

Constitutional Affairs Committee

CA(3)-09-11

CA578 : The Community Care Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011

Procedure: Negative

These Regulations make provision for the making of direct payments in respect of a person securing the provision of certain social care services. In doing so they revoke and replace the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004. The services in question are those which would be provided under the community care enactments mentioned in section 46 (3) of the National Health Service and Community Care Act 1990, to carers under section 2 of the Carers and Disabled Children Act 2000 or services under section 17 of the Children Act 1989 (provision of services for children in need, their families and others).

Technical Scrutiny

Under Standing Orders 15.2 the Assembly is invited to pay special attention to the following instrument:-

1. The Welsh word provided within these Regulations for surrogate is "lladmerydd", which translates as meaning interpreter, deputy or advocate as opposed to surrogate. It would seem that in the context within which surrogate arises within the Regulations, that advocate would be a more appropriate term to use.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements; and Standing Order 15.2 (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

2. Regulation 9 paragraph (4) (a) of the English version of these Regulations states that the responsible authority may, with the requisite consent, make payments under section 57 (1A) of the Health and Social Care Act 2001 ("the 2001 Act") to S ("the suitable person") to secure the provision of a relevant service for P ("the Prescribed person"), whereas the Welsh version states that the responsible authority may in the same circumstances, with the requisite consent, make payments under section 17A (1) of the 1989 Act ("the Children Act") or section 57 (1A) of the 2001 Act. The result of this provision means that the English version would not allow payments to a person who is a parent with parental responsibility for a disabled child, a disabled person with parental responsibility for a child, or a disabled child aged 16 or 17.

(Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements; and Standing Order 15.2 (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

3. Regulation 11 paragraph (6) of the Welsh version refers to section 57 (1A) of the 2001 Act for the purposes of making direct payments whereas the English version merely refers to paragraph (1) of regulation 11 and not to section 57 (1A) of the 2001 Act. Although paragraph (1) of the English version does make reference to section 57 (1A) of the 2001 Act it does so in the context of making it subject to paragraph (5) which is about the rate of payment concerning aftercare. The versions are therefore significantly different from one another.

(Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements; and Standing Order 15.2 (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

4. Regulation 12 paragraph (5) in the English text refers to conditions in paragraph (4) which require that the payee must (amongst other things) not secure the relevant service from a particular person; and must provide such information to the responsible authority whereas regulation 12 paragraph (5) in the Welsh text does not refer to the conditions in paragraph (4).

(Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements; and Standing Order 15.2 (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

5. Regulation 12 paragraph (2) (c), and regulation 13 paragraph (3) (c) of the English text lists persons living in the same household as P for the purposes of payment from those persons for securing a service to meet P's needs. However, regulation 12 paragraph (2) (c), and regulation 13 paragraph (3) (c) of the Welsh text does not refer to persons living in the same household. The Welsh version merely refers to and then lists persons who have a particular relationship with P. Both versions are significantly different as the English provision will apply to persons living within the same household as P whereas the Welsh version is not limited in this way.

(Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements; and Standing Order 15.2 (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

6. Regulation 17 paragraph (2) of both versions differ in how they relate to P. The English version states "that a responsible authority must review the making of direct payments under section 57 (1) of the 2001 Act where the responsible authority reasonably considers, on the basis of information given by any person, that P falls within section 57 (5A) of that Act". Regulation 17 paragraph (2) of the Welsh version states "Rhaid i awdurdod cyfrifol adolygu'r arfer o wneud taliadau uniongyrchol o dan adran 57 (1) o Ddeddf 2001 os yw'r

awdurdod cyfrifol o'r farn, yn rhesymol, ar sail gwybodaeth a roddir gan unrhyw berson, nad yw P yn dod o fewn adran 57 (5A) o Ddeddf honno", which in English means "that a responsible authority must review the making of direct payments under section 57 (1) of the 2001 Act where the responsible authority reasonably considers, on the basis of information given by any person, that P does not fall within section 57 (5A) of that Act".

(Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements; and Standing Order (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

7. Regulation 19 paragraph (6) of the English text refers to "direct payments under section 57 (1A)" whereas regulation 19 paragraph (6) of the Welsh text merely refers to "payments under section 57 (1A) of the 2001 Act." The word "direct" is not reflected in the Welsh text.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements; and Standing Order (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

8. Regulation 19 paragraph 6 (a) of the English version refers to the beneficiary being a prescribed person whereas regulation 19 paragraph 6 (a) of the Welsh version states "os yw'r yn berson rhagnodedig" does not read correctly. It appears that it was intended to read "os yw'n berson rhagnodedig" or "os yw'r buddiolwyr yn berson rhagnodedig".

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements; and Standing Order (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

9. Regulation 10 paragraph (2) of the English version refers to the responsible authority determining the prescribed person's means. Regulation 10 paragraph (2) of the Welsh version refers to "P" instead of the prescribed person within the same context. The prescribed person and "P" have different definitions in regulation 2.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements; and Standing Order (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

10. Schedule 3 refers to regulation 21 as being the appurtenant regulation to this Schedule. However there is no regulation 21 within these Regulations. The relevant regulation is regulation 20.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

11. Schedule 3 of the English version of these Regulations provides an erroneous title to "the Civil Partnership Act 2004 (Amendments to Subordinate Legislation) (Wales) Order 2005" which it seeks to revoke. The correct title to these Regulations is "The Civil Partnership Act 2004 (Consequential Amendments to Subordinate Legislation) (Wales) Order 2005."

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

12. Schedule 2 paragraph (f) and Schedule 1 paragraphs (d) and (e) refer to sections 41, 51 and 52 of the Powers of Criminal Courts (Sentencing) Act 2000 which have been repealed by sections 303 (d) (i), 332, schedule 37, part 7 of the Criminal Justice Act 2003.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

13. Schedule 1 paragraph (g) refers to section 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 when there is no such section in existence.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil a statutory requirement).

14. Schedule 1 paragraph (f) and Schedule 2 paragraph (g) refer to sections 228 to 230 of the Criminal Procedure (Scotland) Act 1995, when these sections are not in existence. Section 228 has been repealed by the Criminal Justice and Licensing (Scotland) Act 2010, section 14 (2), schedule 2, paragraphs (1) and (17). Sections 229 and 230 are not in existence.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil a statutory requirement).

15. Schedule 2 paragraph (c) of these Regulations refers to Schedule 4 of the Criminal Procedure (Scotland) Act 1995, when there is no such Schedule in existence.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil a statutory requirement).

16. Schedule 2 paragraph (h) refers to sections 22 and 26 of the Prisons (Scotland) Act 1989 when both sections have been repealed by the Prisoners and Criminal Proceedings (Scotland) Act 1993, section 47 (3), schedule 7, part I.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil a statutory requirement).

Merits Scrutiny

The Assembly is not invited to pay special attention to the following instrument under Standing Orders 15.3.

Legal Advisers
Constitutional Affairs Committee
March 2011

The Government has responded as follows:

1. – 9. The reporting points 1 to 9 are accepted. The Government intends to bring forward amending legislation as the earliest opportunity and in any event within 3 months from the coming into force of the Regulations.

10. The Government accepts that there is a minor typographical error in the side heading to Schedule 3 to the Regulations and is satisfied that it may be corrected upon publication.

11. The Government accepts that there is a minor typographical / clerical error in the body of Schedule 3 to the Regulations and is satisfied that it may be corrected upon publication.

12. The Government accepts that the references within Schedule 1, paragraphs (d) and (e) and Schedule 2, paragraph (f) to the Regulations are to sections 41, 51 and 52 the powers of the Criminal Courts (Sentencing) Act 2000, which have been repealed.

However, it was necessary to include reference to the repealed sections, which were repealed with savings (in accordance with section 37 of the Criminal Justice Act 2003) as there may be persons subject to on-going treatment obligations in accordance with the provisions that have been repealed but whose effect is preserved. The Government does not therefore consider that the Regulations require amendment in this respect.

13. The Government is satisfied that section 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 is in force. It relates to the release of short-term, long-term and life prisoners. The Government does not therefore consider that the Regulations require amendment in this respect

14. The Government accepts that sections 228 to 230 of the Criminal Procedure (Scotland) Act have been repealed. However is has been necessary to retain reference to the provisions as persons may still be subject to orders made under this section which were made before 1 February 2011 (see SSI 2010/413). Were we to remove reference to these sections then there would be an unintended consequence of the legislation as persons who are subject to an order (which is still effective) under these provisions would be eligible to receive a direct payment in direct contravention to the policy intention. The Government does not therefore consider that the Regulations require amendment in this respect.

15. The Government is satisfied that Schedule 4 to the Criminal Procedure (Scotland) Act is in force. The Government does not therefore consider that the Regulations require amendment in this respect

16. The Government is satisfied that section 22 of the Prisons (Scotland) Act 1989 is in force and the Government does not therefore consider that the Regulations require amendment in this respect.

Section 26 of the Prisons (Scotland) Act 1989 has been repealed with savings. The section refers to persons imprisoned for life and who may have been released subject to a requirement that they undergo treatment. Were we to remove this reference then there would be an unintended consequence of the legislation as persons who are subject to an order which is still effective, notwithstanding the repeal of section 26, would be eligible to receive a direct payment in direct contravention to the policy intention. The Government does not therefore consider that the Regulations require amendment in this respect.