Consultation on Direct Payments Regulations
The Health and Social Care Act 2008 extends the availability of direct payments to those people who lack the capacity to consent to their receipt. The government is also reviewing the current exclusions to receiving direct payments for those people who are subject to various provisions of mental health legislation. The Government is now consulting on regulations relating to these two changes.

### Action Required
Responses to consultation to be sent to extendingdirectpayments@dh.gsi.gov.uk

### Contact Details
extendingdirectpayments@dh.gsi.gov.uk
Contents

Foreword 2
Introduction 3
Development of the draft regulations 5
The aim of the draft regulations 6
The detail of the draft regulations 8
The consultation 13
Annex A – Questionnaire 14
Annex B – The Consultation Process 15
Annex C – Section 57 of the Health and Social Care Act 2001 as amended by the Health and Social Care Act 2008 17
Direct payments are crucial to achieving the government’s aim to increase independence, choice and control for service users and their carers through allowing them the opportunity to arrange their own personalised care. They give people the freedom to design services around their specific circumstances and needs, resulting in better outcomes for both the service user and their carer. They are a key part of the transformation of adult social care agenda set out in Putting People First.

The Health and Social Care Act 2008 extends the availability of direct payments to those people who lack the capacity to consent to their receipt. This move will benefit a number of groups including some people with dementia, adults with severe head injuries and severely disabled children who lose their direct payment when they reach 18. One of the key themes of the draft National Dementia Strategy is the delivery of a high quality of care and support for both those with dementia and their carers. Direct payments are one way to facilitate this.

The draft regulations seek to ensure that the scheme is flexible enough to allow as many people as possible to benefit from direct payments whilst ensuring that the person lacking capacity is safeguarded from any potential abuse that may occur. We realise that there is a tension that must be addressed here and believe that the regulations strike the right balance between these two concerns.

We are also reviewing the current exclusions to receiving direct payments for those people who are subject to various provisions of mental health legislation in light of the modernisation of mental health law brought about by the Mental Health Act 2007. We think people in these groups should have the chance to benefit from direct payments, where the circumstances are right and the local authority agrees that they are appropriate. This is an important change which should help to tackle the stigma which can be associated with treatment for mental disorder, an issue to which I give the highest priority.

I hope you can agree that the changes proposed are of vital importance for these previously marginalised groups. Through extending direct payments to some groups currently excluded, far greater numbers of people will have the opportunity to benefit from the flexibilities that direct payments offer. I would encourage everyone with a relevant interest to help us meet this objective by responding to this consultation.

Ivan Lewis, Parliamentary Under Secretary of State, Care Services, Department of Health
Introduction

This paper is a consultation carried out by the Department of Health on the extension and revision of the current system of making direct payments in respect of persons securing the provision of certain social care services as governed by the 2003 Direct Payment regulations. The changes being proposed are in two main areas; the extension of the direct payment scheme to people who lack the capacity (within the meaning of the Mental Capacity Act 2005) to consent to the receipt of direct payments (“capacity”) and the removal of the exclusions which currently apply to people who are subject to various provisions of mental health legislation.

The 2005 Green Paper, Independence, well-being and choice, consulted on the possibility of extending the scope of direct payments, focusing in particular on those who lack capacity. The responses to the consultation showed strong support for this change and a commitment to extend the availability of direct payments to those who lack capacity was made in the 2006 White Paper, Our health, our care, our say.

This consultation sets out how we propose to use the powers in the Health and Social Care Act 2001 (“the 2001 Act”) as amended by the Health and Social Care Act 2008 (“the 2008 Act”) to extend the availability of direct payments to those lacking capacity.

1 The Community Care, Services for Carers and Children’s Services (Direct Payments) (England) Regulations 2003, Statutory Instrument 2003 No.762
2 Independence, well-being and choice, Department of Health, 2005
3 Our health, our care, our say, Department of Health, 2006
The consultation also proposes the removal of the exclusion\(^4\) of people who are subject to various provisions of mental health legislation from the direct payments scheme. This follows a review of this policy in light of the modernisation of mental health law by the Mental Health Act 2007 (which amends the Mental Health Act 1983). The new regulations give local authorities a power to make direct payments to those groups, but do not require local authorities to make the payment.

This consultation is aimed at anyone who will have an interest in the changes to the direct payment scheme, whether in a professional capacity, as someone who may benefit from the changes, or a friend, relative or carer of a person who may benefit.

A partial impact assessment was carried out for the Health and Social Care Bill (now the Health and Social Care Act 2008) and has been amended to reflect the removal of the exclusions made in respect of people subject to mental health legislation. The revised impact assessment is available at http://www.dh.gov.uk/en/Consultations/Live consultations/DH_087108. A full impact assessment will be published alongside the final regulations.

\(^4\) The consultation does not propose the removal of the exclusion relating to people on after-care under supervision (s25A of the Mental Health Act 1983) because s25A is to be abolished with effect from 3 November 2008, subject to transitional arrangements.
Development of the draft regulations

The new regulations are to be made under the regulation-making powers in the Health and Social Care Act 2001 as amended by the Health and Social Care Act 2008 (see Annex C). The 2008 Act provides regulation-making powers relating to the extension of direct payments to those without capacity.

A paper outlining the envisaged scope of the regulations applying to this group was submitted to the House of Commons committee and debates during the passage of the Bill through Parliament have further informed this thinking.
The aim of the draft regulations

The regulations seek to provide a system under which direct payments can be made to people lacking capacity (in addition to the groups of people in respect of whom direct payments can currently be made i.e. those with capacity and those needing children’s services) whilst ensuring that they are safeguarded from any possible abuse. They also seek to ensure that the scheme is easy to use and flexible for both the service user and local authority so that the maximum number of people can benefit from direct payments.

The regulations also remove the current blanket exclusion of people who are subject to mental health legislation.

In general, there is no reason why people in this situation (i.e. subject to mental health legislation) should not benefit from direct payments to meet either their mental health, or other, needs. However, in some cases, mental health legislation is used to put conditions on people which, in effect, make them accept services for their mental disorder which they might otherwise prefer not to receive.

There could be a tension between such conditions and a duty on local authorities to make direct payments for those services. The person concerned might not, for example, 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.

We think the potential tension with conditions applied under mental health legislation justifies the application of slightly different rules to these groups. For that reason, the draft regulations give local authorities a new power to make direct payments to people subject to mental health legislation, but do not go so far as to impose a duty to do so. This will allow local authorities to use their discretion in cases where they think there is a risk that making direct payments might compromise the effectiveness of conditions applied under mental health legislation. You are invited to comment on this proposal in response to the consultation.
Local authorities are to be allowed to decide whether to make a direct payment to a person in these groups, and if so for which services, and when to terminate any payment. Local authorities will be able to impose conditions in addition to the mandatory ones set out in the regulations on the making of direct payments. They will therefore be able to take any conditions applying under mental health legislation into account when making decisions about direct payments.

The draft regulations allow direct payments to be made to people who both lack capacity and are subject to mental health legislation. In those cases the arrangements for making payments will be the same as those for people who have capacity (i.e. there will be a power not a duty to make direct payments in these cases).

The draft regulations retain the exclusions applying to people who are subject to certain criminal justice system requirements including those in relation to substance misuse or mental health treatment. We think it is right to draw a distinction between these groups and those who are under mental health legislation, due to the different nature and purpose of the regime to which they are subject.
Below we have detailed what we intend each regulation to mean for the making of direct payments. Substantive comments have only been made where the regulations are new or have changed markedly from the 2003 Direct Payment regulations. References to section 57(1) of the 2001 Act refer to direct payments paid to adults with capacity, in the same way as the current scheme. References to section 17A(1) of the Children Act 1989 ("the 1989 Act") refer to direct payments paid to children, in the same way as the current scheme. References to section 57(1A) of the 2001 Act refer to direct payments paid to people who lack capacity, i.e. the changes made by the Health and Social Care Act 2008.

Regulation 1 states the relevant information around the citation, commencement, interpretation and application of the regulations.

Regulation 2 prescribes those people who can receive a direct payment under section 57(1) of the 2001 Act.

Regulation 3 prescribes those people on whose behalf a direct payment can be made under section 57(1A) of the 2001 Act.

Regulation 4 prescribes those people to whom direct payments can be made under section 17A(1) of the 1989 Act.

Regulation 5 prescribes those people who are representatives in relation to making direct payments for people who lack capacity. Representatives are those individuals who the local authority will look to in the first place (before approaching other parties) as ‘suitable’ to manage the direct payment on behalf of the person lacking capacity. We have prescribed them either as court-appointed deputies or as donees of lasting powers of attorney made by the person now lacking capacity, at a time when they had capacity.

Regulation 6 prescribes the powers of surrogates in relation to making direct payments to people who lack capacity. Surrogates are defined in section 5C of the 2001 Act and will have the power to decide, in conjunction with the local authority, whether a person is suitable to manage a direct payment on behalf of a person lacking capacity should there be no representative in place or should the representative be unwilling to take on the role of the ‘suitable person’. Surrogates will have an important and influential role and we have therefore set out that their powers should be narrower than those of a representative, having to specifically include powers relating to managing a direct payment.
Regulation 7 sets out the duties and powers that local authorities have to make direct payments to people under section 57(1) of the 2001 Act and section 17(A) of the 1989 Act.

If the person concerned is not excluded from direct payments (listed in schedule 1), or is not subject to relevant provisions of mental health legislation (listed in schedule 2), local authorities have a duty to make direct payments if:

- the person concerned wants to receive them, and
- the authority is satisfied that the payments can meet their needs for the service in question, or, in the case of a child, will safeguard and promote their welfare.

If the person is subject to mental health legislation the local authority may make direct payments if the above conditions are met, but it does not have to.

Q1. Regulation 7 provides a power for local authorities to make direct payments to these groups, but does not require them to. Do you agree that people subject to mental health legislation should no longer be barred from receiving direct payments? If so, do you agree that giving local authorities the power to make direct payments, rather than imposing a duty as applies to other groups, is the right approach?

Regulation 8 sets out the steps that the local authority must take before it is satisfied that it is appropriate to make a direct payment to a suitable person under section 57(1A) of the 2001 Act. The conditions are that the local authority must:

- consult with those family members and friends who are involved in the provision of care for the person lacking capacity to ascertain whether they believe that a direct payment is the best option for the person they currently help support;
- in certain circumstances they must obtain a Criminal Records Bureau (CRB) certificate (which will be replaced by an Independent Safeguarding Authority (ISA) check when they are introduced) for the suitable person;
- be satisfied that the suitable person will act in the best interests of the person lacking capacity;
- be satisfied that the suitable person appears capable of managing the direct payment;
- be satisfied that the needs of person lacking capacity can be met by a direct payment.

The regulation also sets out that where a person is both lacking capacity and is subject to mental health legislation (see schedule 2) then the local authority has a power (rather than a duty) to make payments to those people in line with the scheme set out in regulation 7.
Q2. Regulation 8(2)(a) seeks to ensure that the local authority consults with those family members and friends who are currently involved in providing care for the person lacking capacity before they are satisfied that it is appropriate for a direct payment to be made. Is the scope of the regulation suitable to cover all those who you believe should be consulted without being too broad? If not what changes would you propose?

Regulation 9 sets out the details of the amount and payment of direct payments under section 57(1) of the 2001 Act and section 17A(1) of the 1989 Act.

Regulation 10 sets out details of the amount and payment of direct payments under section 57(1A) of the 2001 Act. The provisions mirror those under the existing scheme (set out in regulation 9).

Regulation 11 sets out the conditions under which a direct payment can be made under section 57(1) of the 2001 Act and section 17A(1) of the 1989 Act.

Regulation 12 sets out the conditions under which a direct payment can be made under section 57(1A) of the 2001 Act. It mirrors the provisions under the existing scheme (set out in regulation 11) as well as imposing a number of conditions on the suitable person who shall:

- act in the best interests of the person lacking capacity;
- provide such information as the local authority deems necessary;
- if they are not a family member or friend previously involved in the care of the person lacking capacity then they must obtain a CRB certificate (to be replaced by an ISA check) for anyone they secure a service from with the direct payment;
- notify the local authority if they believe the person lacking capacity has gained/re-gained the capacity to consent;
- use the direct payment to secure the services for which the payment was made.

Q3. Regulation 12 sets out a number of conditions that the local authority must impose on the suitable person before making a direct payment to them. These conditions seek to ensure that the suitable person is able to manage the direct payment and meet the needs of the person lacking capacity. Would you like to see further conditions imposed on the suitable person before a direct payment is made? If so, what would they be?
Regulation 13 sets out the maximum periods of residential accommodation which may be secured by means of a direct payment.

Regulation 14 sets out that making of direct payments does not affect a local authority’s functions, and where a payment is made its obligation to provide the service in question is only discharged if it is satisfied that a person’s needs will be met after a direct payment has been made.

Regulation 15 sets out the circumstances in which a local authority can ask for a repayment of the direct payment.

Regulation 16 sets out that a responsible authority should review the making of direct payments under section 57(1A) of the 2001 Act at certain intervals and under certain circumstances namely where a local authority is notified:

- that the person lacking capacity may no longer do so;
- that the direct payment may not have been used to secure the provision of services for which it is made.

Q4. Regulation 16 (c) sets out the circumstances in which the local authority must review the making of direct payments including where they are notified of certain matters. Are there other examples of circumstances in which reviews should be conducted that should be included in this regulation? If so, what would they be?

Regulation 17 sets out the circumstances in which direct payments can or must be terminated under section 57(1) of the 2001 Act and section 17A(1) of the 1989 Act.

Regulation 18 sets out the circumstances in which direct payments can or must be terminated under section 57(1A) of the 2001 Act. They partially mirror part of the provisions in regulation 17. They state that a direct payment to a suitable person can be terminated if they do not meet a condition set out in regulation 12, or if the local authority considers it appropriate to terminate.

This regulation also deals with the issue of fluctuating and temporary gaining or re-gaining of capacity in relation to the decision on whether to consent to the making of direct payments.
It sets out that where a person gains/regains capacity and the local authority thinks that this is temporary then they can continue to receive direct payments under section 57(1A) of the 2001 Act. In these cases the regulations also state that the person who has gained/regained capacity should be allowed to manage payment themselves during the period of their capacity.

Furthermore, the regulation sets out that where the gaining or regaining of capacity is deemed not to be temporary then the person should be consulted as to whether they wish to receive a direct payment under section 57(1) of the 2001 Act. Should they consent direct payments, subject to certain conditions, may be made to them under section 57(1) of the 2001 Act, however the payments made under section 57(1A) of the 2001 Act will not be terminated until direct payments under section 57(1) of the 2001 Act start to be made.

**Regulation 19** sets out the consequential amendments to be made as a result of the changes made by these regulations.

**Regulation 20** sets out that revocations are to be made as a result of these regulations. The revocations that are to be made are detailed in schedule 3.

Schedule 1 lists the groups excluded from receiving direct payments. The wording on some of the exclusions has changed from the 2003 regulations to reflect the new sentencing framework introduced by the Criminal Justice Act 2003.

Schedule 2 lists the groups subject to mental health legislation, previously excluded from direct payments, to whom local authorities have a power to make direct payments under regulations 7 and 8.

Schedule 3 details the revocations that were identified as needing to be made in regulation 20.
The consultation

The draft regulations are published alongside this document. The regulations are subject to negative resolution. When completed they will be laid before Parliament and will come into force on the day specified in the regulations unless they are prayed against (a MP asks to annul them) within 21 days of their being laid.

To help your consideration of these regulations we have included a set of questions on what we consider to be important aspects of the regulations. The questions are there to assist your response. You do not need to respond to all questions, and the inclusion of the questions is not intended to discourage you from providing comments on other related issues.
Annex A – Consultation questions

Consultation responses are sought in particular on the questions set out in the text and repeated below but responses on any other points will also be welcomed. A template has been provided (please see the website) for your responses.

Community Care, Services for Carers and Children’s Services (Direct Payments)(England) Regulations 2009

These regulations concern the extension of direct payments to people who, as defined by the Mental Capacity Act 2005, lack the capacity to consent to their receipt and allow direct payments to be made to people subject to various provisions of mental health legislation.

1) Regulation 7 provides a power for local authorities to make direct payments to these groups, but does not require them to. Do you agree that people subject to mental health legislation should no longer be barred from receiving direct payments? If so, do you agree that giving local authorities the power to make direct payments, rather than imposing a duty as applies to other groups, is the right approach?

2) Regulation 8(2)(a) seeks to ensure that the local authority consults with those family members and friends who are currently involved in providing care for the person lacking capacity before they are satisfied that it is appropriate for a direct payment to be made. Is the scope of the regulation suitable to cover all those who you believe should be consulted without being too broad? If not what changes would you propose?

3) Regulation 12 sets out a number of conditions that the local authority must impose on the suitable person before making a direct payment to them. These conditions seek to ensure that the suitable person is able to manage the direct payment and meet the needs of the person lacking capacity. Would you like to see further conditions imposed on the suitable person before a direct payment is made? If so, what would they be?

4) Regulation 16 (c) sets out the circumstances in which the local authority must review the making of direct payments including where they are notified of certain matters. Are there other examples of circumstances in which reviews should be conducted that should be included in this regulation? If so, what would they be?
Annex B – The Consultation Process

Criteria for consultation

This consultation follows the ‘Cabinet Office Code of Practice’, in particular we aim to:

- consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy;
- be clear about what our proposals are, who may be affected, what questions we want to ask and the timescale for responses;
- ensure that our consultation is clear, concise and widely accessible;
- ensure that we provide feedback regarding the responses received and how the consultation process influenced the development of the policy;
- monitor our effectiveness at consultation including through the use of a designated consultation co-ordinator; and
- ensure our consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The full text of the code of practice is on the Better Regulation website at:

Link to consultation Code of Practice

Comments on the consultation process itself

If you have concerns or comments which you would like to make relating specifically to the consultation process itself please contact:

Consultations Coordinator
Department of Health
3E58, Quarry House
Leeds, LS2 7UE
e: consultations.co-ordinator@dh.gsi.gov.uk

Please do not send consultation responses to this address.

Confidentiality of information

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).
If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Summary of the consultation

A summary of the response to this consultation will be made available within three months of the end of the live consultation period and will be placed on the Consultations website at: http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/index.htm
Annex C – Section 57 of the Health and Social Care Act 2001 as amended by the Health and Social Care Act 2008

1) Regulations may make provision for and in connection with requiring or authorising the responsible authority in the case of a person of a prescribed description who falls within subsection (2) to make, with that person’s consent, such payments to him as they may determine in accordance with the regulations in respect of his securing the provision of the service mentioned in paragraph (a) or (b) of that subsection.

1A) Regulations may make provision for and in connection with requiring or authorising the responsible authority in the case of a person (“P”) of a prescribed description:

a) who falls within subsection (2)(a), and

b) who falls within subsection (5A) or is reasonably believed by the authority to fall within that subsection, to make, with the requisite consent, such payments as the authority may determine in accordance with the regulations to a suitable person other than P in respect of the other person’s securing the provision for P of the service mentioned in subsection (2)(a).

1B) In subsection (1A) the requisite consent means:

a) the consent of the other person; and

b) where the other person is not a surrogate of P but there is at least one person who is a surrogate of P, the consent also of a surrogate of P.

1C) For the purposes of subsection (1A), a person (whether or not an individual) is suitable if:

a) that person is a representative of P;

b) that person is not a representative of P (or there is no-one who is a representative of P), but;

i) a surrogate of P, and

ii) the responsible authority, consider that person to be a suitable person to receive the payments for the purpose of securing provision for P of the service concerned; or

c) that person is not a representative of P (or there is no-one who is a representative of P), and there is no-one who is a surrogate of P, but the responsible authority considers that person to be a suitable person to receive the payments for that purpose.
2) A person falls within this subsection if a local authority (“the responsible authority”) have decided:

a) under section 47 of the National Health Service and Community Care Act 1990 (assessment by local authorities of needs for community care services) that his needs call for the provision by them of a particular community care service (within the meaning of section 46 of that Act), or

b) under section 2(1) of the Carers and Disabled Children Act 2000 (c.16) (services for carers) to provide him with a particular service under that Act.

3) Regulations under this section may, in particular, make provision:

a) specifying circumstances in which the responsible authority are not required or authorised to make any payments under the regulations to a person or in respect of a person, whether those circumstances relate to the person in question or to the particular service mentioned in paragraph (a) or (b) of subsection (2);

b) for any payments required or authorised by the regulations to be made to a person by the responsible authority (“direct payments”) to be made to that person (“the payee”) as gross payments or alternatively as net payments;

c) for the responsible authority to make for the purposes of subsection (4) or (5) such determination as to:

i) the payee’s means in the case of direct payments under subsection (1) or, in the case of direct payments under subsection (1A), the means of the person (“the beneficiary”) in respect of whom the payments are required or authorised to be made, and

ii) the amount (if any) which it would be reasonably practicable for him to pay to the authority by way of reimbursement or contribution, as may be prescribed;

d) as to the conditions falling to be complied with by the payee, in the case of direct payments under subsection (1), or by the payee or by the beneficiary in the case of direct payments under subsection (1A), which must or may be imposed by the responsible authority in relation to the direct payments (and any conditions which may not be so imposed);

e) specifying circumstances in which the responsible authority:

i) may or must terminate the making of direct payments,

ii) may require repayment (whether by the payee, in the case of direct payments under subsection (1), or by the payee or by the beneficiary in the case of direct payments under subsection (1A), or otherwise) of the whole or part of the direct payments;
f) for any sum falling to be paid or repaid to the responsible authority by virtue of any condition or other requirement imposed in pursuance of the regulations to be recoverable as a debt due to the authority;

g) displacing functions or obligations of the responsible authority with respect to the provision of the service mentioned in subsection (2)(a) or (b) only to such extent, and subject to such conditions, as may be prescribed;

h) authorising direct payments to be made to any prescribed person on behalf of the payee.

j) as to matters to which the responsible authority must, or may, have regard when making a decision for the purposes of a provision of the regulations;

k) as to steps which the responsible authority must, or may, take before, or after, the authority makes a decision for the purposes of a provision of the regulations;

l) specifying circumstances in which a person who has fallen within subsection (5A) but no longer does so (whether because of fluctuating capacity, or regaining or gaining of capacity) is to be treated, or may be treated, as falling within subsection (5A) for purposes of this section or for purposes of regulations under this section.

4) For the purposes of subsection (3)(b) “gross payments” means payments:

a) which are made at such a rate as the authority estimate to be equivalent to the reasonable cost of securing the provision of the service concerned; but

b) which may be made subject to the condition that the payee, in the case of direct payments under subsection (1), or the beneficiary in the case of direct payments under subsection (1A), pays to the responsible authority, by way of reimbursement, an amount or amounts determined under the regulations.

4A) A statutory instrument containing

a) regulations made by the Welsh Ministers under section 57, or

b) regulations made by the Welsh Ministers under section 65 that make provision for the purposes of, in consequence of or for giving full effect to section 57, is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

5) For the purposes of subsection (3)(b) “net payments” means payments:

a) which are made on the basis that the payee will himself, in the case of direct payments under subsection (1), or the beneficiary will in the case of direct payments under subsection (1A),
pay an amount or amounts determined under the regulations by way of contribution towards the cost of securing the provision of the service concerned; and

b) which are accordingly made at such a rate below that mentioned in subsection (4)(a) as reflects any such contribution by the payee or (as the case may be) the beneficiary.

5A) A person falls within this subsection if the person lacks capacity, within the meaning of the Mental Capacity Act 2005, to consent to the making of direct payments.

5B) In this section representative, in relation to a person, means such other person (whether or not an individual) as may be prescribed.

5C) In this section “surrogate”, in relation to a person, means:

a) a deputy appointed for the person by the Court of Protection under section 16(2)(b) of the Mental Capacity Act 2005, or

b) a donee of a lasting power of attorney created by the person, whose powers, as deputy or donee, consist of or include such powers as may be prescribed.

6) Regulations under this section shall provide that, where direct payments are made in respect of a service which, apart from the regulations, would be provided under section 117 of the Mental Health Act 1983 (c. 20) (after-care):

a) the payments shall be made at the rate mentioned in subsection (4)(a); and

b) subsection (4)(b) shall not apply.

7) Regulations made for the purposes of subsection (3)(a) may 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.

7A) For the purposes of subsection (3)(d), the conditions that are to be taken to be conditions in relation to direct payments include, in particular, conditions in relation to:

a) the securing of the provision of the service concerned,

b) the provider of the service,

c) the person to whom payments are made in respect of the provision of the service, or

d) the provision of the service.

8) In this section “prescribed” means specified in or determined in accordance with regulations under this section.