At a glance

This briefing examines the legal rules and requirements relating to the Direct Payments scheme and highlights the obligations of both Health and Social Care Trusts (the Trusts) and recipients under the Scheme.

It concentrates on the position for individuals who are able to consent to the Direct Payments Scheme.

It should be read in conjunction with Law Centre (NI) Information Briefing No 28 – Direct Payments.
Introduction

This briefing examines the legal rules and requirements relating to the Direct Payments scheme and highlights the obligations of both Health and Social Care Trusts (the Trusts) and recipients under the Scheme.

Presently only people who consent to Direct Payments\(^1\) are entitled to be on the Scheme. Thus individuals lacking capacity are prima facie not entitled to Direct Payments. This lacuna in the relevant legislation\(^2\) was highlighted in the recent NI Court decision *Re PF and JF’s Application*\(^3\) [2011]. Following the decision in *Re PF and JF*, temporary measures were put in place by the Department of Health Social Services and Public Safety to enable those affected to continue to receive and/or apply for cash payments in lieu of services from the Trusts\(^4\). The current position is examined in Law Centre (NI) Information Briefing No 28\(^5\). The gap will be dealt with when the forthcoming new Mental Capacity legislation is introduced\(^6\).

The current briefing concentrates on the position for individuals who are able to consent to the Direct Payments Scheme and should be read in conjunction with Information Briefing No 28.

1. What are direct payments?

Direct payments are cash payments representing a different way by which the Trusts can discharge their community care responsibilities. The ethos behind the Scheme is that service users/carers will have greater choice and control over their care services.

Having carried out an assessment of an individual’s needs and identified a need which must be met by the Trust, the service user/carer can elect to receive a cash payment to buy in her/his own service instead of having a service arranged by or from the Trust.

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\(^2\) ibid

\(^3\) *PF and JF’s Application* [2011] NIQB 20


\(^5\) Available at: [www.lawcentreni.org/Publications/Law%20Centre%20Information%20Briefings/Community%20Care%20Briefings/Community-Care-Information-Briefing-28-Direct-Payments-March-2013.pdf](http://www.lawcentreni.org/Publications/Law%20Centre%20Information%20Briefings/Community%20Care%20Briefings/Community-Care-Information-Briefing-28-Direct-Payments-March-2013.pdf)

\(^6\) It is anticipated that the Draft Mental Capacity Bill will become law in 2016.
2. The relevant legislation

2.1 Carers and Direct Payments Act (NI) 2002 (The 2002 Act)

The 2002 Act repealed the Personal Social Services (Direct Payments) (NI) Order 1996 which had provided Trusts with the power to make direct payments to adults with an assessed need for personal social services.

The following sections are relevant:

2.1.1 Section 8 (1) and (2)

These provisions enable the Department, (by regulations), to introduce a scheme of direct payments for certain categories of people (see below).

2.1.2 Section 8 (3)

Under this provision, regulations may provide:

- the detail of how the scheme will operate;
- circumstances in which direct payments are not authorised or required;
- conditions to be complied with by direct payment recipients; and
- ‘recovery of charges’ according to means.

Since the cost of some services provided directly by Trusts are currently partly or fully recoverable following a means assessment (eg residential care and home help services), this provision puts those receiving direct payments onto the same footing as other individuals who are paying for services received from the Trust directly.

2.1.3 Section 8 (4) and (5)

These provisions define what is meant by a ‘gross’ and ‘net’ direct payment and enable flexibility in the method of payment depending on the individual circumstances of the direct payments recipient. Where someone is assessed as having to contribute to the cost of the services provided to her/him (eg if the direct payment is used to purchase residential care or a home help service), he or she can either be paid the cost of obtaining a service with the recovery of her/his assessed contribution being made later (a ‘gross’ direct payment), or paid the cost of the service less her/his assessed contribution (a ‘net’ direct payment).

2.1.4 Section 8 (6)

Under this provision the regulations can provide that direct payments shall not be made in respect of the provision of residential accommodation for any person for a period in excess of a prescribed period (four weeks).
2.1.5 Section 9

This provision inserts a new Article 18C into the Children Order 1995. Article 18C permits a similar scheme of direct payments as that introduced by Section 8 of the Act for certain other categories of people (see below).

2.2 The Personal Social Services and Children’s Services (Direct Payments) Regulations (Northern Ireland) 2004 (the Regulations)

These Regulations introduced under the 2002 Act set out the detailed workings of the Direct Payments Scheme.


The Guidance is intended to assist Trusts in implementing the direct payments provision in the 2002 Act.

Reference should be made to the above Act, Regulations and Guidance when seeking to understand the Direct Payments Scheme.

3. Who is eligible to receive direct payments?

The 2002 Act makes direct payments available to the following categories of people:

(a) chronically sick or disabled people aged 16 or over;
(b) people assessed as needing social care services provided under the Health and Personal Social Services (NI) Order 1972;
(c) a person with parental responsibility for a disabled child;
(d) a disabled person with parental responsibility for a child; and
(e) carers of adults assessed as needing services provided under Section 2 (1) of the 2002 Act.

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7 It is available at www.dhsspsni.gov.uk/direct_payments_legislation_and_guidance_for_boards_and_trusts.pdf
8 CO 1995, Article 18C (2) (c) and 2002 Act, Section 8 (2) (a)
9 2002 Act, Section 8 (2) (a)
10 CO 1995, Article 18C (2) (a)
11 CO 1995, Article 18C (2) (b)
12 2002 Act, Section 8 (2) (b)
4. Requisite conditions

The following conditions must be met.

(a) The individual seeking a direct payment has an assessed eligible need requiring the provision of a service from the Trust.

(b) The Trust is satisfied that the individual’s need for the relevant service can be met through the use of a direct payment.

(c) In the case of services provided under Article 18 of the CO 1995 (ie social care services provided for children in need, their families and others) the Trust is satisfied that the child, in respect of whom the service is needed, will be safeguarded and protected through the use of a direct payment.

(d) The person seeking the direct payment appears to the Trust to be capable of managing a direct payment by her/himself or with such assistance as may be available to her/him.

(e) The person seeking the direct payment does not fall within the list of individuals excluded from receiving direct payments.

(f) The direct payment is being sought for the purpose of securing a relevant service.

5. Assessment and review

To be considered for direct payments, an individual must engage in an assessment of her/his needs. Crucially, the individual is not being assessed for direct payments. Direct payments can only be provided following identification of an individual’s eligible social care needs. The direct payments are taken in lieu of services arranged by or from the Trust.

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13 CO 1995, Article 18C (2) (c)
14 In order to decide whether an individual has an assessed eligible need, Trusts should also have due regard to relevant eligibility criteria contained within various pieces of Departmental Guidance including the Regional Access Criteria for Domiciliary Care (2008), available at: www.dhsspsni.gov.uk/circular-eccu-2-2008-domiciliary-care-access-criteria.pdf, and Home Help Circular HSS (SS) 1/80, available at: www.dhsspsni.gov.uk/hssss1_1980.pdf
15 The Regulations, Regulation 2 (3) (a)
16 The Regulations, Regulation 2 (3) (b)
17 The Regulations, Regulation 3 (1) (a)
18 The Regulations, Regulation 2 (1)
It is for the Trust to determine the form and means of assessment. Detailed Guidance exists to assist Trusts in assessing the needs of particular client groups.\textsuperscript{19}

Whichever the method used, an assessment should be needs-led and person-centred and should consider how an individual could use a direct payment to regain or retain her/his independence and live in her/his own home for as long as possible.

Trusts must review an individual’s care package at regular intervals. Once the Trust is satisfied that a direct payments recipient is managing the payments satisfactorily, reviews should be no more frequent than for other service users. The timing of the first review should be agreed at the outset. There is no definitive list provided as to who should be present to attend the review but the Direct Payments Guidance emphasises the importance of communicating directly with the direct payments recipient. It may be useful for the person providing the care to also participate in the review process subject to the recipient’s agreement and provided that there is no conflict of interest identified.

6. Level / amount of direct payment

A Trust should not make a direct payment unless it is at least as cost effective as the services which the Trust would otherwise provide. Any consideration of cost-effectiveness should also consider long-term best value. This would include judging how a preventative strategy may necessitate the Trust to pay a higher level of direct payment to achieve long-term benefits for the service user and long-term savings to the Trust.

The Regulations require that a direct payment should be calculated at such a rate that the Trust estimates to be equivalent to the reasonable cost of securing the provision of the service concerned\textsuperscript{20}. Normal administrative costs and overheads should be taken into account.

Whilst it is for the Trust to determine the amount of direct payment to offer and what it is intended to cover, the Department has not set any maximum or minimum limit on the value of a direct payment nor on the amount of care which can be provided. In other words Direct Payments should not be capped at a particular level.

The Trust is not obliged to fund any cost which is not essential in order to secure the service.

\textsuperscript{19} For example Carers Assessment and Information Guidance, DHSSPSNI, April 2005 (available at: www.dhsspsni.gov.uk/ec-carers-assessment-information-guidance.pdf) and Care Management, Provision of Services and Charging Guidance, DHSSPSNI, 2010 (available at: www.dhsspsni.gov.uk/hsc-eccu-1-2010.pdf)

\textsuperscript{20} The Regulations, Regulation 5 (2)
7. Relevant case law decision

Re DM’s Application [2012] NIQB 9821- Facts of the case

This case concerned a challenge by way of judicial review against the level of direct payments offered to DM by the Northern Health and Social Care Trust. DM was a 49 year old man with a mild learning disability and physical health issues. DM was assessed by the Northern Trust as requiring day care services.

For ten years, DM had been attending the Bridge Training Centre in Antrim (the Bridge) where he engaged in a range of different day opportunities. The costs associated with attending the Bridge had historically been part funded by the Trust together with contributions from the European Social Fund (ESF) and the Department for Employment and Learning (DEL). When funding from ESF and DEL ended, DM applied for direct payments from the Northern Trust to cover the full cost of his continued placement with the Bridge (£47 per day).

The Northern Trust instead offered DM a Direct Payment of £21 per day. DM challenged this sum as being inadequate to purchase the social care he required to meet his needs. In addition, he made the case that the Trust had failed to properly construe, interpret and apply the relevant legislation governing the provision of direct payments to him.

Mr Justice Horner, (finding in favour of DM), ruled that the Northern Trust had failed in its approach to the issue of what direct payment it should make to DM and had acted unreasonably in refusing to discharge in the future the cost of DM attending the Bridge at £47 per day.

In particular, the Trust had failed to:

(i) assess DM’s needs;
(ii) assess the costs of satisfying those needs and /or;
(iii) audit the charge of £47 per day requested by the Bridge to see whether it was reasonable or not.

8. Capable of managing direct payment with or without assistance

The test is capability, not capacity.

A direct payment is only permitted if it appears to the responsible Trust that the person is capable of managing a direct payment by her/himself or with such assistance as may be available to her/him.

If there is doubt as to whether the service user is capable of managing the payment, consideration must be given to what assistance may be available to enable the payment to be properly managed.

The decision should be on an individual basis and should avoid any blanket assumptions that particular groups of people may be incapable of managing a direct payment.

Before making a decision not to make a direct payment all relevant factors should be taken into account and the following should be considered:

- the person’s understanding of direct payments, including the actions required on her/his part;
- whether the person understands the implications of taking or not taking on direct payments;
- what help is available to the person;
- the nature of the services the person is assessed as needing; and
- what arrangements the person would make to obtain services.

There is no restriction on who may help a person to manage her/his direct payments provided that the best interests of the direct payments recipient are being served. The assistance should be available over a sustained period. Individuals may seek assistance from family members, friends, local advocacy or support groups or choose to buy in assistance via, for example, a payroll service. The Centre for Independent Living can provide advice and assistance. The Trust could arrange training to help direct payments recipients to manage.

Whichever form of support or assistance is provided, a Trust must ensure that the direct payments recipient retains control over how her/his direct payments are used and that any monitoring or review procedures involve direct contact with the individual for whom the direct payments are made.

9. Securing a relevant service

Trusts should ensure that the direct payment is being sought for the purpose of securing a relevant service and that the person’s assessed needs will be met through her/his proposed method of using her/his direct payment.

The Direct Payments Guidance emphasises that Trusts should not be constrained by existing patterns of service provision and should be open to considering innovative and creative
options which may provide a cheaper and more effective way of meeting a person’s assessed needs.

Direct Payments can be used to purchase equipment or pay for adaptations (however, they are not a substitute for a disabled facilities grant available for major property adaptations) or fixtures/fittings assessed as being required by the disabled person. They cannot be used for services or equipment provided by the NHS. Carers have, however, been permitted to obtain therapy type services provided by the NHS.

10. Those not entitled to direct payments

The Regulations specify that direct payments may not be offered to individuals whose liberty to arrange their care is restricted by certain mental health or criminal justice legislation:

- patients detained under the mental Health (NI) Order 1986 who are on leave of absence from hospital;
- conditionally discharged restricted patients;
- patients subject to guardianship under the Mental Health (NI) Order 1986;
- people who are receiving any form of aftercare or community care which constitutes part of a programme initiated under a compulsory court order;
- offenders serving a probation or combination order subject to an additional requirement to undergo treatment for a mental health condition or for drug or alcohol dependency; and
- offenders released on licence subject to an additional requirement to undergo treatment for a mental health condition or for drug or alcohol dependency.

People in these groups are required to receive specific community care services and the Guidance suggests that offering these people direct payments instead of the services would not give a sufficient guarantee that the person would receive the services required. This is, however, open to challenge.

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11. Excluded service providers

Unless the Trust is satisfied that securing a service is needed to meet satisfactorily the needs of the recipient or to meet the welfare of the child in need, direct payments cannot be used to purchase services from:

- the recipient’s spouse;
- a person who lives with the recipient as if her/his spouse;
- a person living in the same household who is the recipient’s:
  - parent or parent-in-law;
  - son or daughter;
  - son-in-law or daughter-in-law;
  - stepson or stepdaughter;
  - brother or sister;
  - aunt or uncle; or
  - grandparent.

Relatives who are employed under a direct payment arrangement may cease to be entitled to an assessment and services as a carer under the 2002 Act since these rights only relate to carers who do not provide the care in question by virtue of a contract of employment.

12. Responsibilities and obligations of recipients

Direct payments are intended to allow individuals more control and independence. The following responsibilities come with this:

- when an individual consents to receive a direct payment:
  - he or she takes on responsibility for purchasing the services to which the payment relates;
  - he or she is responsible for ensuring that he or she receives the appropriate services to an acceptable quality;
- depending on the way in which the direct payment recipient chooses to arrange her/his own service, he or she may also be required to assume the legal responsibilities associated with becoming an employer or contracting with a care agency;
- the direct payment recipient is accountable to the Trust for the way in which the direct payment is spent;
direct payment recipients are required to comply with the Trust’s accounting and monitoring procedures (which include submitting annotated bank statements to the Trust’s Finance Department on a quarterly basis)\textsuperscript{23}.

13. Responsibilities and obligations of Trusts

Placing an individual onto the Direct Payments Scheme does not remove the Trust’s responsibility for ensuring that the individual’s care needs continue to be met.

- Trusts are required to make information about direct payments readily available within their geographical areas.
- Trusts are required to establish that a direct payment recipient understands what is involved before making a direct payment to her/him.
- Trust staff must explain what is involved to those who wish to consider receiving direct payments. They should draw attention to the fact that any contract made for the provision of services will involve legal obligations and that if the direct payment recipient contracts directly with another individual, he or she will become an employer.
- The aim of advice and information given by Trust staff should be to inform the potential recipients accurately, responsibly, constructively and supportively.
- Trust staff must satisfy themselves that the individual’s assessed needs will be met by the use of the direct payment by confirming with the individual how he or she intends to secure the services which he or she has been assessed as needing.
- Trusts must ensure that the money is being spent appropriately. Trust staff should explain the nature of the accounting and monitoring requirements and the information which a direct payment recipient will be expected to provide in this regard.
- Trusts should provide assistance to help recipients to obtain accurate information about the range of local services available (for example by providing a local register of approved providers) in order that the recipient can consider her/his options.
- Trusts should provide potential recipients with accurate information on support services available (such as the Centre for Independent Living), advocacy services and where to seek more expert advice on their legal obligations\textsuperscript{24}.

\textsuperscript{23} Separate Departmental Guidance was issued in 2009 entitled ‘Circular HSC (ECCU) 3/200: Guidance on Accounting and Monitoring Requirements for Payments Made Under the Carers and Direct Payments Act (NI) 2002’, available at: www.dhsspsni.gov.uk/eccu3-09.pdf. This sets out the accounting and monitoring requirements associated with the Direct Payments Scheme. It addresses what is required of the direct payment recipient, social care staff and the Finance Department.
• Trusts can provide a support service directly, in partnership with a local voluntary organisation or by some other means.

• Trusts must give individuals as much notice as possible of the value of the direct payment which they will receive and any contribution which they must make to the direct payment before the payment begins or the level changes. Trusts should also ensure that arrangements for payments are reliable so as to avoid any unnecessary disruptions to services.

• Additional responsibilities exist where the Trust is considering making a direct payment in relation to a child. In particular, Trusts must be satisfied about the suitability of any potential employee and must apply directly to Access NI on behalf of a direct payments recipient for an Access NI check to be carried out. Trusts should make people with parental responsibility aware that the fact that a check reveals no criminal convictions does not necessarily mean that someone is a suitable person to work with children. Additional advice should be given to those with parental responsibility wishing to employ someone to look after a child such as the need to obtain two references which should be checked carefully and followed up with a phone call.

14. Who is responsible when problems arise?

The Trust is ultimately responsible for ensuring that the individual’s assessed needs are met. Whilst it is reasonable to expect the direct payments recipient to have a contingency plan, difficulties will sometimes arise which have not been anticipated and will not be addressed even where a contingency plan is in place.

Where the Trust becomes aware that an individual is unable to secure services to meet her/his needs, then the Trust’s responsibility to arrange services is the same for a direct payments recipient as it would be for an individual receiving services directly from the Trust.

The Trust should consider ensuring that the direct payments recipient has a named individual to contact (for example within the Trust or at a support service).

Problems can be minimised by:

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24 In 2008, the Department issued ‘A Guide to Receiving Direct Payments’ which is intended to provide general information about the direct payments scheme for potential recipients. It contains a list of relevant organisations which can provide advice and assistance to individuals. It is available at: [www.dhsspsni.gov.uk/guidance_for_receiving_direct_payments_2008__pdf_313_kb_.pdf](http://www.dhsspsni.gov.uk/guidance_for_receiving_direct_payments_2008__pdf_313_kb_.pdf).

25 Section 15.6 Legislation and Guidance for Boards and Trusts 2004 contains details of advice to be given to persons with parental responsibility.
• carrying out comprehensive assessments;
• providing clarity (at the outset) about how the money can be used;
• ensuring effective support arrangements (where necessary) are in place; and
• discussing with the direct payments recipient potential areas of difficulty and how they should be handled if they occur.

A Trust will need to be prepared to respond in these circumstances just as it would with a service user not in receipt of direct payments. When a problem arises with the care which a direct payment recipient has been receiving, Trusts should first consider providing assistance to enable the individual to continue managing her/his own care but can also consider arranging direct service provision.

Conclusion

The Direct Payments Scheme was introduced with the aim of empowering service users and giving them greater choice and control over their care. The Scheme must, however, never be seen as a means of relieving Trusts of the duty to meet need and/or to save costs. The duty to ensure that an individual’s care needs are met continues while an individual remains on the Direct Payments scheme. Both Trusts and service users can benefit from the Scheme. At its best, the service user utilising the scheme can have greater independence while the Trust can save time normally spent arranging and pursuing service providers.

Also, regarding the Briefing paper on Direct payments, I meant to come back to you to query something on Page 12 which refers to the need to approach the Department for a PECS check; I think it should refer to Access NI for an Access NI check.

Our advice line

9.30 to 1pm, Monday to Friday 9024 4401 and 7126 2433
Law Centre (NI) contact details

Central Office
124 Donegall Street
Belfast
BT1 2GY
Tel: 028 9024 4401
Fax: 028 9023 6340
Textphone: 028 9023 9938
Email: admin.belfast@lawcentreni.org

Western Area Office
9 Clarendon Street
Derry
BT48 7EP
Tel: 028 7126 2433
Fax: 028 7126 2343
Email: admin.derry@lawcentreniwest.org

Twitter: @LawCentreNI
Web: www.lawcentreni.org

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