EXPLANATORY MEMORANDUM TO

THE COMMUNITY CARE, SERVICES FOR CARERS AND CHILDREN'S SERVICES (DIRECT PAYMENTS) (ENGLAND) (AMENDMENT) REGULATIONS 2010

2010 No. 2246

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

2. Purpose of the instrument

2.1 This instrument amends existing legislation on social care direct payments. These are cash payments given to people in lieu of social care services that would otherwise have been arranged for them by local authorities. The instrument removes the requirement for local authorities to carry out a financial assessment when determining what amount is reasonably practicable for a direct payment recipient to pay towards securing the provision of residential accommodation.

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

3.1 None

4. Legislative Context

4.1 The Community Care (Direct Payments) Act 1996 gave local authorities the power to make cash payments in lieu of social care services to adults of working age. The scheme was extended in 2000 to include older people. The Health and Social Care Act 2001 ("the 2001 Act"), under which this instrument is made, extended direct payments to include carers and the Children Act 1989 ("the 1989 Act") extended direct payments to include parents of disabled children and 16 and 17 year olds. The 2001 Act and the 1989 Act also allowed regulations to impose a duty as well as a power on local authorities to make direct payments to individuals who fulfilled the requirements of the direct payments scheme with their consent.

4.2 The Health and Social Care Act 2008 amended the 2001 Act to extend direct payments to people who lacked capacity to consent to such payments. The Community Care, Services for Carers and Children's Services (Direct Payments)(England) Regulations 2009 ("the principle Regulations") which this instrument amends, consolidated previous regulations on direct payments, extending such payments to previously excluded groups.

5. Territorial Extent and Application

5.1 This instrument applies to England

6. European Convention on Human Rights

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

7. Policy background

7.1 Local authorities can discharge their social service responsibilities either by providing such services directly or by making direct payments to enable the person to purchase services themselves.

7.2. In the case of residential accommodation, direct payments are available for up to four consecutive weeks per year.

7.3 Where the local authority is itself providing residential accommodation (as opposed to making direct payments), under section 22 of the National Assistance Act 1948 ("the 1948 Act"), there is a duty to charge for such accommodation. Where a person is unable to pay the full cost of the accommodation, the authority must assess the person's ability to pay and determine what lower rate the person should pay.

7.4 Under section 22(5A) of the 1948 Act an assessment of ability to pay is not required where residential accommodation is provided for 8 weeks or less and the charge is the amount it seems reasonable to the local authority that the person should pay. The purpose of this provision was to relieve local authorities of the disproportionate administrative burden of carrying out means assessments for temporary stays.

7.5 Where direct payments are made for residential accommodation, regulations 9(2) and 10(2) of the principle Regulations require that, in determining the amount which is reasonably practicable for a person to pay towards securing services, the local authority must have regard to the person's means. There is no exception in relation to direct payments for residential accommodation.

7.6. Thus a local authority is required to carry out an assessment of means when determining the amount a person should pay towards temporary residential accommodation where direct payments are made but not when determining charges where such accommodation is directly provided by the local authority.

7.7. The policy is that for direct payments for temporary residential accommodation, local authorities should not have to undertake a means assessment when determining what amount is reasonably practicable for a person to pay. The aim is to relieve local authorities of the disproportionate administrative burden of having to carry out means assessments where direct payments are made for short stays in care homes, in line with the situation where temporary residential accommodation is directly provided by a local authority.

7.8. The instrument amends regulations 9 and 10 of the principal Regulations to lift the requirement on local authorities to carry out a financial assessment when determining what amount is reasonably practicable for the

direct payment recipient to pay towards securing the provision of residential accommodation. This brings the position in line with that of temporary residential accommodation directly provided by the local authority.

8. Consultation outcome

8.1 No consultation has been undertaken as the instrument makes a very minor change to resolve an anomaly which had been poorly understood by local authorities.

9. Guidance

9.1 Guidance on direct payments has been available to local authorities since they were first introduced in 1997 and has been updated and expanded as their use has developed and increased. This guidance has been revised to reflect the changes to the principle Regulations made by this instrument.

9.2 Guidance to local authorities on how to determine contributions to be made by persons towards their social care personal budgets (which may be taken as direct payments) was issued in July 2009. This guidance has been revised to reflect the changes to the principle Regulations made by this instrument.

9.3 The updated guidance will be available on the Department of Health website at:

http://www.dh.gov.uk/en/AdvanceSearchResult/index.htm?searchTerms=direct+payments

http://www.dh.gov.uk/en/AdvanceSearchResult/index.htm?searchTerms=fairer+contributions+guidance

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument as no impact on business, charities or voluntary bodies is foreseen.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The policy will be reviewed alongside review of the principle Regulations which will be done three years after their implementation in 2012.

13. Contact

Paul Brittain at the Department of Health Tel: 0207 972 4280 or email: paul.brittain@dh.gsi.gov.uk can answer any queries regarding the instrument.