

Implementing direct payments for people with learning difficulties

The Community Care (Direct Payments) Act 1996 gave local authorities the power to make cash payments to community care users for the purchase of their own support. Development of direct payments has been slow, particularly for people with learning difficulties. Tony Ryan of Values Into Action looked in detail at the legal aspects of making cash payments to people with learning difficulties and examined some of the implications for practice, using case studies in three local authorities.

- f** People with learning difficulties are specifically included in the direct payment regulations. Local authority policies which exclude people with learning difficulties as a group run the risk of being challenged.
- f** There are a number of ways in which people with learning difficulties can be supported to have control over their direct payments. For example, one local authority has developed indicators which show that the service user is in control even when a third party is managing the payment.
- f** The direct payments guidance allows for people with learning difficulties to have as much assistance as they require when receiving a direct payment.
- f** Systems are being developed to provide proper safeguards for people with learning difficulties using direct payments, whatever the extent of their disability.
- f** Existing local authority powers enable people with learning difficulties to access cash payments through 'independent living trusts'. This enables people to enjoy the benefits of direct payments whilst ensuring that they are fully safeguarded.
- f** The researcher concludes that important features for the successful implementation of direct payments include: flexible arrangements which support people with learning difficulties to give legal consent; risk taking; working in partnership; planning based on individual circumstances; openness and transparency; and local authority personnel who have both the vision to try new ways of working and the power to implement them.

Background

The Community Care (Direct Payments) Act 1996 came into force on 1 April 1997. It enables local authorities to make cash payments to individuals instead of directly providing services, but it does not require them to do so. Some local authorities have been reluctant to implement the legislation, particularly for people with learning difficulties, but others are committed to developing direct payments systems which include people with learning difficulties.

The legislation states that community care users must consent to having a direct payment, and the associated guidance states that they should be "willing and able" to manage it. Many people with learning difficulties may be perceived as ineligible where schemes focus on these aspects rather than on the recognition, also in the guidance, that people can receive "assistance" with their direct payment.

Blanket policies

The discretionary nature of the direct payments legislation has led some local authorities to develop blanket policies that exclude people with learning difficulties from receiving direct payments. However, according to the legal advice obtained for this study, a local authority which excludes people with learning difficulties leaves itself open to challenge, possibly resulting in judicial review.

Ability to manage a direct payment

People who get direct payments do not have to manage them alone or in isolation. Government guidance allows people to have as much help as they want or need. There are many ways in which people with learning difficulties can have help to manage their direct payment, and there are also many sources of help. There were some people in this project who needed almost total assistance, but still managed to control their direct payments.

Consent to a direct payment

Some local authorities are merging the two notions of 'willing' and 'able'. Consent, or *willingness*, to receive a direct payment is quite different from *ability* to manage a direct payment. The project found a number of examples in which consent and autonomy remained with the individual despite their receiving almost total assistance with managing their direct payments.

The legal advice obtained by this study, however, states that an individual does need to consent before a local authority can make a direct payment. This may present a problem for some people with learning difficulties, but does not mean that local authorities can assume that most people with learning difficulties will necessarily lack the capacity to consent. The fact that someone's financial affairs

may be managed by the Court of Protection, for example, does not mean they can be assumed to be unable to consent to a direct payment.

Maximising the opportunity to consent

Measures local authorities were taking to maximise the potential for people with learning difficulties to make an informed choice included: providing accessible information, giving people time, reducing the formalities, respecting the ways in which people communicate, lessening the pressures and enabling people to make decisions in their own, familiar environment.

Control and direct payments

Some local authorities are making direct payments to people with learning difficulties whose capacity to consent might be questionable, but whose control over the use of the money is not. One local authority, for example, has developed indicators which show that the service user is in control even when a third party is managing the payment. The indicators include: maximising the involvement of service users in decision-making; recognising the way a person communicates wishes and aspirations; building these wishes and aspirations into decision-making; providing the opportunity to facilitate informed choice; documentation of decision-making; and the involvement of a wide network of people.

Independent living trusts

When a person does not have the capacity to consent to a direct payment, existing local authority powers (Local Authority Act 1970 s.137) can be used to give people more control over the ways in which their assistance is purchased. 'Independent living trusts' provide a simple, cheap and effective legal structure which sets out the framework for receiving payments from a local authority and arranging services for a person who is eligible for community care. Trusts also provide proper legal safeguards for people with learning difficulties and can be designed to facilitate supported decision-making, thus maximising the person's own control. Increasing numbers of people with learning difficulties and their supporters are now using trusts and supported decision-making to guide the use of resources.

Risk taking

Direct payments give people control, but they also shift some of the responsibilities from the local authority to the individual and may leave people feeling isolated and vulnerable. Direct payments are discretionary. Part of the process of assessing eligibility for a direct payment is the identification of potential hazards and risks. It is from this point that the necessary systems to enable control and prevent abuse can be put in place. One local authority worker

involved in the project commented: “I would be prepared to take the risk if that is what would make the difference for someone”.

Providing safeguards

Safeguards are useful to local authorities because they provide a framework within which risks can be clearly identified and monitored. Safeguards are important for third parties because they enable them to show that they are acting with and for someone rather than for their own needs or gain. More significantly, safeguards are important for people with learning difficulties because they provide them with the vigilance they might require to prevent abuse.

Safeguards can be legal, formal or informal. Safeguards can include: the involvement of wider networks; independent advocacy; appropriate informal monitoring by local authorities; transparency in decision-making and financial recording; legal or formal agreements (such as independent living trusts); discussion and openness between all parties.

Partnership

The project found that direct payments are often presented as a way of arranging services which is completely removed from statutory bodies. Many people who use direct payments successfully want this separation. But for many others this is an alarming prospect which can discourage them from applying. Government policy guidance itself suggests that direct payments work best when employed in a spirit of partnership. People need to be reassured that if they wish to have a direct payment it does not mean they will automatically have to survive on their own. There are still many services which they can use.

Learning through practice

Local authorities which are in the vanguard of developing systems for supporting people with learning difficulties to get direct payments are there because they are learning through doing. In the words of one local authority worker: “If we come up against any problems we will just have to find a way around them”.

Power and vision

Although it is important for all relevant local authority personnel to play a part in the implementation of direct payments, it is natural that one or two individuals will take a lead role. Within some local authorities this role appears to have been given to individuals who, although having vision and imagination, lack the power to effect real change within departments. In effect, direct payments are sidelined.

Where local authorities have been successful in implementing direct payments, particularly for people with learning difficulties, the lead roles have

been taken by individuals with real strategic power to nurture a culture of risk taking, and the vision and imagination to facilitate new ideas. Personnel who have close connections with the voluntary sector as well as with other key local agencies such as health agencies are well positioned to influence the local picture. One advocacy worker referred to one such officer in a large authority as someone who “does not always look to the rule book”.

Planning around individual circumstances

Without planning around each individual’s own circumstances (‘person-centred planning’), it could be difficult for people to know how they would use direct payments if they were to receive them. For people who may not have the capacity to understand direct payments fully and who may need assistance in their management and control, person-centred planning plays an even more crucial role. The process itself helps circles and networks to focus on the person. Clear recording of each individual’s requirements and how these might be met will help to guide the use of a direct payment. The recording and documentation of such plans (in an accessible form) can also provide an important safeguard for the use of direct payments.

Clare is a woman with learning difficulties who might not be regarded as having the capacity to consent to a direct payment. Nonetheless Clare does receive money through an independent living trust. She receives Independent Living Fund and health authority money as well as local authority money in this way. The trust manages the resources on her behalf. The trust has three trustees: her parents and a third who acts as a safeguard for Clare. A wider circle of friends also ensures that the money is used in Clare’s interests.

Paul’s local authority wanted to give him a direct payment. Staff were not overly concerned that he could manage it on his own, but were concerned that he controlled the money. Paul’s direct payment is paid into a joint bank account that he holds with his mother. His mother provides almost total assistance in managing the money, but Paul is the one who makes all the decisions, from choosing personal assistants to choosing how to spend his time. Financial records and monthly meetings involving all the relevant people in Paul’s life ensure that the money is used solely to meet his aspirations.

Conclusion

The researcher concludes that:

- Each request for a direct payment should be considered on its own merits against local authority criteria.

- Any assessment of a person's ability to manage a direct payment should focus on the support mechanisms that can be employed around them, not on their individual skills or abilities.
- Consent to a direct payment should be viewed as a separate issue from any others, with requests again judged on their individual merits.
- 'Person-centred planning' is a crucial factor in the successful implementation of direct payments for people with learning difficulties.
- A problem-solving approach and a culture of risk-taking are essential if local authorities are to grip this innovative nettle. It appeared to the project that sometimes more effort is expended on preventing people from accessing direct payments than on solving problems and breaking down barriers.

About the study

The study was based on three areas of activity. First, legal advice was taken about the issues of consent and the nature of legislation and policy guidance. Second, the project worked with three local authorities to examine the ways in which they were tackling the development of direct payments for people with learning difficulties. Finally, the project worker met with people with learning difficulties, their families and supporters, who were receiving individualised funding in one form or another, in order to examine the nature of their arrangements and the ways in which decisions were made about their direct payments.

How to get further information

Further information about this project, and other work by VIA on direct payments, is available from Values Into Action, Oxford House, Derbyshire Street, London, E2 6HG, Tel: 0171 729 5436, Fax: 0171 739 7797, e-mail: VIA@BTInternet.com.

This project has produced two resource packs about direct payments: **Able and Willing?** is for local authorities; **Pointers to Control** is for people with learning difficulties and their supporters. The packs are available from VIA and cost £20 each inclusive of post & packing.

The Able and Willing? pack includes:

- *Able and willing? Supporting people with learning difficulties to use direct payments* by Tony Ryan and Andrew Holman, VIA 1998
- *Funding freedom: A guide to direct payments for people with learning difficulties* by Andrew Holman and Jean Collins, VIA 1997
- *A Sample Trust Deed*, VIA 1997
- A leaflet and audio tape explaining direct payments, VIA 1998

- *Choice and control. A discussion paper on consent and supported decision making* by Catherine Bewley, VIA 1998

The Pointers to Control pack includes:

- *Pointers to control: People with learning difficulties using direct payments* by Tony Ryan and Andrew Holman, VIA 1998
- *Make your move: A video guide to independent living*, VIA 1998
- *A Sample Trust Deed*, VIA 1997
- A leaflet and audio tape explaining direct payments, VIA 1998
- *Choice and control: A discussion paper on consent and supported decision making* by Catherine Bewley, VIA 1998

Both the main reports, **Able and Willing?** and **Pointers to Control**, are available separately from VIA at £5 each plus £1.50 post & packing.