

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE (DIRECT PAYMENTS)
(AMENDMENT) REGULATIONS 2013

2013 No. 2354

1. This explanatory memorandum has been prepared by Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the National Health Service (Direct Payments) Regulations 2013 (S.I.2013/1617) ('the Direct Payments Regulations'), which governs the rules for the making of direct payments for health care to secure the provision of certain health services under the National Health Service Act 2006.

2.2 The purpose of this Instrument is to –

(a) re-insert two paragraphs, with minor modifications, of the previous negative regulations governing direct payments (the National Health Service (Direct Payments) Regulations 2010, S.I.2010/1000) and which have not been replicated in the Direct Payments Regulations. These paragraphs allow an individual living in the same household, a family member or a friend to be paid to provide care using part of a patient's direct payment in exceptional circumstances and which were omitted in error. For that reason, this Instrument is being issued free of charge.

(b) make some minor amendments to the Direct Payments Regulations to insert new review provisions for applicants who have had their original application for a direct payment refused, for those whose direct payments have been reduced and for those who have had a particular service within their care plan refused.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Affirmative Order (the National Health Service (Direct Payments) (Repeal of Pilot Schemes Limitation) Order 2013 (S.I. 2013/1563)), which repeals the part of the legislation (sections 12A(6) and 12C(1) to (4) of the National Health Service Act 2006) that stipulated only pilot schemes could make direct payments for healthcare, successfully passed through both Houses and came into force on 1 August 2013.

4.2 The Affirmative Order paved the way for revision of the negative instrument, the Direct Payments Regulations, which make provision for the making of direct payments for health care to secure the provision of certain health services under the National Health Service Act 2006 by a health body (a clinical commissioning group ("CCG"), the National Health Service

Commissioning Board (“the Board”), a local authority or the Secretary of State), or in the case of a CCG or the Board, under any other enactment). The Direct Payments Regulations also came into force on 1 August 2013.

4.3 This Instrument is being made to correct defects in the Direct Payments Regulations and makes some minor amendments to those regulations.

5. Territorial Extent and Application

5.1 This instrument applies to England only.

6. European Convention on Human Rights

As this Instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The policy background on Personal Health Budgets was set out in the Explanatory Memorandum of 28th June 2013 and remains relevant to the amendments in this Instrument.

7.2 Payment of family carers (an individual living in the same household as a patient, a family member or a friend) only in exceptional circumstances was originally part of the National Health Service (Direct Payments) Regulations 2010 (S.I. 2010/1000), but the relevant paragraphs were omitted in error from the Direct Payments Regulations. The policy intention was to retain this limitation and so an early amendment is needed to rectify this error. This instrument therefore re-inserts, with minor modifications to the language, the relevant paragraphs to allow an individual living in the same household, a family member or a friend to be paid to provide care using part of a patient’s direct payment only in very limited circumstances.

7.3 There are currently processes within the Direct Payments Regulations which enable people to have certain decisions made by health bodies regarding direct payments reviewed. However, not all decisions have review processes in place. These are the initial decision whether to give direct payments, decisions made to reduce the amount of the direct payment and decisions not to include certain services in the care plan which can be paid for by direct payments. This Instrument ensures that all decisions made by a health body regarding direct payments are reviewable to ensure consistency and transparency.

7.4 The review provision inserted by regulation 2 of this Instrument (new regulation 7(13) of the Direct Payments Regulations) for applicants who have had their original application for a direct payment refused, is slightly different to the other review provisions in that it allows more than one re-consideration of an initial decision to give a direct payment, but limits it to one re-consideration in any six month period. The reason for this is in recognition of the fact that it is appropriate for the first decision - as to whether a person is eligible for a direct payment - to be re-considered at intervals, for example, if the person’s condition has changed. It is, however, considered proportionate to limit those re-considerations to no more regularly than once every six months

to prevent applicants from making repetitious and potentially onerous demands on a health body when the evidence has been fully considered and has not changed. By contrast, the nature of the other decisions subject to review and contained within the Direct Payments Regulations and this amending Instrument are more straightforward and concern one-off decisions only. Accordingly, allowing for more than one re-consideration on all other review provisions is not considered to be necessary or proportionate.

8. Consultation outcome

8.1 The consultation¹ background and outcome was set out in the Explanatory Memorandum of 28th June 2013 and remains relevant to the amendments in this Instrument.

9. Guidance

9.1 The Board (now known as NHS England) will shortly publish guidance to assist with the interpretation of the Direct Payments Regulations and this amendment. This guidance will be published on NHS England's website <http://www.england.nhs.uk/>.

10. Impact

10.1 The impact on business, charities, voluntary bodies and the public sector was outlined in the Explanatory Memorandum of 28th June 2013 and remains relevant to the amendments in this Instrument.

10.2 An Impact Assessment has not been prepared for this Instrument as the Instrument itself has no impact on the private sector or the voluntary sector. A full impact assessment was produced in relation to the overall personal health budget policy which includes direct payments for healthcare and a copy is available at <http://www.dh.gov.uk/health/2013/03/direct-payments-consultation/>

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Direct Payments Regulations enable the Secretary of State, the Board, all CCGs and local authorities to give patients direct payments for healthcare if it is appropriate and beneficial for the patient.

12.2 Revisions to the Standing Rules (the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012, S.I. 2012/2996) in 2014 will put in place a 'right to ask' for a personal health budget for people in receipt of NHS Continuing Healthcare and those transitioning into these packages. This will include a right to ask

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210668/Consultation_response_with_DH_BrandingFINAL_2.7.13.pdf

for a direct payment as one of the methods by which personal health budgets can be delivered. The timing will ensure that CCGs have the infrastructures in place to be able to deliver personal health budgets to those who would benefit rather than simply refusing applicants on the basis that they do not have the correct procedures in place.

- 12.3 There is an objective in the first mandate to NHS England² that patients who may be able to benefit will have the option to hold their own personal health budget by 2015.

13. Contact

The NHS Services Team at the Department of Health Tel: 0207 210 6876 or email: nhsservicespolicy@dh.gsi.gov.uk can answer any queries regarding the instrument.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213131/mandate.pdf