



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

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# **Direct Payments 'Suitable Person' Guidance**

Guidance developed by the  
All Wales Direct Payments Forum  
in conjunction with the  
Welsh Assembly Government

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## **Acknowledgements**

This guidance has been produced by the All Wales Direct Payments Forum, in conjunction with the Welsh Assembly Government.

The Forum is a support network for local authority officers with responsibility for the development of direct payments schemes.

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## 1. INTRODUCTION

1.1. New Regulations concerning direct payments came into force in Wales from 11 April 2011. The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011 extend the scope of direct payments to include adults lacking capacity to give their consent to a direct payments arrangement, by allowing them to access the service via the use of a 'suitable person'.

1.2. The new Regulations will also change the list of people who cannot participate in a direct payments arrangement, such as certain individuals who are subject to mental health and certain criminal justice legislation.

1.3. This document has been produced by the All Wales Direct Payments Forum, in conjunction with the Welsh Assembly Government, to give further guidance to local authorities on the appointment of a suitable person. It should be read alongside the Regulations and the Assembly Government's statutory 'Direct Payments Guidance' (2011).

### Note: **Direct payments regulations**

The new Regulations must be implemented in conjunction with the Mental Health Act 2005, to ensure good practice regarding suitable risk management and safeguarding issues.

## 2. DIRECT PAYMENTS FOR ADULTS LACKING CAPACITY TO CONSENT

2.1. Direct payments can be made to a willing and appropriate suitable person who receives and manages the direct payments on behalf of a person who lacks capacity as defined in the Mental Capacity Act 2005. In most cases this will be a family member, or a close friend already involved in the care of the service user.

The definition of a **suitable person** with respect to direct payments:

1. can be someone who has been awarded **lasting power of attorney (LPA)** but it is unlikely that a financial LPA on its own will be sufficient
2. can be someone who has been appointed a **deputy** for the person needing services by the **Court of Protection** under section 16 of the Mental Capacity Act 2005

3. can be someone who has offered to act as a suitable person – this will need to be agreed by the care manager and the senior designated officer of the local authority
4. can be someone agreed by the local authority to act as a suitable person
5. can be an organisation or third party appointed by the local authority – for example, a support scheme provider

**Note: Fluctuating capacity – who is the employer?**

Where a service user **has capacity** at the start of the direct payments, but then has a period of fluctuating capacity, the employer is the service user.

Where the service user is **without capacity** prior to the initiation of a direct payments arrangement, the employer is the suitable person. Direct payments should not be made to someone who lacks capacity unless the payments are made via a suitable person, trust or managed account.

Where the service user has **fluctuating capacity** at the start of the direct payments, a suitable person could be appointed and will remain the employer.

Where the service user **regains capacity** permanently, the local authority will need to establish that they consent to receiving direct payments. The direct payments to the suitable person should not be terminated until the new arrangements to pay the service user directly are in place.

2.2. The capacity to consent to direct payments needs to be established. Capacity to consent is **not** the same as ability to manage, which is a *capability* issue.

2.3. A person may be regarded as incapable by the local authority not because they lack mental capacity but because they are not considered sufficiently responsible to ensure that the payments are properly managed. Care managers need to consider whether the service user would be able to manage direct payments alone or with support. In these circumstances the local authority should look at what assistance is available to help with administering and managing the direct payments.

2.4. The Mental Capacity Act 2005 presumes that a person has capacity unless it is established otherwise. Each person has to be assessed on an individual basis in relation to the decision to be made. A person lacks capacity if at the material time he/she is unable to make a decision because of impairment of, or a disturbance in the functioning of, the mind or the brain.

**Note: Service users without capacity**

Direct payments should not be made to someone who lacks capacity unless the payments are made via a suitable person, trust or managed account.

2.5. A two stage test needs to be carried out to establish:

firstly, whether they have the necessary impairment or disturbance; and secondly, to consider whether that means that the person is unable to make the specific decision to consent to the direct payments at the time it needs to be made.

2.6. Once it is established **and recorded** that the individual lacks capacity to consent to direct payments, then it may be appropriate for a suitable person to receive the direct payments on their behalf.

**Note: Examples of when someone is not suitable**

where there are Protection of Vulnerable Adults and safeguarding concerns

where there may be conflicts of interest

where there are unsatisfactory Criminal Records Bureau checks

where the local authority may have other significant reasons or concerns

2.7. If the service user regains capacity permanently, the local authority will need to establish whether they consent to receive the direct payments. The direct payments to the suitable person should not be terminated until the new arrangements are in place.

**Note: Fluctuating capacity - frequency of reviews**

It may be beneficial, where the service user has fluctuating capacity, to have more regular reviews. The suggested frequency for a review of a direct payments package, where a suitable person has been agreed and/or where the service user has fluctuating capacity, is six weeks, then three months, then six months and then annually.

### 3. WHAT IS A REPRESENTATIVE OR SURROGATE?

3.1. A suitable person may be a representative or surrogate of the service user:

a **'representative'** is a court appointed deputy under section 16 of the Mental Capacity Act 2005 Act, or a donee of a lasting power of attorney (LPA), under section 9 of the same Act.

a **'surrogate'** is a deputy or donee (as above), whose powers consist of, or includes powers relating to, decisions about securing provision of community care services within the meaning of section 46 of the 1990 Act. A financial LPA on its own is unlikely to be sufficient to be a surrogate. This may be considered by local authorities.

3.2. Where a local authority has deputy status for a service user, the authority will be able to nominate a suitable person. This is likely to be a third party organisation.

3.3. Copies of the LPA or Order appointing a deputy should be kept in the service user's file.

Note: **'Nominee'**

The term *suitable person* should not be confused with the term *nominee*. A nominee will manage the direct payments on behalf of a person with capacity. A nominee's role is to support the service user with the administration of the direct payments. A suitable person's role carries far more responsibility than a nominee's as it includes managing the direct payments on behalf of the service user and making choices about the care and support the service user receives via direct payments. Whereas the suitable person can be the employer on behalf of the person without capacity, a nominee merely undertakes administration on behalf of the service user and will not be the employer.

### 4. HOW TO DETERMINE THE SUITABILITY OF A SUITABLE PERSON

4.1. There is no suitability test required for a legally appointed 'representative', who would normally be first choice as a suitable person. If a representative or surrogate (see section 3 above) is not present or does not wish to act, the local authority will then need to identify an alternative person to take on the role of the suitable person.

4.2. If the representative who is also a surrogate does not want to act as the suitable person, the representative-surrogate, together with the local authority, needs to consider an alternative suitable person. Where the representative-surrogate does not agree with the local authority about a proposed suitable person, that person cannot act as the suitable person, as the surrogate has a power of veto.

4.3. If there is neither representative nor surrogate, the local authority has the power to decide whether or not a proposed person should act as the suitable person.

**Note: Safeguarding considerations**

There may be times when a person is not considered appropriate to act as a suitable person - where, for example, there are safeguarding and/or Protection of Vulnerable Adult concerns, Criminal Record Bureau issues, a conflict of interest, financial issues and or other concerns. This list is not comprehensive, and each local authority may wish to have additional criteria to determine its final decision.

4.4. The local authority must be satisfied that an identified suitable person can fulfil the role.

4.5. The following steps can be used to determine the suitable person:

The first steps should involve consulting with the individual, if possible, and/ or others – for example, family, friends, peers, professional and other interested parties.	
<b>STEP 1</b>	Before consideration is given to anyone becoming a suitable person, the local authority must establish if there is a person appointed by a court who is willing to be the agreed suitable person (see section 3 on ‘representatives’ and ‘surrogates’).
<b>STEP 2</b>	The local authority, so far as is reasonably practical and appropriate, must consult and take into account the views of: <ul style="list-style-type: none"> <li>anyone named by the direct payments beneficiary as someone to be consulted with</li> <li>anyone currently engaged in caring for the person</li> </ul>



	<p>lacking capacity, or interested in their personal welfare any representative or surrogate of the person lacking capacity.</p>
<b>STEP 3</b>	<p>The local authority should consider the past and present wishes and feelings of the person who lacks capacity, as far as is reasonable to ascertain.</p> <p>This should include their beliefs and values that would be likely to influence the person's decisions if the person had capacity, and any other factors that the person would be likely to consider if they were able to do so.</p> <p>This should be in line with the Code of Practice accompanying the Mental Capacity Act 2005.<sup>1</sup></p>
<b>STEP 4</b>	<p>An enhanced Criminal Record Bureau (CRB) certificate must be available in respect of the proposed recipient for:</p> <p>personal assistants employed by the suitable person for the provision of care for the individual an individual who will have overall responsibility for the day to day management of the direct payments on behalf of a corporate body or an unincorporated body of people.</p> <p>It is important that local authorities consider all Protection of Vulnerable Adults safeguards, and that good practice is adopted in accordance with 'In Safe Hands'<sup>2</sup> and the Interim Policy Procedures for the Protection of Vulnerable Adults from Abuse 2011<sup>3</sup>.</p>

<sup>1</sup> Mental Capacity Act 2005, Code of Practice:  
[www.wales.nhs.uk/sites3/docopen.cfm?orgid=744&id=116382](http://www.wales.nhs.uk/sites3/docopen.cfm?orgid=744&id=116382)

<sup>2</sup> In Safe Hands: Implementing Adult Protection Procedures in Wales (July 2000); In Safe Hands Update 2003: The Protection of Vulnerable Adults from Financial Abuse; In Safe Hands: The Protection of Vulnerable Adults from Financial Abuse in Their Own Homes: Update 2009; and In safe Hands - The Role of CSSIW Cardiff, Welsh Assembly Government (2009). These documents may be found on the Welsh Assembly Government website: <http://wales.gov.uk/topics/health/publications/socialcare/?lang=en>

<sup>3</sup> Commissioned by the four Wales regional Adult Protection Forums.

	Additional local practice may be formulated in conjunction with the Adult Protection Safeguarding unit.
<b>STEP 5</b>	Where there is no identified suitable person, the local authority may appoint an organisation or third party as a potential suitable person, where appropriate.

**All of the above steps should be based on the need to take into account at all stages the ‘best interests’ of the service user concerned, supported by the relevant local authority guidance.**

**Note: Criminal Records Bureau checks**

If a family member is to be considered as a potential suitable person, or employed as a personal assistant, the local authority may require them to obtain a Criminal Record Bureau (CRB) check before the direct payments begin. For further guidance see the ‘Employing family under exceptional circumstances’ (available from the All Wales Direct Payments Forum), or refer to your Adult Protection Officer locally.

4.7. The local authority must be satisfied that:

the service user’s needs will be met by making the direct payments to a suitable person

the suitable person will act in the service user’s best interests when securing services for the service user

the suitable person is capable of managing the direct payments by themselves or with support and assistance

it would be appropriate to make the direct payments to the identified suitable person

appropriate contingency plans are in place to cover both the care needs of the service user, and in the event of the suitable person being temporarily or permanently unable to fulfil their role. This should be supported in the contractual agreement between the local authority and the proposed suitable person.

**Note: Local authority decisions on the appointment of a suitable person**

The care manager may be the initial person to identify and work with a potential suitable person, but before the direct payments arrangement is agreed and payments are made to the suitable person the appropriate local authority senior designated officer (this may vary from one authority to another) will need to agree to the proposed arrangement.

## **5. ONCE A SUITABLE PERSON HAS BEEN AGREED**

5.1. Once all reasonable steps have been taken and satisfied, the local authority can make the direct payments with the consent of the suitable person. Local authorities need to establish their own decision making and recording guidelines.

5.2. The suitable person receiving the direct payments on behalf of the service user must agree to accept certain responsibilities. These responsibilities should be clearly outlined in the contractual agreement between the local authority and the proposed suitable person.

5.3. The following conditions apply when monies are paid to a suitable person:

A service shall not be secured from family members living in the same household unless under exceptional circumstances – see local guidance and/or the All Wales Direct Payments Forum ‘Employing family under exceptional circumstances’.

The suitable person shall provide information to the local authority when requested, and in accordance with their contractual agreement with the local authority.

The suitable person will obtain a Criminal Record Bureau (CRB) certificate or obtain verification that a satisfactory certificate, in line with vetting and barring regulations, has been obtained in respect of any person who is employed or provides a regulated service.

The suitable person must inform the local authority if they believe that the service user no longer lacks capacity.

The suitable person must inform the local authority if his or her circumstances change in any significant way.

Any other condition that the local authority thinks appropriate, and which should be included in the local authority contractual agreement

**Note: Payments to a suitable person**

The suitable person would not normally receive any benefit - financial or otherwise - for taking on the role of suitable person. However, there may be exceptional circumstances where it would be appropriate for payment to be made to the suitable person. Any such arrangement must be agreed by the appropriate local authority senior designated officer.

## **6. REVIEWING**

6.1. In accordance with the Direct Payments Guidance (2011), reviews should be completed at least annually. It is, however, beneficial and good practice for a local authority to review the direct payments regularly, to ensure the suitable person is continuing to work in the service user's best interests and to ascertain the service user's capacity status.<sup>4</sup>

6.2. The review should always focus on achieving the agreed outcomes for the service user, rather than on services being delivered in a certain way.

**Note: Frequency of reviews**

It is likely that reviews will need to be completed more frequently in the early stages of direct payments being started. The recommended frequency for a review of a direct payments package where a suitable person has been agreed is six weeks, three months, six months and then yearly. Historically, some direct payments may have been set up inappropriately, and this might have happened for a range of reasons. However, at the next review practitioners should address whether or not direct payments should continue to be paid this way or in an alternative way – for example, via a suitable person.

6.3. Alternatively reviews can be completed:

at least once within the first year of the direct payments being made  
at appropriate intervals not exceeding 12 months thereafter  
where the local authority has reasonable grounds that the person no longer lacks capacity  
whenever the local authority has been notified that the direct payments have not been used to purchase the services for which they were made

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<sup>4</sup> Direct Payments Guidance (2011), chapter 7: Monitoring and Reviews.

when there are concerns regarding the suitable person, or about their ability to manage the direct payment  
when a person had capacity but is now believed to no longer have capacity  
where there are any concerns about safeguarding, issues around the Protection of Vulnerable Adults, mismanagement of funds or similar issues.

6.4. In view of the responsibility held by the suitable person to act in the service user's best interests, the Direct Payments Guidance (2011) suggests that where a person lacks capacity or has fluctuating capacity the reviews are completed on a more frequent basis than standard reviews.

**Note: Change in status of suitable person**

If it is established that someone is no longer appropriate to be the suitable person, this should automatically trigger a review.

## **7. TERMINATION OF DIRECT PAYMENTS**

7.1. There will be occasions where local authorities will need to consider terminating a direct payments arrangement. Where this is the case, it is important for direct payments packages to be terminated in line with local authority policy and procedures. It is important to remember that where personal assistants are employed there will be statutory obligations with regard to their employment status and notice periods.

7.2. The local authority may decide to terminate the payments when:

the service user no longer meets the assessed eligible community care need  
the local authority is no longer satisfied that the service user's needs can be met by means of direct payments  
the suitable person is not acting in the service user's best interests  
the suitable person is not capable, or no longer capable, of managing the direct payments  
the suitable person does not comply with their obligations as detailed above  
it is no longer appropriate for the direct payments to be made to the suitable person identified  
the service user regains long term capacity  
it is contrary to the service user's best interests

the service user and/or suitable person no longer wishes to manage the direct payments arrangement.

This list is not exhaustive.

**Note: Continuity of care provision**

The termination of a direct payments arrangement should not have an adverse impact on the care provided to the service user.

## **8. REPAYMENT OF DIRECT PAYMENTS**

8.1. Where the local authority is not satisfied that the direct payments have been used to secure the provision agreed, or that the suitable person has complied with their obligations, the local authority will in most cases require repayment or part repayment of the monies paid through the direct payments arrangement. (Local authorities will have their own policies and procedures in relation to this.)

**Note: Contribution or reimbursement**

It is the suitable person's responsibility to ensure that any assessed contribution or reimbursement for which the service user would normally be liable is paid to the local authority. Local arrangements apply. This should be recorded in the contractual agreement with the local authority.

## **9. OTHER CHANGES INTRODUCED BY THE NEW REGULATIONS**

9.1. Previously many individuals who were subject to compulsory measures under the mental health legislation were excluded from receiving direct payments. Local authorities now have the same duty to offer direct payments to eligible people who are subject to mental health legislation, with some exceptions. Please refer to the relevant sections of the Direct Payments Guidance 2011 (especially paragraphs 6.51 to 6.57).

## **10. NEGLECT OR FRAUD**

10.1. Whilst an authority will not want to deter or discourage people from taking up the role of suitable person, it is advisable that any potential suitable person is given relevant and appropriate information before they accept the responsibilities

of becoming an agreed suitable person. One of the key areas they must be briefed on is their responsibility with regard to neglect and fraud.

10.2. Anyone who cares for a person who lacks capacity and neglects or ill treats that person can be found guilty of a criminal offence under the Mental Capacity Act 2005. This is punishable by up to five years in prison, a fine or both.

10.3. The Fraud Act 2006 also created a new offence of 'fraud by abuse of position'. This may apply to a range of people including those with lasting power of attorney, enduring power of attorney, or deputies appointed by the Court of Protection. This provision will apply to a suitable person who may also be guilty of fraud if they dishonestly abuse their position.

10.4. Practitioners must be satisfied that the potential suitable person is aware of what constitutes abuse either by themselves and/or other others.

## 11. DISPUTES AND DISAGREEMENTS

11.1. Disputes and disagreements may arise before, during or after a suitable person is agreed. This may be between a variety of people including service user, carers, parents, or professionals.

**Note: Examples of where disagreements may occur**

during transition, where a young person wants to take over an existing direct payments package in their own right when they become an adult but the parents believe their child lacks the capacity to consent

where there are different or conflicting views of a person's (lack of) capacity

where there are differences of opinion on who is a suitable person

where there are differences regarding who should be employed by the suitable person to provide support to the service user.

11.2. Where disputes and disagreements cannot be resolved, they should be dealt with locally by those involved. Service users, suitable persons, family friends, or any party in dispute must be made aware of how they can make a complaint, although this should be regarded as a last resort.

## **12. PLANNING FOR LOSS OF CAPACITY**

12.1. Some service users may be concerned about losing mental capacity in the future. Practitioners may want to assist or signpost the service user to the relevant person or organisation who will be able to help the service user to:

consider awarding Lasting Power of Attorney to a family or friend or other appropriate person

discuss and consider how to apply to the Court of Protection to appoint a deputy

create a statement of wishes and preferences (advanced directive) that can be referred to in the future, as appropriate.

12.2. Practitioners must be aware that if someone is in receipt of direct payments and it is likely that they will lose capacity in the future, they must be advised to make appropriate arrangements for when this happens.



### Example - Checklist for Appointing a Suitable Person

Name of Service User		Address	
ID Number		Date of Birth	

#### Proposed suitable person

First Name	Surname	Address	Relationship to service user	Legal status – e.g. representative/surrogate	Suitable person agreed Yes/No	Signed and printed (designated senior manager)

Proof of identity of suitable person	Document – e.g. copy of LPA dated and where filed	Identification number (e.g. passport or driving licence number etc)

#### People consulted about the suitable person role

First name	Surname	Address	Relationship to service user	Legal status

Reason why \_\_\_\_\_ was chosen to be suitable person - e.g. legal status, knowledge of service user, named in statement of preference/wishes. In addition state why this is in the best interests of the service user named above.

Practitioner name \_\_\_\_\_ Practitioner signature \_\_\_\_\_  
 Practitioner job role \_\_\_\_\_ Date \_\_\_\_\_  
 Senior designated manager \_\_\_\_\_ Date next review due \_\_\_\_\_