regulation 4 who falls within subsection (2)(a) of section 57 of the 2001 Act and subsection (5A)(**6**) of that section or is reasonably believed by the responsible authority(**7**) to fall within that subsection;

"relevant service" ("*gwasanaeth perthnasol*") means —

(a) in the case of direct payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act—

(i) a community care service within the meaning of section 46 of the 1990 Act(**8**),

(ii) a service under section 2 of the Carers and Disabled Children Act 2000 (services for carers)(**9**), or

(iii) a service which the responsible authority(**10**) may provide in exercise of functions under section 17 of the 1989 Act (**11**) (provision of services for children in need, their families and others); or

(b) in the case of direct payments under section 57(1A) of the 2001 Act, a community care service within the meaning of section 46 of the 1990 Act;

"S" is the suitable person referred to in regulation 9(1).

Prescribed descriptions of persons under section 57(1) of the 2001 Act – community care services and services for carers

3. For the purposes of section 57(1) of the 2001 Act, a person is of a prescribed description if he or she is—

(**5**) 2010 nawm 2. Section 13(2) contains the list of chargeable services which are —

(a) *a service provided under section 29 of the National Assistance Act 1948 (c. 29) unless the service is one for which payment may be required under section 22 or 26 of that Act;*

(b) *a service provided under section 45(1) of the Health Services and Public Health Act 1968 (c. 46);*

(c) *a service provided under Schedule 15 to the National Health Service (Wales) Act 2006 (c. 42);*

(d) *a service provided under paragraph 1 of Part II of Schedule 9 to the Health and Social Services and Social Security Adjudications Act 1983 (c. 41) unless the service is one for which payment may be required under section 22 or 26 of the National Assistance Act 1948;*

(e) *a service provided under section 2 of the Carers and Disabled Children Act 2000 (c. 16) unless the service is provided in the form of residential care.*

The Welsh Ministers may, by order, amend the list of services prescribed by section 13(2).

(**6**) Section 57A of the Act was inserted by section 146(6) of the 2008 Act.

(**7**) *See* section 57(2) of the Act for the definition of "responsible authority".

(**8**) Section 46 was amended by paragraph 14 of Schedule 10 to the Local Government (Wales) Act 1994 (c. 19) and by paragraphs 128 and 129 of Schedule 1 to the National Health Service (Consequential Provisions) Act 2006 (c. 43).

(**9**) 2000 c. 16.

(**10**) *See* section 17A(2) of the Children Act 1989 (c. 41) for the definition of "responsible authority".

(**11**) Section 17 was amended by section 7(1) and (2) of the Children (Leaving Care) Act 2000 (c. 35), by paragraphs 15 and 16 of Schedule 3 to the Tax Credits Act 2002 (c. 21) and by section 116(1) of the Adoption and Children Act 2002 (c. 38), by section 53(1) of the Children Act 2004 (c. 31), by paragraph 6 of Schedule 3 to the Welfare Reform Act 2007 (c. 5), by section 24 of the Children and Young Persons Act 2008 (c. 23), paragraph 1 of Schedule 1, paragraphs 1 and 2 of Schedule 3 and by Schedule 4 to that Act.

(a) a person who appears to the responsible authority to be capable of managing a direct payment by himself or herself, or with such assistance as may be available to him or her;

(b) not a person who falls, or is reasonably believed by the responsible authority to fall within section 57(5A) of the 2001 Act; and

(c) not a person to whom Schedule 1 applies.

Prescribed descriptions of persons under section 57(1A) of the 2001 Act – community care services

4. For the purposes of section 57(1A) of the 2001 Act a person is of a prescribed description if they are not a person to whom Schedule 1 applies.

Prescribed descriptions of persons under section 17A(1) of the 1989 Act – children's services

5. For the purposes of section 17A(1) of the 1989 Act, a person is of a prescribed description if he or she is—

(a) a person who appears to the responsible authority to be capable of managing a direct payment by himself or herself or with such assistance as may be available to him or her; and

(b) not a person to whom Schedule 1 applies.

Persons prescribed as representatives

6. For the purposes of section 57(5B) of the 2001 Act, a person is prescribed as a representative in relation to another person if they are—

(a) a deputy appointed for that other person by the Court of Protection under section 16(2)(b) of the Mental Capacity Act 2005(**12**); or

(b) a donee of a lasting power of attorney within the meaning of section 9 of the Mental Capacity Act 2005 created by that other person.

Prescribed powers for surrogates

7. For the purposes of section 57(5C) of the 2001 Act (which provides that a "surrogate" ("*lladmerydd*"), in relation to a person, means a person listed in that provision whose powers consist of or include such powers as may be prescribed), the prescribed powers are powers relating to decisions about securing the provision of a community care service within the meaning of section 46 of the 1990 Act.

Direct payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act

8.—(1) If the conditions in paragraph (2) are satisfied, a responsible authority—

(a) may, with that person's consent, make in respect of a prescribed person such payments under section 57(1) of the 2001 Act or section 17A(1) of the 1989 Act as are determined in accordance with regulation 10 ("direct payments") ("*taliadau uniongyrchol*") in respect of the prescribed person securing the provision of a relevant service which the person is obliged to receive as a result of an obligation imposed under an enactment mentioned in Schedule 2;

(b) may, with that person's consent, make in respect of a prescribed person in respect of whom there is in force a condition imposed in accordance with section 42(2) or 73(4) (including

(**12**) 2005 c. 9.

such a condition which has been varied in accordance with section 73(5) or 75(3)) of the 1983 Act or who is a patient who has been conditionally discharged under section 193(7) of the Mental Health (Care and Treatment) (Scotland) Act 2003(**13**), direct payments in respect of the prescribed person securing the provision of a relevant service; and

(c) in all other cases must, with that person's consent, make in respect of a prescribed person direct payments in respect of the prescribed person securing the provision of a relevant service.

(2) The conditions referred to in paragraph (1) are that the responsible authority is satisfied—

(a) that the person's need for the relevant service can be met by securing the provision of it by means of a direct payment; and

(b) in the case of a relevant service as defined in paragraph (a)(iii) of the definition of that term in regulation 2 that the welfare of the child in respect of whom the service is needed will be safeguarded and promoted by securing the provision of it by means of a direct payment.

Direct payments under section 57(1A) of the 2001 Act

9.—(1) The responsible authority must take the steps in paragraph (2) before it may be satisfied that it is appropriate for a payment under section 57(1A) of the 2001 Act to be made to a suitable person ("S") in respect of S securing the provision of a relevant service for a person falling within the description prescribed by regulation 4 ("P").

(2) The steps referred to in paragraph (1) are that the responsible authority must—

(a) so far as is reasonably practicable and appropriate, consult and take into account the views of—

(i) anyone named by P as someone to be consulted on the matter of whether a payment should be made to S for the purpose of securing provision for P of a relevant service or on matters of that kind,

(ii) anyone engaged in caring for P or interested in P's welfare, and

(iii) any representative or surrogate of P(**14**);

(b) so far as is reasonably ascertainable, consider–

(i) P's past and present wishes and feelings (and, in particular, any relevant written statement made by P when P had capacity, within the meaning of the Mental Capacity Act 2005(**15**), to consent to the making of direct payments),

(ii) the beliefs and values that would be likely to influence P's decision if P had such capacity, and

(iii) the other factors that P would be likely to consider if P were able to do so;

(c) obtain an enhanced criminal record certificate issued under section 113B of the Police Act 1997(**16**)—

(i) in respect of S where S is an individual and is neither a person mentioned in paragraph (3) nor a friend of P who is involved in the provision of care for P, and

(**13**) 2003 asp 13.

(**14**) *See* section 57(5B) of the 2001 Act and regulation 6 for the definition of "representative". *See* section 57(5C) of the 2001 Act and regulation 7 for the definition of "surrogate".

(**15**) 2005 c. 9. *See* section 1 of that Act for the key principles applying to decisions and actions taken under that Act, including the presumption of capacity. *See* section 2 of that Act for the definition of a person who lacks capacity.

(**16**) 1997 c. 50. Section 113B was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005 (c. 15) and was amended by paragraph 14 of Schedule 9 to the Safeguarding Vulnerable Groups Act 2006 (c. 47), by paragraph 149 of Schedule 16 to the Armed Forces Act 2006 (c. 52), by sections 79(1) and 80 of the Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14) and by S.I. 2009/203.

(ii) where S is a body corporate or an unincorporated body of persons, in respect of the individual who will, on behalf of that body, have overall responsibility for the day-to-day management of P's direct payments,

such certificate to include suitability information relating to vulnerable adults (within the meaning of section 113BB(2) of that Act(**17**)).

(3) The persons referred to in paragraph (2)(c)(i) are—

(a) the spouse or civil partner of P;

(b) a person who lives with P as if their spouse or civil partner;

(c) a person who is P's—

(i) parent or parent-in-law,

(ii) son or daughter,

(iii) son-in-law or daughter-in-law,

(iv) stepson or stepdaughter,

(v) brother or sister,

(vi) aunt or uncle, or

(vii) grandparent;

(d) the spouse or civil partner of any person specified in sub-paragraph (c); and

(e) a person who lives with any person specified in sub-paragraph (c) as if that person's spouse or civil partner.

(4) Where, having taken the steps in paragraph (2), the responsible authority is satisfied of the matters listed in paragraph (5), the responsible authority —

(a) may, with the requisite consent(**18**), make such payments under section 57(1A) of the 2001 Act as are determined in accordance with regulation 11 ("direct payments") ("*taliadau uniongrychol*") to S in respect of S securing the provision of a relevant service for P which P is obliged to receive as a result of an obligation imposed under an enactment mentioned in Schedule 2;

(b) in a case where there is in force, in respect of P, a condition imposed in accordance with section 42(2) or 73(4) (including such a condition which has been varied in accordance with section 73(5) or 75(3)) of the 1983 Act or in a case where P is a patient who has been conditionally discharged under section 193(7) of the Mental Health (Care and Treatment) (Scotland) Act 2003, may, with the requisite consent, make direct payments to S in respect of S securing the provision of a relevant service for P; and

(c) in all other cases must, with the requisite consent, make direct payments to S in respect of S securing the provision of a relevant service for P.

(5) The matters referred to in paragraph (4) are that–

(a) P's need for the relevant service can be met by securing the provision of it by means of a direct payment;

(b) S—

(**17**) Inserted by the Safeguarding and Vulnerable Groups Act 2006 (c. 47); sub-section (2)(d) was amended by the Policing and Crime Act 2009 (c. 26), section 81(2) and (3)(h).

(**18**) *See* section 57(1B) of the 2001 Act for the definition of "requisite consent". Section 57(1B) was inserted by section 146(2) of the Health and Social Care Act 2008 (c. 14).