
Direct Payment Policy 2023

Document Control

Document Ref:		Date Created:	December 2023
Version:	1.0	Date Modified:	
Revision due	December 2026		
Author:	Jo England	Sign & Date:	December 2023
Owning Service	Adult Social Care		
Equality Impact Assessment: (EIA)	Date undertaken:		
	Issues (if any):		

Chief Executive	Sign & Date:	
Corporate Director (Communities)	Sign & Date:	
Corporate Director (Economy and Environment)	Sign & Date:	

Change History

Version	Date	Description	Change ID
1	09/01/2024	Approved at Corporate Board 9 th Jan 2024	
2	08/02/2024	Approved at Executive Board 8 February 2024	
3			



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Introduction

1. Statement of purpose

- 1.1. This policy is intended to cover direct payments for adults and carers.
- 1.2. **The purpose of this policy is to make clear the Council's approach to direct payments, and the responsibilities of the direct payment recipient. It should be read in conjunction with the direct payment factsheets and the direct payment agreement.**
- 1.3. The Care Act 2014 requires local authorities to 'consider the person's own strengths and capabilities, and what support might be available from their wider support network or within the community to help' in considering 'what else, other than the provision of care and support, might assist the person in meeting the outcomes they want to achieve'. This is done by taking an approach that looks at a person's life holistically, considering their needs in the context of their skills, ambitions, and priorities. Similarly, the Children's and Families assessment seeks to capture the strengths and needs of each family.
- 1.4. West Berkshire Council is committed to this approach (i.e. identify the individual's personal, community and social networks, and maximise those strengths to enable them to achieve their desired outcomes), thereby meeting their needs and improving or maintaining their wellbeing.
- 1.5. Any suggestion that support could be available from family and friends should be considered in the light of their appropriateness, willingness and ability to provide any additional support and the impact on them of doing so. This is also subject to the agreement of the adult or carer in question (see [Chapter 6 of the Care & Support Statutory Guidance](#)).
- 1.6. Supporting the person's strengths can help address needs, whether or not they are eligible for support in a way that allows the person to lead, and be in control of, an ordinary and independent day-to-day life as much as possible. It may also help delay the development of further needs.
- 1.7. Every adult or carer who is eligible for care and support will have a personal budget identified. This is equivalent to the amount of money that the Council believes is reasonable to buy services to meet those eligible needs. The person who requires the support can then choose how that budget is spent.
- 1.8. They can request that the Council makes all the arrangements for meeting those needs and manage the budget on their behalf; or they can ask for a direct payment to be paid to themselves or to a nominated person or a 3rd party.
- 1.9. A direct payment is the mechanism for personalised care and support and is one of the available options offered by West Berkshire Council when there is assessed but *unmet* eligible needs stated within an individual's support plan.
- 1.10. A direct payment has to be used to meet the needs and outcomes that have been agreed with a social care practitioner, in a way which they can exercise choice and control over who provides their support, and when and how it's provided. The direct

payment should be used to support the strengths-based approach; to protect and enhance the individual's wellbeing, independence, resilience, and ability to make choices.

2. Legislative framework

2.1 The legislative framework to make adult direct payments is contained within Sections 31, 32, and 33 of the Care Act 2014, the Care and Support (Direct Payments) Regulations 2014, s117 (2c) of the Mental Health Act 1983, and the Care and Support Statutory Guidance.

2.2 Local Councils have a duty to provide direct payments.

2.3 Direct payments will be made to all individuals who are eligible to receive them and who want them. The Council cannot however force someone to have a direct payment against their will.

2.4 The person in receipt of the direct payment does not have to manage the direct payment themselves (either the financial aspects or the organisation of the service) – this can be undertaken by a third party – as an individual, a formal network or a trust.

3. What are direct payments?

3.1 A personal budget is a sum of money allocated to a person as a result of an assessment of needs. This can be taken in the form of a direct payment for the recipient to arrange and pay for their own care and support or in the form of a service provided by the Council (or a combination of both)

3.2 There are other forms of personal budgets, for example, a personal health budget. The Council will work with individuals who are, or will be, in receipt of a personal health budget and a Council direct payment to ensure that a joined health and social care budget works in the best way for them. For information about personal health budgets visit the NHS website <https://www.england.nhs.uk/personal-health-budgets/>

3.3 The Council cannot compel anyone to accept a direct payment, but can encourage and support as many people as possible to take control over their own care support by use of a direct payment. If individuals wish, Councils can arrange mixed packages with some directly provided services and direct payments for other needs. This can, for example, give somebody the opportunity to familiarise themselves with managing direct payments before taking on responsibility for arranging support to meet all their needs.

3.4 As a general principle, the Council will aim to leave choice in the hands of the person by allowing them to meet their own needs as they consider best, whilst satisfying itself that the agreed outcomes are being achieved.

Who does the Council have a duty to offer direct payments to?

4. Overview

The Council has a duty to make direct payments available to anyone with eligible needs that is capable of managing direct payments and would like to receive them. This group includes:

- Adults who have been assessed as eligible to receive help from the Council in arranging care and support to meet their unmet needs in a setting other than a long term stay in a care home.
- Carers aged 16 and over, for their own assessed needs, i.e. for services to support their caring role and to maintain their own health and wellbeing.
- An appointed authorised person for someone who lacks capacity.

5. Direct payments for adults with capacity

5.1 The Council must offer direct payments where:

- a personal budget for an adult specifies an amount which the Council will pay towards the cost of meeting the person's needs, and
- a person requests the Council to meet some or all of their needs by making payments to them or to a person nominated by them, and the following conditions are met:

Condition 1	the adult has the capacity to make the request and, where they have nominated a person to make the payments to, that person agrees to receive the payments
Condition 2	the Council is not prohibited by regulations under section 33 of the Care Act 2014 from meeting the adult's needs by making direct payments to the adult or nominated person
Condition 3	The Council is satisfied that the adult or nominated person is capable of managing direct payments either by themselves or with whatever help the Council thinks the person or nominated person will be able to access
Condition 4	The Council is satisfied that making direct payments to the adult or nominated person is an appropriate way to meet the adult's needs.

5.2 If the Council decides that it is not appropriate to make direct payments, it will put the reasons for the decision in writing and make a written record available to the individual. It will also inform the individual about how to complain if they are not satisfied with the decision of the Council.

6. Direct payments for adults lacking capacity to consent

6.1 In cases where a person in need of care and support has been assessed as lacking capacity to request direct payments, an authorised person can request the direct payment on the persons behalf, if that person satisfies all of the following five conditions:

- Where the person is not authorised under the Mental Capacity Act 2005 but there is at least one person who is so authorised, that person who is authorised supports the person's request.
- The Council is not prohibited by regulations under the Care Act 2014 section 33 from meeting the adult's needs by making direct payments.
- The Council is satisfied that the authorised person will act in the adult's best interests in arranging for the provision of care and support for which the direct payments under this section would be used.
- The Council is satisfied that the authorised person is capable of managing direct payments by himself or herself, or with whatever help the authority thinks the authorised person will be able to access
- The Council is satisfied that making direct payments to the authorised person is an appropriate way to meet the needs in question.

6.2 The authorised person is managing the direct payment on behalf of the person lacking capacity on the understanding that they must act in their best interests.

6.3 The authorised person cannot receive the direct payment and also be paid from it for providing care and support for the person lacking capacity.

6.4 For further information about appointing an authorised person, please refer to Appendix 1.

7. Direct payments for carers

7.1 In relation to carers, the Care Act relates mostly to adult carers (people over 18 who are caring for another adult). This is because young carer's (aged under 18) and adults who care for disabled children can be assessed and supported under children's law.

7.2 A carer is someone who helps another person, usually a relative or friend, in their day to day life. This is not the same as someone who provides care professionally, or through a voluntary organisation.

7.3 Using a strength based approach to carer assessments, carers unmet needs can be met in a number of ways. Following a carer's assessment it may be agreed that the best way to help a carer is by providing:

- access to a range of universal services, including community support
- a direct payment to purchase services and or equipment for themselves services to the person they are looking after
- a combination of the above.

- 7.4 Direct payments may be awarded to carers where the providing of the care is having a significant impact on the carer's wellbeing and the care the carer is giving is necessary and appropriate (i.e. the care being given is not disempowering the care recipient because the care is not needed).
- 7.5 Direct payments for carers allow the carer to purchase the services they are assessed as needing to support them in their caring role and to maintain their own health and wellbeing. The Care Act 2014 outlines that a carer's need for support can be met by providing care to the person they care for, but decisions about who is being provided with the service may affect whether the service is chargeable.
- 7.6 It is important for all those involved to understand whose needs are intended to be met by a particular type of support, and to whom the support will be provided directly, and therefore who may pay any charges due. However the Council will ensure that the person requiring care is involved in the decision making process and agrees with the course of action.
- 7.7 Where a service is provided directly to an individual needing care, even though it is to meet the carer's needs, then the adult would be liable to pay any charge. The Council will take steps to ensure that the wishes of the person requiring care are taken into account during these decisions, including obtaining the persons agreement to pay for any charges due.
- 7.8 Decisions about which services are provided to meet carer's needs and which are provided to meet the needs of the person they care for will be decided as part of the support planning process, in discussion with the individuals concerned. As part of this process the Council will consider whether joint plans will be of benefit.
- 7.9 The direct payment will be terminated, if the person being cared for is placed in a permanent residential setting or dies. Any funds remaining in the account must be returned to the Council.

8. Carer's direct payments where the adult being cared for has no eligible needs

- 8.1 The Council is able to meet the carer's needs by providing a service directly to the adult needing care. However, there may be instances where the adult being cared for does not have eligible needs, so does not have their own personal budget or care plan. In these cases the carer will have their own support plan specifying how their needs will be met (for example, via replacement care to the adult needing care) and the personal budget would be for the costs of meeting the carer's needs. The adult needing care would not receive a direct payment because the service is designed to meet the carer's needs. The person that requires care must be involved in the decision making process and agree with the intended course of action. In these circumstances the carer can use the direct payment to commission their own replacement care because they are the direct recipient of the service.

9. Who is excluded from receiving direct payments?

- 9.1 Direct payments cannot be made in respect of people who have been placed under certain conditions or requirements by the courts in relation to drug and/or alcohol dependencies as specified in Schedule 1 of the Care and Support (direct payments) Regulations 2014. These include:
- Offenders on a community order, or serving a suspended sentence under the Criminal Justice Act 2003 which includes a requirement to accept treatment for drug or alcohol dependency;
 - An offender on a community rehabilitation order under the Powers of Criminal Courts (Sentencing) Act 2000, which includes a requirement to accept treatment for drug or alcohol dependency;
 - Offenders released from prison on license under the Criminal Justice Act 1991, the Criminal Justice Act 2003 or the Crime (Sentences) Act 1987 subject to an additional requirement to undergo treatment for drug or alcohol dependency; and
 - People subject to equivalent provisions under Scottish criminal justice legislation.
 - Where the recipient is placed by the courts under a condition or requirement relating to a drug and/or alcohol dependency.

Use of direct payments

10. What can direct payments be used for?

- 10.1 Where a person is eligible to receive services from the Council they may be eligible to receive direct payments in order that they can organise their own care and support either as an on-going provision or as a one off direct payment for such things as respite care.

11. What can an adult spend their direct payment on?

- 11.1 Direct payments can be used to purchase most services for persons who are ordinarily resident in West Berkshire that meet the needs and outcomes agreed in their support plan. For example, the types of services that can be purchased, can include:
- Personal care
 - Purchasing equipment
 - Community activities or day care
 - Short-term breaks, such as respite care
 - Help with maintaining a hygienic and habitable home where they are incapable of doing it themselves.
 - Community care services for disabled parents to assist with parenting tasks.
- 11.2 This may involve a person contracting with an agency to provide services or becoming an employer and recruiting their own personal assistant.

For more examples of what direct payments can be used for see Appendix 2.

12. What can a carer spend their direct payment on?

- 12.1 Direct payments can be used to provide a carer with practical help and support in their caring role to meet their physical, mental and emotional wellbeing. The test for ordinary residence determines which Local Authority would be responsible for meeting the needs of a carer. For carers, the responsible Local Authority will be the one where the adult for whom they care for is ordinarily resident.
- 12.2 There may be some cases where the carer provides care for more than one person in different Local Authority areas. In these circumstances, the Council will consider how best to cooperate on and share the provision of support. It may have an agreement to jointly fund the support for the carer, or it may that overall responsibility for certain aspects. For example, it may lead on reviews because it is geographically closer to the carer's home.
- 12.3 The types of practical help and support for a carer may include enabling them to:
- develop and maintain family and other personal relationships
 - engage in recreational activities
 - maintain a habitable home environment
 - manage and maintain nutrition for themselves and their family
 - engage in work training and education

For further information about how a carer's needs can be met refer to the care and support meeting needs policy. For more examples see Appendix 2.

13. What can direct payments not be used for?

- 13.1 Direct payments cannot be used for any of the following purposes:-
- To purchase services for the direct payment recipient from a provider that West Berkshire Council or the NHS, has already directly commissioned for them, however a person can purchase services from another Council, for example if the person lives near the border of another area and wishes to use services in that area.
 - To purchase items that do not meet the agreed outcomes in a person's support plan.
 - To pay for personal or household expenses, such as personal loans, utility and household bills, rent or mortgage payments.
 - As at the date of this policy, direct payments in West Berkshire cannot be used to purchase long term care in a care home.
 - To purchase services or equipment that should be funded by other types of financial support, such as health services the NHS provides, or disabled facilities grants.

- To purchase a service for someone who is no longer an ordinary resident of West Berkshire other than by prior agreement in writing with West Berkshire's adult and children's services and the persons funding authority.
- To secure services from a spouse or a partner with whom they live, or from a close relative or their spouse or partner who live in the same household as the direct payment recipient. This does not include close family members who live elsewhere. Examples of personal relationships include:
 - your spouse (husband or wife)
 - your civil partner
 - your partner whether you are unmarried or part of a same sex couple or
 - a close relative who lives with you or the spouse or partner of that close relative

A close relative is a person that you are related to including one of the following: parent or parent in law, aunt or uncle, grandparent, son/daughter, /son in law/daughter in law, step son or daughter, brother or sister and partner of any of the above.

This restriction does not apply where a close family member is providing management and/or administration support to the direct payments holder in cases where the Council deems this to be necessary. If a family member is being paid for administration services any payment made to them must comply with HMRC regulations.

In 'exceptional circumstances' where the Council is satisfied that it is necessary to meet a person's needs satisfactorily, the Council will allow people to use direct payments to secure services from a family member or partner living in the same household.

The following may be accepted as exceptional circumstances as long as adequate evidence can be furnished to substantiate the situation:

For reason of ethnicity or religious beliefs, specific limitations apply to who may acceptably be employed to deliver the care, and there is no likelihood of being able to recruit an appropriate carer locally.

That delivery of personal care by a third party would cause genuine distress to the cared for person.

There is a need for live-in care but no appropriate accommodation available.

Care needs are intermittent and unpredictable, and recruitment or use of an agency to meet such needs is impracticable.

This was the only practicable way of meeting the care needs during a temporary breakdown of other service arrangements.

Setting up and managing a direct payment.

14. Information about setting up a direct payment.

- 14.1 The availability of direct payments will be included in the universal information services that the Council provides. This will allow people to be fully aware of what direct payments are and what they can be used for. In addition to this general information the Council will explain to people what needs could be met by a direct payment during the care and support planning process.
- 14.2 It is expected that most requests to receive direct payments will occur during the assessment or support planning stage; however the Council will consider requests for direct payments made at any time, and will have processes in place to respond to requests, for example when the support plan is being reviewed.
- 14.3 Direct payments will be an integral part of the support plan option when looking at ways of meeting the person's assessed and eligible needs.
- 14.4 If a person is interested in direct payments they will receive advice and guidance about direct payments and how to manage them. This includes being provided with information about;
- what direct payments are
 - how to request one, including the use of nominated and authorised persons to manage the payment
 - the responsibilities involved in managing a direct payment and being an employer
 - explanation of the direct payment agreement
 - where to get support from the Council, and details of what support and information is available from local providers
- 14.5 A social care practitioner or direct payment officer will be the initial source of information and advice during the assessment and support planning process for adults.

15. Managing a direct payment.

- 15.1 Most recipients of direct payments will be able to take full and complete responsibility for the management of the services they require and others may need to get help to get started. Some people may need support on an ongoing basis. Support and advice can come from a wide variety of sources.
- 15.2 Where someone needs assistance to manage direct payments, ways of supporting this can be investigated so that adequate help is available over a sustained period, not just for the set-up period. Recipients may choose to ask family or friends, or advocacy, or support groups to help them. They may also choose to buy in assistance, for example, with keeping records, management of day-to-day relationships with staff or using a payroll service.

15.3 In certain circumstances a trust may take on the employment of staff and the financial management of the payment, In such cases, the Council will seek to establish that there is an understanding by those appointed to manage the administration of the payment of what is involved before making direct payments.

16. Direct payment support

16.1 The Council has a team of direct payment officers who can help adults with direct payment queries, including information on the services and support available. There are also fact sheets on the Council's website or from a direct payment officer, providing information on: using an agency; employing a personal assistant; acting as an authorised person; carer's direct payments as well as general advice and information. The social care practitioner will be the initial source of information for children's and families.

16.2 There are organisations that can provide independent and impartial advice, and support to people who are interested in learning more about direct payments as well as providing support and specialist advice such as:

- Help with insurance, recruitment, training, employment, contracts of employment, HMRC responsibilities, pension auto-enrolment, and national insurance.
- Support and advice about employment law, providing advice and support to sort out difficulties with employees
- Calculating holiday entitlement, notice, redundancy pay etc. for employees
- Providing a payroll service and payslips
- Easily accessible advice and support about payroll issues
- Managed accounts
- Support to process Disclosure and Barring Service checks (DBS)

16.3 Information about 'Approved Providers' and the services they offer is available [in the Berkshire Care Directory](#).

17. Disclosure and barring service (DBS) checks

17.1 West Berkshire Council recommends that DBS checks are carried out on all employees, including existing and new employees. The cost of the check should be met from the direct payment funds.

17.2 At present, when employing people via direct payments a DBS check is at the discretion of the employer, with the exceptions of the following where a DBS must be undertaken:

- where they are required by law for staff working with vulnerable adults
- where there is a child aged 16 or less living in the household

- where the social care practitioner has assessed that a person may be vulnerable or other vulnerable people living in the household may be putting themselves at risk if a DBS check is not carried out
- where there is an authorised person appointed the regulations specify that if the authorised person is not the spouse, civil partner, partner, close relative (or spouse or partner of a close relative) or friend involved in the provision of care of the person lacking capacity, then the Council will obtain a DBS check for that authorised person, as a further protective measure for the person lacking capacity. For example, the authorised person may be an independent care broker or a solicitor acting as a professional deputy, who may not previously have been personally known to the service recipient.

18. Role of the person receiving a direct payment.

18.1 The person receiving the direct payment, their nominated, or authorised appointed person is entering in to a contractual agreement with Adult Social Care (ASC) so it is important that they make sure they fully understand the terms of the agreement and what is involved.

18.2 The Council can give advice to the recipients on the responsibilities of managing a payment and whether the person in receipt of a direct payment needs to register with HM Revenue & Customs (HMRC) as an employer. Becoming an employer carries responsibilities and obligations, in particular to HMRC, and people must be aware of this before agreeing to take up a direct payment, as they are accepting responsibility to act legally as an employer including:

- registering as an employer
- operating PAYE
- checking that the potential employee has the right to work in the uk
- ensuring that any employees have undergone DBS checks before they start work
- ensuring that they pay their employees at least the national living wage
- complying with working time directives and adhering to legislation around holiday, sickness, maternity and paternity pay
- enrolling eligible employees into a workplace pension scheme
- putting personal liability insurance in place before a person works in their home.

18.3 The Council's direct payment officers can give access to information and advice on the support available for employers. There is also a separate fact sheet detailing the responsibilities of being an employer and the support available. The social care practitioner will be the initial source of information for Children's and Families.

- 18.4 Once direct payments have started, the individual or the Nominated/Authorised Appointed Person, will have to organise care to meet the agreed needs as set out in the support plan. This can include recruiting staff, employing an agency maintaining records, managing the direct payment and providing evidence to the Council that the money is being used to meet their agreed needs and that the person is central to the management of the direct payment.
- 18.5 Where there appears to be a change of need and/or the support plan appears to no longer meet the needs, the direct payment recipient and/or the Nominated/Authorised Appointed Person, must ask for a reassessment and a new support plan to be agreed.
- 18.6 For example where a person's needs change from support at home to the need for respite breaks, this must be agreed by the Council in advance.
- 18.7 The person receiving the direct payment must ensure (if appropriate) that services purchased meet an outcome specified in the support plan. Services that do not meet an outcome may be considered a breach of the direct payment agreement and could result in the direct payment being suspended or withdrawn.

19. Lasting power of attorney

- 19.1 An adult with mental capacity can make a Lasting Power of Attorney (LPA) for Health and Welfare decisions. He or she makes the LPA in the expectation that if they lose capacity, the person appointed as their Attorney will lawfully be able to continue to deal with his or her health and welfare once the power is registered with the office of the public guardian.
- 19.2 An LPA for property and finance can also be made, however the Care Act states that a person has to be authorised under the Mental Capacity Act to make decisions about the adult's needs for care and support in order to qualify as an authorised person in relation to direct payments, therefore an LPA for Property and Finance would not suffice for this purpose. If a person receives direct payments, then the attorney under the LPA could continue to receive payments on his or her behalf. The LPA will be asked to sign a direct payment agreement as the authorised person.
- 19.3 An attorney acting under an enduring power cannot give consent on the person's behalf, as an Enduring Power of Attorney only covers property and finance.
- 19.4 If a person, to the knowledge of ASC, becomes permanently incapable of managing a direct payment, whether alone or with help, ASC are required to review the situation and agree whether the direct payment can continue or whether the direct payment may have to cease and the Council commission for the provision of services instead. Currently, such an attorney cannot make decisions about a person's health care or personal welfare.

20. Dealing with emergencies/contingency arrangements.

- 20.1 The Council expects each person receiving a direct payment to make arrangements or contingency plans to cope with emergencies and this responsibility is included in the direct payment agreement.
- 20.2 The Council will ensure that support and advice on how to prepare appropriate arrangements is offered as part of the support planning process.
- 20.3 The duty of care rests with the Council, so in the event of an emergency, if the individual cannot organise care as detailed in their support plan, they should request assistance from the Council. Contact details for adults can be found on the West Berkshire Council website at <https://www.westberks.gov.uk/adultcare> or by calling 01635 503050.

21. Direct payments and hospital stays

- 21.1 There may be occasions when direct payment recipients require a stay in hospital. Consideration should be given to how the direct payment may be used in hospital to meet non-health needs or to ensure employment arrangements are maintained. Suspending or even terminating the payment could result in the recipient having to break/terminate the employment contract with an employee, potentially causing distress and a lack of continuity of care when discharged from hospital.
- 21.2 The employee's contract of employment should detail whether they will be retained in these circumstances, and any arrangements for paying retainers should be taken account of as part of support planning process.
- 21.3 In these cases, the Council will explore with the person, their carer and the NHS the options to ensure that both the health and care and support needs of the person are being fully met in the best way possible. For example, the person may prefer the personal assistant to visit hospital to help with personal care matters. This may be especially so where there has been a long relationship between the direct payment holder and the personal assistant. This should not interfere with the medical duties of hospital personnel, but be tailored to work alongside health provision
- 21.4 In some cases, the nominated or authorised person managing the direct payment may require a hospital stay. In these cases, the authority will conduct an urgent review to ensure that the person continues to receive care and support to meet their needs. This may be through a temporary nominated/ authorised person, or through short-term authority arranged care and support.

22. What if a bankrupt person requests direct payments?

- 22.1 If a person requesting a direct payment has been made bankrupt they must ensure that this is made clear to the Council at the time they apply.
- 22.2 The person can nominate someone else to manage their direct payment, by an account in the name of a third party, or managed account provider.

22.3 If there is any doubt as to the security of a direct payment account, the direct payment may be refused.

23. What if someone is already using direct payments and is declared bankrupt?

23.1 The Council will seek immediate advice from the Official Receiver/Trustee as to the security of the direct payment account. In the event of the account being subject to the terms of the bankruptcy, the direct payment monitoring team must be informed immediately. Payments to the account will be suspended until alternative arrangements can be made for another account holder or arrange a directly commissioned service.

23.2 The Council will ensure that any money paid into a direct payment account is safe and will not be included in any bankruptcy proceedings. The customer will have bankruptcy papers, which will determine which assets are included; they will also have a named Official Receiver/Trustee to oversee the bankruptcy. The Council will obtain copies of the bankruptcy papers and also telephone the Official Receiver/Trustee for advice as to the security of the direct payment account.

How direct payments are calculated and paid

24. Calculating the amount of the direct payment

24.1 The direct payment will be an amount that is sufficient to meet the needs the Council has a duty to provide.

- For ASC, the direct payment amount is derived from the personal budget as set out in the care and support plan
- For carer's, the assessing officer will determine an amount sufficient to achieve the unmet outcomes identified in the support plan.

24.2 This means that the direct payment should be sufficient to enable the recipient to lawfully secure a service of a standard that ASC considers is reasonable to fulfil the outcomes to which the payment relates.

24.3 The Council will consider whether the needs to be met via a direct payment will result in any on-costs, such as those associated with being an employer. Costs, such as employer's national insurance, tax, holiday pay, pension, and employers liability insurance, and the cost of providing support with payroll and management of the account will be incorporated into the personal budget amount where it is clear that the use of a direct payment to meet needs will incur these costs.

24.4 Under the Pensions Act 2008 every employer must put eligible employees into a pension scheme and contribute towards it. This is called auto-enrolment. The Government has set minimum levels of contributions that must be paid to the workplace pension scheme by the employer and employee. The Council will only fund the minimum employer contribution from the direct payment. This will be based on qualifying earnings between the lower earnings threshold and the upper earnings threshold. The Secretary of State will review these amounts each tax year.

- 24.5 ASC are not obliged to fund additional costs associated with the persons preferred method of securing the service, or costs incurred by the person at their discretion, for example, non-statutory liabilities such as an ex-gratia bonus or overtime payments to a personal assistant.
- 24.6 ASC may however decide that they are able to increase the amount to enable the person to secure his or her preferred service if it satisfied that the benefits of doing so outweigh the costs and that it still represents the best value for money.
- 24.7 Direct payments recipients can use their own resources to purchase additional services if they wish to do so.
- 24.8 A preventative strategy may necessitate a higher investment to achieve long-term benefits and savings. Provision of direct payments that allow a person to remain in their own home may represent long term savings if that person does not then require hospital or residential care. Similarly the provision of direct payments to a person in need of rehabilitated care may result in a more sensitive and individualised service, which may in turn ease a person's recovery.

25. How and when will the direct payment be made?

- 25.1 A separate current account or payment card account must be used for a direct payment. This has to be in the name of the person receiving the direct payment or may be a third party if agreed by the person in receipt of the direct payment and adult or children's services. The account cannot have an overdraft facility as the budget should be managed to avoid overspending.
- 25.2 The first payment will only be made once the support plan has been agreed and the signed direct payment agreement and Bankers Automated Clearing Service (BACS) form (if not chosen a payment card account) have been received.
- 25.3 Direct payments will be made by BACS, into the recipients direct payment account every 4 weeks in advance. Carers direct payments are usually made as a one off payment.
- 25.4 The amount of the direct payment may change following a review of assessed needs. If the review results in an increase in direct payments the additional funds may be made as a separate payment, or included in the next scheduled payment. Direct payments are paid in advance, so if the review results in a decrease in direct payments, no further payments will be made until the amount of the overpayment has been recovered. The recipient or the person managing the direct payment will receive remittance advices with details of payments made. The Council may also make changes to the direct payments at any time, giving service users at least 4 weeks' notice in writing.

26. Payment for goods and services from the direct payment account

- 26.1 All payments for goods and services to meet assessed needs identified in the care and support plan must be paid from the direct payment account. Suitable methods of payment for variable payments are cheque, bank transfer or direct debit. A

standing order should only be used for regular payments for items such as payroll fees, or gym membership. It is more difficult to control payments that are made by standing order, because if the cost of goods or services change or end you may under or over pay. The direct payment recipient is responsible for chasing the recovery of any overpayments made.

26.2 Payments for goods and services for which a person has been given a direct payment to meet assessed needs should not be paid for from the person's personal account. Funds can only be transferred from the direct payment account to reimburse costs paid from personal funds on the agreement of a direct payment officer and only in exceptional circumstances.

26.3 Cash payments cannot be made unless in exceptional circumstances and agreed with ASC, or a direct payment officer. A petty cash recording system will be set up to record and account for the cash withdrawn.

27. Payment card accounts

27.1 Payments can be paid into a payment card account, which the Council will open for the recipient. A debit card will be issued which can be used for chip and pin transactions. The recipient will also be able to access an online portal to manage the payment of their care and support by bank transfer, standing order or direct debit.

27.2 If the option of a payment card is chosen, receipts for support and services to meet assessed needs will need to be retained by the recipient as the Council may ask to see them. The Council will be able to monitor how the direct payment is being spent so it will not be necessary for monthly bank statements and expenditure records to be kept and submitted to the Council.

27.3 The use of a payment card account has benefits for the direct payment recipient and the Council but a 'traditional' direct payment paid into a bank account will be available if this is what the person requests and this is appropriate to meet needs.

28. Temporary and short term residential care arrangements.

28.1 Direct payments cannot currently be used to pay for people to live in long-term care placements. They can be made to enable people to purchase a short stay care home for themselves provided that the stay does not exceed a period of four consecutive weeks in any 12-month period. This could be used for example to provide a respite break for a carer.

28.2 The Regulations specify that where the interim period between two stays in care homes is less than four weeks, then the two stays should be added together to make a cumulative total, which should also not exceed four weeks if it is to be paid for with direct payments. On the other hand, if two stays in care homes are more than four weeks apart then they are not added together.

28.3 Once a direct payment recipient has had four consecutive weeks in care homes, or two or more periods separated by less than four weeks which added together total four weeks, then they cannot use their direct payments to pay for any more

services in a care home setting until 12 months have passed from the start of the four-week period. On the other hand, as long as each stay is less than four weeks and there is an interim period of at least four weeks between two or more stays which added together exceeds four weeks, then the service recipient may use their direct payments to pay for residential breaks throughout the year.

28.4 People can receive additional weeks in a care home once they have reached the four week maximum. They cannot purchase the stay using their direct payments, but if the Council and the person are in agreement that a longer stay is needed, it can still be arranged through a directly commissioned service.

28.5 The time limit is imposed to promote people's independence and to encourage them to remain at home rather than moving into long-term home placement. Where a person is constantly using the direct payment to pay for a short-term care home stays, the Council will consider whether to conduct a review to ensure that the support plan is still meeting needs.

28.6 Where someone is discharged from hospital and requires support after being through reablement or where a regular carer is not able to offer their support for a short period and it is assessed that the person needs help at home, this could be offered via a direct payment.

28.7 In these situations it is important to ensure that the assessment process is completed quickly to enable a direct payment to be offered in time for the care services to be engaged.

29. Additional sources of funding

29.1 To enable people to maximise their life choices there is a range of funding available other than social care funding.

29.2 It is important to ensure that all individuals maximise their income through the welfare benefit system. Welfare benefit checks will be undertaken when a financial assessment is carried out to establish any client contributions towards the direct payment that must be paid. If it is identified that an individual may have an entitlement to welfare benefits the financial assessment officer will make them aware of how to claim, and where appropriate refer them to the relevant benefits provider for assistance with making a claim.

29.3 The Council will cost packages of care on the assumption that a person will claim all the benefits and additional sources of funding to which they are entitled.

29.4 Health services will fund a wide range of health products, aids and adaptations and enter into joint funding arrangements with the Council where there are significant health implications.

30. Client Contributions

30.1 The Council will carry out a financial assessment with the person or their financial representative to establish how much, if any, a person has to contribute towards their direct payment.

- 30.2 For further information about financial assessments and charges please read the [Care and Support Charging](#) Policy.
- 30.3 The direct payment will be paid gross without deducting the assessed client contribution and an invoice for the contribution will be issued on a four weekly basis.
- 30.4 If the direct payment recipient chooses to secure the services of an agency that does not have a contract with the Council, the cost of care may be more expensive than the amount received as a direct payment. In this situation, the individual will need to make a payment from their personal funds for the difference in costs.
- 30.5 If a person chooses to purchase extra support from an agency, in addition to that identified in the support plan to meet their assessed needs, the additional cost should be paid into the direct payment account to pay for this. The person may prefer the agency to invoice them separately for any additional personal contribution.
- 30.6 If a person chooses to arrange extra support from their personal assistant/s they are also responsible for additional employment costs incurred, such as accrued holiday, national insurance contributions, employers national insurance, pension contributions, and redundancy payments, if appropriate. These additional costs must be paid in to the direct payment account
- 30.7 If a personal assistant is employed in more than one role only the role/s relevant to meet the needs identified in the care and support plan can be paid from the direct payment. For example if a person is employed as a gardener and as a personal assistant to provide personal care, but gardening is not an assessed need in the care and support plan, only the employment of the role of personal assistant should be paid from the direct payment. HMRC or a payroll provider can advise on the administration of payroll in these circumstances.

Terminating Direct Payments

31. Discontinuing direct payments.

- 31.1 A person to whom direct payments are made, whether to purchase support for themselves or on behalf of someone else, may decide at any time that they no longer wish to continue receiving direct payments. In these cases, the Council will ensure there are no outstanding contractual liabilities, and conduct a review of the support plan to consider alternate arrangements to meet needs.
- 31.2 If terminating a direct payment, the Council will ensure there is no gap in the care and support. Where a decision has been made to terminate a direct payment, the Council will conduct a revision of the support plan to ensure that the plan is appropriate to meet the needs in question. Either the direct payment recipient or the Council can give four weeks' notice to terminate the direct payment.

- 31.3 Where the direct payments are used to employ personal assistants the Council give sufficient notice of termination to ensure the direct payment recipient/employer is able to give the employee appropriate notice under their contract of employment.
- 31.4 Direct payments will be discontinued when a person no longer needs the support for which the direct payments are made. This might happen in situations where the direct payments are for short-term packages when leaving a care home or hospital. Direct payments for aftercare services under section 117 of the Mental Health Act would also cease once the clinical commissioning group and Council are satisfied that the person concerned is no longer in need of such services.
- 31.5 There may be circumstances in which the Council discontinues direct payments temporarily. An example might be where there are safeguarding concerns or when an individual does not require assistance for a short period because their condition improves and they do not require the care and support that the direct payments are intended to secure. The Council will need to discuss this with the person, their carer, and any other person how best to manage this. The person should be allowed to resume responsibility for their own.. care after the interruption, if that remains their wish, unless there has been a change of circumstances, which means that the conditions in the Act and/or Regulations are no longer met. If there is a change of circumstances that affects the support plan the Council will revise the plan to ensure that it is still meeting needs.
- 31.6 The Care and Support (Direct Payments) Regulations 2014 set out that a direct payment must not be provided under certain conditions, such as where the recipient is placed by the courts under a condition or requirement relating to a drug and/or alcohol dependency.
- 31.7 Where direct payments are discontinued as a result of criminal justice legislative provisions, the Council will make timely arrangements for services to be provided in lieu of the direct payments, to ensure continuity of support.
- 31.8 Where the direct payment is made to a payment card account the Council may put a deposit only marker on the account where there is inappropriate spend pending investigations.
- 31.9 The Council may suspend the direct payment pending investigation of inappropriate spend, where funds have been spent on goods or services which do not meet the person's assessed needs identified in the support plan/child in need plan. We will write to you advising you of this course of action and seek to remedy any issues and explore whether additional support in the management of the direct payment is appropriate.
- 31.10 Where a direct payment is used to employ a personal assistant a direct payment may be suspended when there is evidence that the employer is not acting legally by complying with HMRC regulations or working time directives, whilst the options of the persons suitability to act an employer is considered and additional support explored.
- 31.11 The Council will only terminate a direct payment as a last resort, unless there is clear and serious contradiction of the Regulations or where the conditions in

sections 31 or 32 of the Care Act are no longer met (except in cases of fluctuating capacity). The Council will take all reasonable steps to address any situations without the termination of the payment. This may include exploring additional support with management of the account and employer responsibilities.

31.12 The Council will discontinue payments if the person fails to comply with a condition imposed under regulations to which the direct payments are subject, or if the Council no longer believes it is appropriate to make the direct payments. For example, the Council might discontinue the direct payment if it is apparent that they have not been used to achieve the outcomes of the support plan, or when a person fails to comply with the financial monitoring requirements.

31.13 Direct payments will cease if the person no longer appears to be capable of managing the direct payments or of managing them with whatever support is necessary.

32. Recovering direct payments

32.1 Direct payment recipients will be asked to repay funds into the direct payment account if it has been used to pay for good or services which do not meet the agreed assessed outcomes in the support plan.

32.2 When the direct payment ends the closing balance, of the direct payment must be returned to the Council.

32.3 The Council will arrange an invoice for any funds that are not repaid to the direct payment account or directly back to the Council. Non-payment of the invoice may be pursued through the Council's debt recovery process.

33. Discontinuing direct payments in the case of persons who lose capacity to consent

33.1 Where someone with capacity was receiving direct payments but then loses capacity to consent, the Council will discontinue direct payments to that person and consider making payments to an authorised person instead. In the interim, the Council will make alternative arrangements to ensure continuity of support for the person concerned.

33.2 If the Council believes the loss of capacity to consent to be temporary, it may continue to make payments if there is someone else who is willing to manage payments on the person's behalf. This situation should be treated as strictly temporary and closely monitored to ensure that, once the person has regained capacity, they are able to exercise overall control over the direct payments as before. If the person's loss of capacity to consent becomes prolonged, then the Council should consider making more formal arrangements for an authorised person to take over receipt of the direct payments on that person's behalf. The Council should make clear that the arrangement is designed to be temporary, so that the person managing the direct payment does not enter into any long-term contractual arrangements.

34. Discontinuing direct payments in the case of persons lacking capacity to consent

34.1 Direct payments will be discontinued if the Council is no longer satisfied that the authorised person is acting in the best interests of the beneficiary, within the meaning of the Mental Capacity Act 2005. The Council might also wish to discontinue the direct payments if it has sufficient reason to believe that the conditions imposed under regulations on the authorised person are not being met. The authority may wish to consider if someone else can act as an authorised person for the person lacking capacity, or whether it will have to arrange services for them in place of the direct payments.

34.2 Section 32 of the Care Act 2014 states that direct payments will be discontinued where the Local Authority has reason to believe that someone who had lacked capacity to consent to direct payments has now regained that capacity on a long-term or permanent basis. The authority should not terminate direct payments to the authorised person before beginning to make direct payments to the service recipient themselves or to arrange services for them, according to their wishes. If the Local Authority is satisfied that the regaining of capacity will only be temporary, then it can continue to make direct payments to the authorised person if during the period that the adult has the capacity to make the request and is capable of managing the direct payment, the adult will manage the payments for him or herself.

Reviews and Monitoring

35. Reviewing the direct payment

35.1 It is necessary as with any new package of care to monitor and review direct payments closely in the first few months. The direct payment review should be incorporated into the initial review of the support plan 6-8 weeks after the direct payment agreement has been signed and will include discussions, such as managing the direct payment, and long term support arrangements that may be appropriate, such as payroll, insurance cover, and use of support services.

35.2 If there are concerns about stability of the care package or the ability of the person to manage their care it will be necessary to undertake a risk assessment. This will weigh the relative gains for the person and risks involved.

35.3 If the direct payment recipient is employing people, the Council will within the first 6 months check to ensure that the individual is fulfilling their responsibilities as an employer, in particular that they submitting PAYE returns to HMRC as well as paying tax, national insurance contributions and any pension contributions.

35.4 A change in needs is identified as part of a care assessment, alternative ways of those needs may be identified which result in a change to the amount or use of direct payment, including the ending of the direct payment.

36. Financial Monitoring

36.1 The Council is accountable for the public money it manages. This includes direct payments funding. Direct payments are part of the accounting process and as such accurate records are required to identify how this money is used to provide services to individuals.

36.2 In addition to ensuring that the persons care and support needs are being met by the direct payment, financial monitoring will be undertaken to assess the person's ability to manage the financial responsibility for purchasing services. All new direct payments will be monitored within the first 3 months of starting to ensure that all legal obligations such as submissions to HMRC are being met and to identify if any additional support is needed.

36.3 The monitoring review will include reviewing spend to ensure there is sufficient money to pay for employment related responsibilities (where applicable) and to check the client contributions that are being paid into the account.

36.4 Financial monitoring is also carried out to safeguard direct payment recipients from financial abuse or lack of care provision through insufficient funds.

36.5 If a direct payment is made to a payment card account the Council will have access to all transactions made and regular submission of spending returns will not be required. However, all documents should be retained as the Council will ask to see samples of these, and where inappropriate spend has been identified will ask to see all evidence of spending. If this information is not provided to verify expenditure the Council may consider transferring the payment to a managed account. If a payment card has not been chosen and the payments are made to the individuals direct payment account, there will be two levels of monitoring:

- **Standard** - The direct payment recipient will be required to submit regular returns of their spending, including receipts and bank statements to the direct payment officer upon request. Accounts will then be submitted every six months. If it is identified that additional support is needed or there are concerns about the management of the direct payment, such as non-payment of client contribution; non-payment of PAYE, the accounts will continue to be submitted on a 3 monthly basis.
- **Light-Touch** - Where the direct payment is being well managed, without support. The direct payment recipient will need to keep spending receipts and bank statements but will be asked to submit an annual spending return.

36.6 The monitoring team will contact the direct payment recipient to remind them to submit this information, if overdue. If accounts are not submitted following reminders, arrangements may be made for future direct payments to be paid to a payment card or managed account, so that expenditure from the direct payment can be verified.

36.7 The direct payment recipient will be placed on the 'Standard' financial monitoring once the direct payment has been put in place. The timetable for providing information will be discussed at the direct payment set-up meeting.

- 36.8 A risk based approach will be used to assess whether the person's suitability for moving on to a 'Light Touch' monitoring is appropriate.
- 36.9 People will not be forced on to light touch monitoring if they express a preference to submit regular returns.
- 36.10 When the direct payment has been monitored a report will be sent to the direct recipient if areas of concern have been identified. This might include; non-payment of contribution or top-up; low balance/overspending; inappropriate spend or excess funds. The report will outline any action that needs to be taken.
- 36.11 If the direct payment monitoring identifies funds in excess of that needed to meet the agreed outcomes in the support plan, this will be shown in a monitoring report. A breakdown of how the surplus has been calculated will also be provided. The calculation will take into account any known liabilities and will leave an additional 4 weeks payment as a contingency. The social care team will confirm whether the surplus funds are to be returned and a full review of the care and support may be needed.

37. When a direct payment is refused

- 37.1 In some circumstances it may not be possible for ASC to agree a direct payment for an individual. This may be because they become exempt under legislation, where there is evidence of inability to manage the budget, or where there are concerns that a person isn't able or willing to act legally as an employer.
- 37.2 The reason for the decision will be clearly documented, discussed and communicated in writing to the person and where appropriate with any family or friends.
- 37.3 The person will also be advised of their rights to challenge the decision and how to use the complaints procedure to do this.
- 37.4 This may involve a meeting of the parties involved to try to find a solution to the issues raised in the formal rejection. This could include the person and their representatives, and representatives from the relevant Council department.

38. Complaints procedure

- 38.1 This is available to all direct payment recipients and can be used to make a complaint about services or procedures undertaken by the Council.
- 38.2 A person who is considering direct payments may use this procedure to formally complain about the process, the decision making or the amount offered as a direct payment but not about the services they have purchased.
- 38.3 Individuals, their families or carers who wish to make a complaint, comment or compliment should contact the Complaints Team based at:

West Berkshire Council

Market Street Offices
Newbury
RG14 5LD

38.4 A complaint can be made in writing to the above address or on line using the link below.

<https://www.westberks.gov.uk/complaints>

39. Social Care Fraud

39.1 This type of fraud is when a person who receives social care services:

- Is dishonest about their financial status or care and support needs
- Misuses direct payments provided to pay their care
- Uses the direct payment account for money laundering

39.2 Some types of social care fraud include;

- Using money that has been claimed from the Council to pay for care for their own personal use.
- Submitting false evidence that a direct payment is being used on care.
- Being dishonest about financial circumstances or care and support needs when asking for social care funding.
- Not telling the Council when a service user has died, and keeping their direct payment money.
- A person abusing their position of care to take money from a vulnerable person.
- Paying money into the direct payment account that has been gained from criminal conduct.

39.3 The Council has a duty to protect the public purse and has a zero tolerance approach to fraud and corruption. Action will be taken against any attempted or actual fraudulent acts relating to direct payments.

39.4 Everyone has a duty to report any concerns of fraud, or misuse of direct payments funds, and any report of fraud against the Council will be taken seriously.

40. Auditing of processes

40.1 The Council's internal audit department will periodically review direct payments and associated processes, to ensure compliance with this policy and with the agreed terms and conditions in the direct payment agreement.

Appendix 1

1. Appointing an authorised/suitable person

Chapter 23 sub section 32 of the Care Act 2014 Statutory Guidance sets out clearly who can be considered an authorised person in terms of receiving a direct payment on behalf of a person who lacks mental capacity to manage one themselves. It outlines what conditions have to be met before the Local Authority must make payments to the authorised person if requested.

A person is authorised to receive payments if:-

- a) The person is authorised under the Mental Capacity Act 2005 to make decisions about the adult's needs for care and support (this would be a person who holds a valid Lasting Power of Attorney for Health and Welfare, or who has been appointed as a deputy for Health and Welfare decisions by the Court of Protection).
- b) Where the person is not authorised as above, but a person who is so authorised agrees with the Local Authority that the person is a suitable person to whom to make direct payments.
- c) Where the person is not authorised as mentioned in Paragraph (a) and there is no person who is so authorised, the Local Authority considers that the person is a suitable person to whom to make direct payments.

The conditions outlined in the Care Act are as follows:-

Condition 1 is that, where the authorised person is not authorised as mentioned in subsection [\(4\)\(a\)](#) but there is at least one person who is so authorised, a person who is so authorised supports the authorised person's request. Condition 2 is that—

- (a) the Local Authority is not prohibited by regulations under section 33 from meeting the adult's needs by making direct payments to the authorised person, and
- (b) if regulations under that section give the Local Authority discretion to decide not to meet the adult's needs by making direct payments to the authorised person, it does not exercise that discretion.

Condition 3 is that the Local Authority is satisfied that the authorised person will act in the adult's best interests in arranging for the provision of the care and support for which the direct payments under this section would be used.

Condition 4 is that the Local Authority is satisfied that the authorised person is capable of managing direct payments—

- (a) by himself or herself, or

- (b) with whatever help the authority thinks the authorised person will be able to access.

Condition 5 is that the Local Authority is satisfied that making direct payments to the authorised person is an appropriate way to meet the needs in question.

2. Conditions to be met by the authorised person

As with all direct payments, the Council must be satisfied that the beneficiary's needs are met by means of the direct payments and that the recipient (in this case the suitable person) is capable of managing the direct payments.

To help ensure that the authorised person does not mismanage or misuse the direct payments, the Regulations set out a number of conditions that the Council should require of the authorised person before it makes direct payments to that person on someone else's behalf.

- Unless the Council is satisfied that it is necessary to satisfactorily meet the person's needs, direct payments may not be used to secure services from the spouse, civil partner or partner of a person lacking capacity. Neither can they be used to secure services from a close relative, spouse or partner of a close relative of the person lacking capacity who is currently living in the same household as the person lacking capacity. There may be occasions when the Council decides that it is necessary for the authorised person to use the direct payments to secure services from a member of the family of the person lacking capacity. However, such situations are likely to be exceptional and the Council should be satisfied at all times that arrangements are made in the best interests of the person lacking capacity.
- The authorised person manages the direct payments on behalf of the person lacking capacity, on the understanding that in doing so, they must act in the best interests of that person. This includes, as far as is reasonably practicable, encouraging and permitting the person lacking capacity to have the fullest input possible into decisions affecting them.
- The authorised person should be required to take all practical steps to ensure that decisions are taken in the best interests of the person who lacks capacity. This may involve consulting other people close to the person lacking capacity, or health and social care professionals where appropriate. To ensure that the service recipient can maintain as much control and independence as possible, the authorised person should be required to notify the Council as soon as they believe the person has regained capacity.

3. Principles of best interest

A person trying to act in the best interests of someone lacking capacity should:

- do whatever is possible to permit and encourage the person to participate, or to

- improve their ability to participate, as fully as possible, in acts and decisions;
- try to identify and take into account all the things that the person who lacks capacity would take into account if they were acting for themselves, including their past and present wishes and feelings and any beliefs and values which would be likely to influence their decisions;
- not make assumptions about what might be in the interests of the person lacking capacity simply on the basis of the person's age, appearance, condition or behaviour;
- assess the likelihood of the person regaining capacity;
- consult others when making decisions, including anyone previously named by the person as someone to be consulted, anyone engaged in caring for the person, family members, close relatives, friends or others who take an interest in the person's welfare, any attorney appointed under a lasting power of attorney made by the person and any deputy appointed by the Court of Protection to make decisions for the person; and
- for any major decisions, make sure a record is kept of the process of working out the best interests of that person.

4. Where disputes arise

The authorised person may face disagreements with others involved in or concerned for the welfare of the person lacking capacity to consent. Family members, partners and carers may disagree between themselves about how direct payments should be spent, or they may have different memories about what views the person expressed in the past. Carers and family might disagree with a professional's view about the person's care or treatment needs.

The Council will support the authorised person to balance these concerns and decide between them. The Council will include the person who lacks capacity (as much as they are able to take part) and anyone who has been involved in earlier discussions. It may or may not be possible to reach an agreement at a meeting to air everyone's concerns, but any decision will always be in the person's best interests, following the best interests' principles in the 2005 act.

5. Advocacy

An advocate may be useful in providing support for the person who lacks capacity to consent either in terms of deciding who should act as an authorised person on their behalf or, subsequent to that decision being made, how the direct payments should be used to meet the assessed needs. Advocates may be especially appropriate if:

- the person who lacks capacity has no close family or friends to take an interest in their welfare;
- family members disagree about the person's best interests;

- family members and professionals disagree about the person's best interests;
- the person who lacks capacity has already been in contact with an advocate; or
- there is a concern about the protection of a vulnerable adult.

6. Approaches to risk

People lacking mental capacity may not be able to exercise the same level of choice and control as other direct payment recipients. However, direct payments can still provide a vital means of ensuring that choices about the persons care and support can be made by those who are best placed to understand their needs and preferences and who know how to involve them as much as possible in decisions to support their best interest.

The Council will take steps to develop a comprehensive risk management strategy, to ensure that where a person is lacking capacity, and may not only be more vulnerable to abuse, but also less able to tell people when it is happening that such circumstances inform the support plan and subsequent arrangements for monitoring and review. It is likely that reviews may need to be conducted more frequently and in person rather than on the telephone, particularly in the early stages of the direct payments being made. The Council can consider involving other people known to the person lacking capacity, particularly those consulted when the authorised person was first appointed, as well as independent advocates where appropriate.

The Care Act 2014 and the mental capacity act code of practise specify that independent mental capacity advocates (IMCA's) can be used in care reviews where the person concerned has no one else to be consulted.

7. Safeguarding

There are various legislative provisions that have been put in place to support safeguarding measures for adults lacking mental capacity. The regulations specify that if the authorised person is not the spouse, civil partner, partner, close relative (or spouse or partner of a close relative) or friend involved in the provision of care of the person lacking capacity, then the Council will obtain a DBS check for that authorised person, as a further protective measure for the person lacking capacity.

For example, the authorised person may be an independent care broker or a solicitor acting as a professional deputy, who may not previously have been personally known to the service recipient.

Anyone caring for a person who lacks capacity for the purpose of the Mental Capacity Act 2005 who wilfully neglects or ill-treats that person can be found guilty of a criminal offence under the act punishable by up to five years in prison, or a fine, or both.

In addition, the Fraud Act 2006 created a new offence of 'fraud by abuse of position'. This may apply to a range of people including attorneys under a Lasting Power of Attorney (LPA) or enduring power of attorney (EPA) or deputies appointed by the court of Protection to make financial decisions on behalf of a person who lacks capacity.

Someone acting as an authorised person receiving direct payments may be guilty of fraud if they dishonestly abuse their position, intend to benefit themselves or others, and cause loss or expose that person to the risk of loss.

Without discouraging people from taking up the role of authorised person, Councils should also make clear to anyone considering the role the consequences of financial misconduct or other forms of neglect or ill treatment.

The independent mental capacity advocate service was set up as a consequence of the 2005 act to support and represent the views of particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions.

For more information; see department of health, making decisions: the Independent Mental Capacity Advocate (IMCA) service (2007), Section 44 of the Mental Capacity Act 2005, and Section 4 of the Fraud Act 2006 guidance on direct payments.

The regulations also provide Councils with the power to impose other directions on the authorised person if Councils believe that it is necessary to ensure the best interests of the person requiring services to impose other conditions, then this should be done.

Appendix 2

1. The following are examples only of what direct payments can be used for:

- (a) A direct payment can be used to pay an independent care agency (the Council would expect them to be registered with the Care Quality Commission (CQC)), or to employ anyone with the exception of a close relative living in the same household – except where adult's services have agreed that in exceptional circumstances it is the only way a service can be secured to meet the person's needs.
- (b) Direct payments may also be used to enable people who are living in care homes to have temporary access to direct payments to try out independent living arrangements before making a commitment to moving out of their care home.
- (c) Direct payments can be used by people living in care homes to buy a day service place, or engage in an alternative daytime activity. This can be particularly enabling for young people at transition stage as long as it is an agreed and eligible need as identified in the support plan.

The Council may provide direct payments to enable people to purchase for themselves equipment that would otherwise have been provided by adult and children's services.

Direct payments may also be made to enable people to pay for adaptations, which would otherwise have been provided or arranged by ASC.

The Council may make direct payments for equipment to enable carers to purchase, as a carers service, specific items of equipment that are not provided by adult and children's wellbeing services or the NHS.

Direct payments cannot currently be used to pay for long term residential care but they can be made to purchase short stays in a care home. Once a direct payment recipient has had four consecutive weeks in care homes or two or more periods separated by less than four weeks, which added together total four weeks, they will not be permitted to use their direct payments to pay for any more care home fees until 12 months have passed since the start of the four week period. Where each stay is for less than four weeks and there is an interim period of at least four weeks between two or more stays, which added together exceed four week, the service user may use their direct payments to pay for residential breaks throughout the year.

- (i) Direct payments can be used flexibly by the service users to purchase alternatives to traditional care, for example gym memberships as an alternative to attending day care. These services should only be included as an alternative, not an addition, to traditional care services. Any such costs need to be **defined** in the support plan/child in need plan and the service users made aware that they will get confirmation from the social worker or

direct payment monitoring officer before paying for anything that is not mentioned in the support plan/child in need plan.

2. Direct Payments for persons in supported living arrangements

Currently, it is not possible to purchase permanent residential care with a direct payment, however direct payments can be used by people living in supported living services to purchase part or all of their care. This can pose a range of issues where the person has a tenancy in a group living arrangement and the whole group is supported by one care agency, in which case the following provisions will apply:-

- (a)** Each tenant should have an individual arrangement and support plan and the option to have some or all of their needs met via a direct payment. When setting up supported living in a group situation it is important to commission each service individually.
- (b)** Direct payments can be made for equipment assessed as aiding independence by ASC staff; usually an occupational therapist.
- (c)** When making a direct payment for the purchase of items of equipment, staff will need to satisfy themselves that the person's needs are met by their own arrangements and they are adequately supported by specialist expertise. This is particularly true in the case of major items, when advice may be needed to ensure that equipment purchased is safe and appropriate.