

IN THE MATTER OF DIRECT PAYMENTS UNDER THE CARE ACT 2014

ADVICE FOR INCLUSION LONDON

1. I am asked to advise Inclusion London on issues relating to direct payments made to disabled people under the Care Act 2014 to meet their eligible social care needs. It is important to note that this advice can only be at a general level and individual disabled people will need to obtain advice on the specific facts of their own case. No reliance should be placed on this general advice in individual cases.
2. I am instructed that Inclusion London has noticed a general trend of local authorities implementing changes to their policies, direct payment agreements or individual care packages aimed at reducing the amounts of direct payments. Many changes are aimed at restricting the ways in which money can be spent, clawing back money that has not been spent (often without informing the individual), or introducing very complex monitoring procedures. It is particularly concerning that Inclusion London has identified numerous examples where direct payments have been cut without the person knowing or being told that this would happen. In other cases service users are told that their support package needs to be cut even before the review/reassessment meeting has started.
3. Making a direct payment is a way in which a local authority can discharge its core duty, pursuant to section 18 of the 2014 Act¹, to meet a disabled person's eligible needs. Direct payments made to adults who have capacity to request them are governed by section 31. This creates a duty to make direct payments where four conditions are met, the last of which being that the local authority is 'satisfied that making direct payments to the adult or nominated

¹ All references to sections of legislation in the remainder of this advice are to the Care Act 2014, unless otherwise stated.

person is an appropriate way to meet the needs in question'.² Direct payments can also be made where an adult lacks capacity to request them, where an 'authorised person'³ makes the request, see section 32. Again the final condition for a duty to make direct payments to arise in this context is that the local authority considers that making such payments is an appropriate way to meet the adult's needs.

4. Section 33 then requires regulations to be made providing further details as to how direct payments should be made. The resulting regulations are [The Care and Support \(Direct Payments\) Regulations 2014](#) ('the DP Regs'). I address the relevant features of the DP Regs below in relation to each of the specific questions put to me by Inclusion London.
5. The operation of direct payments by local authorities is also covered extensively by chapters of [the Care and Support Statutory Guidance](#) ('the Guidance'), see in particular chapter 12. The Guidance is issued under section 78, which requires that local authorities must 'act under' it. Guidance with this status must be followed unless there is a considered decision that there is good reason not to do so; see *R (TG) v Lambeth LBC* [2011] EWCA Civ 526 at [17]. Again, I address the relevant aspects of the Guidance below in relation to the relevant question.
6. The specific questions I am asked to advise on are as follows:
 - a. Can local authorities lawfully reduce direct payment amounts by assuming that certain tasks such as housework, meal preparation, shopping are done by carers?

² The Guidance (see below) notes at para 12.19 that 'Local authorities must not use this condition to arbitrarily decline a request for a direct payment.'

³ See sub-section 4; '(4) A person is authorised for the purposes of this section if—(a) the person is authorised under the Mental Capacity Act 2005 to make decisions about the adult's needs for care and support, (b) where the person is not authorised as mentioned in paragraph (a), a person who is so authorised agrees with the local authority that the person is a suitable person to whom to make direct payments, or (c) where the person is not authorised as mentioned in paragraph (a) and there is no person who is so authorised, the local authority considers that the person is a suitable person to whom to make direct payments.'

- b. In what circumstances can a local authority clawback the money not spent? How should this be done? Are there any circumstances when claw back will be unlawful?
- c. Can local authorities legally reduce the amount of direct payments or stop a direct payment for people who have not paid their contribution towards their care?
- d. What freedom do service users have to use their direct payment flexibly? Can local authorities insist on the use of exact numbers of hours each day/week?
- e. Can service users use their underspend to meet the eligible needs in their care plan in a different way (hire a more expensive PA for example)?
- f. What kind of direct payment support do local authorities have a duty to provide?
- g. Can local authorities restrict people's choices by imposing prepaid cards, specific payroll or insurance companies?

7. Taking each question in turn:

a. ***Reductions on the assumption that carers will undertake certain tasks:***

Local authorities are not entitled to reduce direct payment amounts by assuming that certain tasks such as housework, meal preparation, shopping are or will be carried out by carers. Under the Care and Support (Eligibility Criteria) Regulations 2015, relevant outcomes which can give rise to eligibility include 'managing and maintaining nutrition' and 'maintaining a habitable home environment'. If a person has needs which mean those outcomes cannot be achieved and the eligibility criteria are otherwise met, then the local authority must meet those needs in accordance with the section 18 duty. See section 18(1): '[the] local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria...'. Section 18(7) provides that this duty does not apply 'to such of the adult's needs as are being met by a carer.' However this is a question of fact to

be determined in each individual case; a local authority is not entitled to assume that certain categories of need are being met by carers, it must enquire in the individual case as to whether those needs are being met. Carers are of course not legally required to meet any of a disabled person's needs; it must be a free choice for the carer as to whether or not to do so, and that choice should be properly informed by an understanding of the local authority's duty to meet eligible needs.

b. *Clawback of unspent funds:*

I cannot see any provision in the legislation or guidance permitting local authorities to claw back unspent direct payment sums. Local authorities are of course required to review the direct payment, initially within the first six months and then annually; see the Guidance at paras 12.61-12.66. The outcome of the review may be that the direct payment is decreased going forward, if it is considered that the previous payment was more than required to meet eligible needs. In this context it is important to note the following from para 12.66 of the Guidance; 'The outcome of the review should be written down, and a copy given to all parties. Where there are issues that require resolving, the resolution method should be agreed with all parties involved, as far as is reasonably practicable.' However there is nothing in the Guidance to suggest that the outcome of a review could be a requirement to repay sums already paid to the service user. I note section 33(5) can allow a local authority to require repayment, but this is only applicable where there has been a breach of a relevant condition.⁴ Any local authority seeking to claw back unspent direct payment sums in any other context should therefore be asked to identify the legal basis for such a request.

c. *Failure to pay contributions:*

Para 12.67 of the Guidance states that 'Direct payments should only be terminated as a last resort, or where there is clear and serious contradiction of the Regulations or where the conditions in sections 31 or

⁴ For example the statutory condition in section 33(3) that direct payments are only used to pay for arrangements under which the needs specified in the care and support plan are met.

32 of the Act are no longer met'. Sections 31 and 32 do not require a service user to have paid their contribution. However regulation 4(1) of the DP Regs allows local authorities to make direct payments 'subject to other conditions'. As such it seems to me that a local authority could properly impose a condition of payment of contribution. I would also suggest that it is more likely in practice that the local authority will simply discount the amount of the service user's assessed contribution from the amount of the direct payment made. A direct payment is of course a form of personal budget, and under section 26(1)(b) the amount of a personal budget takes into account the amount which, on the basis of the financial assessment, the adult must pay towards the cost of meeting their needs. See here the Guidance at para 12.25; 'The amount of the direct payment is derived from the personal budget as set out in the care and support plan, or support plan, and thus must be an amount which is sufficient to meet the needs the local authority has a duty or power to meet. The direct payment amount will reflect whether the person is required to make any financial contributions...'.⁵

d. ***Flexible use of DPs:***

The whole purpose of direct payments is to give service users choice and control over their support arrangements.⁶ In this regard regulation 4(3)(a) of the DP Regs prohibits any condition being imposed by a local authority when making a direct payment that 'the needs of the adult [are] to be met by any particular person'. The principle statutory requirement is that direct payments are used to pay for arrangements under which the needs specified in the care and support plan are met, see section 33(3). The Guidance emphasises the need for local authorities to allow service users to exercise choice and control within this statutory parameter; see for example para 12.3 ('People should be encouraged to take ownership of their care planning, and be free to choose how their needs are met...') and

⁵ The Guidance correctly goes on to note that 'Local authorities cannot require financial contributions for a direct payment for after care services under the MHA; these must be provided without charge.'

⁶ See the Guidance at para 12.2, stating that direct payments 'provide independence, choice and control by enabling people to commission their own care and support in order to meet their eligible needs.'

12.4 ('processes must not restrict choice or stifle innovation by requiring that the adult's needs are met by a particular provider'). In this context I do not see how a local authority could lawfully insist on the use of direct payments to purchase an exact numbers of hours of care in a specified period.

e. ***Use of underspends:***

In the light of my answer to question (d), it is obvious that service users can use any 'underspend' to meet eligible needs in their care plan in any way they choose (subject to obvious minimum requirements, for example that the activity is lawful). If the local authority considers that the personal budget allocation and hence the direct payment is too generous, it will need to amend it following the review process, giving the service user a right to challenge.

f. ***Direct payment support:***

At para 12.21, the Guidance states 'A further condition [for making direct payments] is that the local authority must be satisfied that the person is able to manage the direct payment by him or herself, or with whatever help or support the person will be able to access. Local authorities should therefore take all reasonable steps to provide this support to whoever may require it.' The Guidance then sets out numerous specific ways in which local authorities are required to provide direct payment support to service users. For example see para 12.33, 'Local authorities should ensure all direct payment recipients are supported and given information in regards to having the correct insurance cover in place' and para 12.48, 'Local Authorities should give people clear advice as to their responsibilities when managing direct payments, and whether the person in receipt of direct payments needs to register with HM Revenue & Customs (HMRC) as an employer.' There is however no set form for this support; the Guidance states at para 12.49 that 'Many local authorities have commissioned voluntary and charity organisations to provide support to direct payment holders on these matters', however this is not mandatory.

g. Prepaid cards etc:

I am firmly of the view that local authorities cannot restrict service user's choices by imposing the use of prepaid cards or specific payroll or insurance companies. The Guidance is clear at para 12.58 that prepaid cards 'should not be provided as the only option to take a direct payment. The offer of a 'traditional' direct payment paid into a bank account should always be available if this is what the person requests and this is appropriate to meet needs.'⁷ More fundamentally any attempt to impose such mechanisms on service users runs contrary to the purpose of sections 31-33, which is to allow service users to exercise choice and control over the way in which their support is arranged. This is also consistent with the fundamental purpose of the legislation to promote well-being, as per section 1. The personal dignity of service users (section 1(2)(a)) is plainly enhanced by having control over their support arrangements. Moreover 'well-being' expressly includes (section 1(2)(d)) 'control by the individual over day-to-day life (including over *care and support, or support, provided to the individual and the way in which it is provided*' (emphasis added). I note that para 12.33 of the Guidance requires local authorities to ensure that correct insurance cover is in place for recipients of direct payments, but does not permit or require local authorities to mandate a particular insurer.

8. I would stress that in forming the views set out above I have limited my consideration to the statutory scheme under the 2014 Act. I have not found it necessary to have regard to any wider relevant law, for example the provisions of the Equality Act 2010 such as the 'public sector equality duty' in section 149 of that Act, or the human rights of service users arising from Articles 8 and 14 of the European Convention on Human Rights, as informed by the UN Convention on the Rights of Persons with Disabilities. However it is clear that the broad and permissive construction of the statutory scheme

⁷ The Guidance further states that 'It is also important that where a pre-paid card system is used, the person is still free to exercise choice and control. For example, there should not be blanket restrictions on cash withdrawals from pre-paid cards which could limit choice and control.'

under the 2014 Act I have reached above would be strongly supported by the wider legal scheme.

9. In terms of how these issues can be challenged, it may well be that disputes in relation to any of the points above would be suitable for challenge through an application for judicial review. There would of course be a need to demonstrate in each case why the statutory complaints process is not an effective alternative remedy. In general terms the key issue here will be whether there is a dispute of law, as such disputes need to be resolved by the courts rather than through complaints. Similarly judicial review is more likely to be the appropriate remedy where the challenge is to a policy, rather than to a decision in an individual case. The seriousness and urgency of the issue may also support a claim for judicial review rather than a complaint. However in every case specific advice would need to be sought from a specialist solicitor, before either issuing a judicial review claim or deciding that the dispute is not suitable for judicial review. It is also critically important to bear in mind that judicial review claims must be brought 'promptly' and no later than three months after the grounds of claim first arose.

This advice is emailed to Inclusion London to allow for immediate action. I will be pleased to discuss its contents at a meeting which I understand is being arranged for February 2019. If I can provide any further assistance please contact me in chambers.

Dated 16 January 2019

STEPHEN BROACH
Monckton Chambers