

Report to Cabinet

7 December 2022

Subject:	Adult Social Care Direct Payments Policy
Cabinet Member:	Finance and Resources - Cllr Piper Adults, Social Care and Health - Cllr Hartwell
Director:	Director of Finance – Simone Hines Director of Adult Social Care - Rashpal Bishop
Key Decision:	Yes
Contact Officer:	Service Manager (Business Management) - Kay Murphy, Kay_Murphy@sandwell.gov.uk

1 Recommendations

- 1.1 That the Director of Adult Social Care and the Director of Finance be authorised to implement the proposed Direct Payments Policy and ensure it is embedded in future practice by all relevant staff members.




2 Reasons for Recommendations

- 2.1 The Director of Adult Social Care and the Director of Finance have commissioned work to check the compliance of the Council's current Direct Payments practice against the Care Act 2014.
- 2.2 Although much of our existing Direct Payments practice is governed by legislation, there are areas of local discretion and clarification, and this paper proposes establishing a policy which sets out the council's decisions on such areas, as well as taking account of recent case law and Local Government Ombudsman findings. In addition, specific legal advice has been obtained to ensure that the changes proposed fall within the discretionary powers of the council.



- 2.3 The proposed policy does not impact on the financial elements of Direct Payments: it provides more detailed guidance on the operation of the national scheme, so it is not considered that public consultation is required.

3 How does this deliver objectives of the Corporate Plan?

	<p>People live well and age well - clarifying some elements of current policy makes it easier for users of service and residents to understand how we make decisions regarding our provision of Direct Payments and associated governance</p>
	<p>Strong resilient communities - ensuring residents understand our policy and principles will contribute towards creating stronger and more resilient communities</p>
	<p>A strong and inclusive economy – ensuring people have sufficient funds to meet all reasonable needs through a Direct Payment is essential for an equitable economy</p>

4 Context and Key Issues

- 4.1 The Care Act repealed all previous national direct payment regulations and guidance such as the Direct Payment Regulations 2009, which were replaced by new statutory guidance in the Care and Support Statutory (CASS) Guidance published in October 2014 and the Care and Support (Direct Payments) Regulations 2014.
- 4.2 Direct payments were originally introduced nationally in the 1990's and the Care Act consolidated their use to “provide the platform with which to deliver a modern care and support system” along with personal budgets and personalised care and support planning.
- 4.3 People assessed as needing care and support are to be encouraged to take ownership of their care and support planning and be free to choose how their needs are met, whether through council or third-party provision, by direct payments, or by a combination of these ways.
- 4.4 This paper proposes adopting a new Direct Payments Policy to govern those areas of the law where the council has discretion or where it is considered we need to clarify how we deal with specific issues which have arisen in the decades of operating a DP scheme.



- 4.5 These changes focus on the offer of direct payments and their governance. Direct payments are the key mechanism for delivering personalised care and support, and so are our preferred method of delivering services where people can manage them. They provide independence, choice, and control by enabling people to arrange and purchase their own care and support to meet their eligible needs.
- 4.6 At the same time, we have a duty to use public funds wisely and ensure that they are used in accordance with law and regulation (including employment and tax). That requires us to operate effective monitoring processes that ensure that a direct payment is meeting a person's assessed needs without restricting choice, stifling innovation, or placing undue burdens on people to provide information to us.
- 4.7 Setting out a policy provides clarity about the council's expectations in offering a direct payment and underpins current work to simplify processes for both DP recipients and staff. This includes the imminent introduction of a "pre-paid card" which will transform the operational and reporting requirements currently placed on DP recipients.
- 4.8 The government's recent announcement of proposals for Adult Social Care Act funding reform do appear likely to extend the use of Direct Payments to cover long-term residential care from October 2023, currently not permitted. However, this does not in itself impact on the policy elements included in this report. Once final details of the reforms are published, a separate report to Cabinet will be required – possibly associated with public consultation – to implement all of the elements, which will impact on a number of policy and practice guidance documents including those for Direct Payments.
- 4.9 If approved by Cabinet, the policy will be implemented through both public information and internal practice guidance in January 2023. However, whilst the policy should apply to all clients from the approval date, there may be some existing clients whose direct payment arrangements are not compliant with the policy – for example, where close relatives are being employed.
- 4.10 In these circumstances, there will need to be a period of transition, as legal advice is that a strict application of the new policy on day one could be seen as unreasonable. It is proposed, therefore, that following implementation of the policy, the Council undertakes a review of existing



cases to identify those which are non-compliant with the new policy. At this point, we will;

- a) work with the client and their families to assure ourselves that the arrangements are a reasonable use of the Council's discretion; and/or;
- b) work with the client and their families to identify what change(s) are required to make the arrangements compliant with the Council's policy.

4.11 There is no legal requirement for the Council to consult on these changes, given that the policy is based on (and is in line with) the statutory framework. As there is no existing written policy reflecting the current position from which the Council is diverging, legal advice is that there is no need to consult.

4.12 The key elements of the proposed policy are summarised below, with the proposed policy attached as **Appendix A**.

5 Summary of main proposals

- 5.1 The right to have a Direct Payment: the council's preference for DPs as a delivery mechanism must be balanced by the need to ensure that making direct payments is an appropriate way to meet the needs in question.
- 5.2 Offering a Direct Payment: encouraging DP take-up; the use of nominated and authorised people to assist a person to take on a DP.
- 5.3 Direct Payments for people with capacity: The Care Act conditions to be met for a person assessed as having the mental capacity to manage it; the use of a nominated person where required or (exceptionally) the use of a third party agency to manage the DP on behalf of the person where they have capacity but cannot deal with the management.
- 5.4 Direct payments for adults lacking capacity to consent: not providing Direct Payments to a person assessed as lacking capacity to request them, unless they have an authorised person who can manage on their behalf and who meets capacity and suitability tests set out in the Care Act.



- 5.5 Suitability for a Direct Payment: assessing the suitability of the person or their nominee/authorised person to effectively manage a direct payment to meet their needs.
- 5.6 Safeguarding: ensuring that Care Act requirements for safeguarding and managing risk are embedded in the DP process.
- 5.7 Conditions of a Direct Payment: setting out the key expectation of anyone who receives a direct payment in terms of planning and practice.
- 5.8 Restrictions on paying family members: setting out when this is acceptable, by clarifying the Care Act requirement that such payments can only be made if the local authority considers it is necessary to do so to meet the needs of the adult: providing guidance to ensure the best interests of the cared-for person are paramount.
- 5.9 Employment duties: setting out the duties a person who employs staff to deliver their care must adhere to, and when a Disclosure and Barring Service (DBS) check may be required in accordance with the Safeguarding Vulnerable Groups Act 2006.
- 5.10 Recovering Direct Payments: being clear where we may recover unused funds and/or adjust future payments.
- 5.11 Suspending or terminating Direct Payments: setting out the circumstances where we may (or are required to) suspend or withdraw a DP and provide care and support by alternative methods.
- 5.12 Wrongful use of a Direct Payment: setting out the actions we will take in the event of improper use of a DP.

6 Alternative Options

- 6.1 The Council should have a Direct Payments Policy to cover areas of discretion, or to clarify our decisions where issues have arisen in the past.
- 6.2 It would be possible to carry on without a policy, but this risks the Council being challenged on areas where the Care Act does not set out a clear framework, and it is considered prudent, therefore, to ensure that people understand what our policy is.



7. Implications

<p>Resources:</p>	<p>There are no specific financial issues arising from this report.</p> <p>In terms of staffing, the requirements outlined above will require more review in relevant cases to ensure compliance. There will be an impact on social care practitioner time, for example in assessing a person's ability to manage finance, which they may not have experience in doing. There may also be an increase in appeals.</p> <p>These staffing implications will be managed by the provision of more detailed guidance, a toolkit and criteria to ensure consistency of application. This will be accompanied by associated training to manage the risks to a more acceptable level.</p>
<p>Legal and Governance:</p>	<p>The discretionary elements of the Care Act 2014 and subsequent regulation provides the basis for this policy.</p>
<p>Risk:</p>	<p>There are risks associated with this report arising from the introduction of a policy that sets out to ensure our practice is consistent. In some cases, this may mean that we decide we should not offer a direct payment, or that we suspend or terminate one that we assess is not being managed effectively.</p> <p>This may lead to outcomes such as increases in appeals or challenge, or refusal to accept the care and support service the person has been assessed to require. However, specific legal advice has been obtained to confirm that the changes made fall within the council's discretionary powers.</p> <p>Legal advice is that the introduction of the new policy is unlikely to carry significant risk of legal challenge; it is the changes that could be made to a particular client's specific arrangements as a consequence that could bring challenge in an attempt to resist any changes the Council proposes. This could be either based on a legitimate expectation argument, or on a human rights basis in relation to employing close relatives and the right to a family life. However, in both cases, the Council could potentially justify any changes on,</p>



	<p>for example, the grounds of safeguarding if a challenge is made.</p> <p>The risks have been assessed, and sufficient actions have been identified to ensure that the risks are mitigated to an acceptable level and are being addressed in an improvement plan which aims to deliver change within the current calendar year. None of the risks are “red” in terms of being high impact or highly likely.</p>
Equality:	Overall, the proposed policy is not considered to have any impact on any type of equality characteristic. The EIA completed for this report contains more analysis and detail.
Health and Wellbeing:	There are no specific health and wellbeing implications arising from this report.
Social Value:	There are no specific social value implications arising from this report
Climate Change:	There are no specific climate change implications arising from this report

8. Appendices

Appendix A – the proposed Direct Payments Policy

9. Background Papers

- The Care Act 2014
- The Care and Support Statutory (CASS) Guidance October 2014
- The Care and Support (Direct Payments) Regulations 2014
- The Mental Health Act 1983
- Safeguarding Vulnerable Groups Act 2006

