

**REPORT OF THE CHAIRMAN OF THE ADULT SOCIAL CARE AND PUBLIC
HEALTH COMMITTEE****DIRECT PAYMENTS POLICY: UPDATE TO THE DISCLOSURE AND
BARRING SERVICE SECTION****Purpose of the Report**

1. This report seeks approval of the proposed amendments to the Disclosure and Barring section of the Direct Payments Policy, attached as **Appendix 1**, and the addition of paragraph 11 relating to safeguarding against Modern Day Slavery where a Direct Payment is being used to employ Personal Assistants.

Information

2. The refreshed Direct Payments Policy was approved at Policy Committee on 18th July 2018. Following this approval it became evident that further legal clarification was required regarding the Council's authority to *require* the undertaking of DBS checks for Personal Assistants employed through a Direct Payment and to clarify the Council's policy position in relation to DBS checks where a Personal Assistant (PA) is also a family member of the service user. Legal guidance clarified that:
 - if receiving payment for services, a Personal Assistant's role falls within the definition of Regulated Activity under the Safeguarding Vulnerable Groups Act 2006. This applies equally to family and non-family Personal Assistants.
 - under the Safeguarding Vulnerable Adults Act 2006, the Direct Payment recipient faces potential criminal sanctions if they use a Personal Assistant who is barred from providing those services. Undertaking an enhanced DBS and Barred list check on all Personal Assistants is the most straightforward way to find out if a Personal Assistant is barred.
 - the policy has therefore been revised to show that the Council expects an Enhanced DBS and Barred list check to be undertaken for all Personal Assistants paid using a Direct Payment.
 - non-compliance by the Direct Payment recipient with the Council's DBS check recommendations is not sufficient in law to entitle the Council to withhold the offer of a Direct Payment if all the required pre-requisites listed in the Care Act 2014 for offering

a Direct Payment are otherwise fulfilled. Therefore the Council cannot have a rigid policy that DBS checks are a mandatory requirement for employing Personal Assistants with a Direct Payment (this was the previous Direct Payment policy position as agreed in July 2018).

- however, section 31 of the Care Act 2014 sets out conditions that must be met before the Direct Payments process can be used. One condition is that the Council must be satisfied that the potential Direct Payment recipient is capable of managing the direct payments. Another is that the Council is satisfied that using Direct Payments is an appropriate way to meet the recipient's needs. It may well be that if a Direct Payment recipient refused to comply with the Council's DBS check recommendations, it would lead the Council to conclude that, in that particular instance, the above stated conditions were not met. In such circumstances, the Council would not be able to offer a Direct Payment.
 - it was agreed at Policy Committee in July 2018 that the Council would be an Umbrella Organisation. This enables it to undertake the checks on behalf of Direct Payment recipients, who, as individual employers cannot request a DBS check for their staff in their own right.
 - carrying out checks for the Direct Payment recipient will result in the Council seeing what information is contained on the DBS certificates, and this will help the Council assist the Direct Payment recipient to undertake employability suitability decisions. Additionally the Council will assess risk should any potential Direct Payment recipients decide not to undertake DBS checks on their Personal Assistants, and make a decision as to whether, in those circumstances, to offer a Direct Payment to those individuals. Such matters would be considered on a case by case basis.
3. Following the legal clarification, it is proposed that changes are made to Section G of the Direct Payments Policy. These revisions set out the Council's position in compliance with both the Care Act 2014 and the individual employer's responsibilities in relation to the Safeguarding Vulnerable Groups Act 2006. The proposed changes are highlighted in yellow in **Appendix 1**.
4. In addition, a further section has been included in the Direct Payments Policy covering the Council's recommendations for Direct Payment recipients to help safeguard against Modern Day Slavery. All Direct Payment recipients would be expected to check that the bank details for the salary of their Personal Assistants to be paid into are in the name of the Personal Assistant providing support. The Direct Payment recipient would be advised to check bank statements as well as bank account and sort code details. It will also advise Direct Payment recipients to contact the Council if they have any concerns relating to Modern Day Slavery. This is also highlighted in yellow in **Appendix 1** at **paragraph 11**.

Legal Clarification Obtained – DBS Checks

5. In order to determine the responsibilities and requirements for an Enhanced DBS and Barred list to be undertaken for Personal Assistants being employed through a Direct Payment, two pieces of legislation need to be looked at together. These are the Safeguarding Vulnerable Groups Act 2006 and the Care Act 2014.

6. The Council's obligations under the Care Act 14 (Section 31) outlines four conditions that, when met, oblige the Council to offer the option of a Direct Payment as a mechanism for an individual to manage their care support needs. As the requirement for an Enhanced DBS and Barred list check is not one of the conditions, the Council is not able to have a blanket policy that prohibits the use of a Direct Payment where a DBS check has not been undertaken.
7. The legal guidance received confirmed that the current Direct Payments Policy is open to legal challenge, as it made it mandatory for all Direct Payment recipients to undertake an Enhanced DBS and Barred list check on any Personal Assistant they employ.
8. The Safeguarding Vulnerable Groups Act 2006 (Section 9) states that a person commits an offence if they permit an employed individual to engage in regulated activity from which they are barred. As the generic role of a Personal Assistant includes tasks that will fall within the definition of Regulated Activity, the recipient of a Direct Payment risks committing an offence if the Personal Assistant they intend to engage is barred. The most straightforward way to establish whether someone is barred is to obtain a check from the Disclosure and Barring Service.
9. As an individual employer cannot request an Enhanced DBS and Barred list check in their own right, this would need to be requested through an "Umbrella Organisation" (the Council is an Umbrella Organisation).
10. Section G of the Policy has therefore been adjusted in light of the above detailed legislative requirements and legal guidance regarding correct implementation. The proposed revision now states that rather than a DBS and Barred list check and Right to Work in the UK check for each Personal Assistant employed being a mandatory requirement, it is a Council expectation.
11. Where a Direct Payment recipient chooses that the check is made by an Umbrella Organisation that is not the Council, the Council will only put the funds into the Direct Payment account equivalent to the cost incurred by the Council to undertake the checks.
12. As the Direct Payment recipient rather than the Council employs the Personal Assistant, the Council cannot decide who is employed as a Personal Assistant. Where a Direct Payment recipient insists that the DBS check is not undertaken at all, the Council will make a decision whether, in such circumstances, the four section 31 conditions are still met. These require the Council to be satisfied that the Direct Payment recipient is able to manage a Direct Payment, and that a Direct Payment is an appropriate way to meet needs. This decision will be taken in line with the Council's safeguarding responsibilities. If it is agreed that a Direct Payment can be used without a Personal Assistant having a DBS Check, the Council will ensure the Direct Payment recipient is aware of the risk of their committing a criminal offence.
13. Legal clarification has confirmed that where the Personal Assistant is a family member of the person receiving support and is receiving a payment for care tasks undertaken, it is possible to obtain a DBS check for them as the employment relationship is one of "commercial activity". The previous policy position was that such checks could not be obtained for family members.

Other Options Considered

14. The Council could choose to continue with the current Direct Payments Policy position in relation to Enhanced DBS and Barred list checks approved at Policy Committee in July 2018. However, legal guidance advised that this could leave the Council open to a judicial review legal challenge.
15. The Council could choose not to obtain DBS checks for Direct Payment recipients. However this might lead to an increased cost to the Direct Payment recipient and it would be more cumbersome for the Council to check whether the DBS check has been undertaken.
16. The issues associated with safeguarding against Modern Day Slavery could be restricted to Staff Guidance rather than within the Direct Payments Policy. However, embedding the recommendation within the Direct Payments Policy highlights the priority that the Council places on safeguarding people from the risk of Modern Day Slavery.

Reason/s for Recommendation/s

17. The proposed update to Section G of the Direct Payments Policy reflects the guidance given by the Council's Legal Services. The changes mean that the Council will still be compliant with its responsibilities in relation to The Care Act 2014 in regards to the offer of Direct Payments. It also means that a process is in place to ensure that individuals in receipt of a Direct Payment who choose to employ their own staff are meeting their legal responsibilities under the Safeguarding Vulnerable Groups Act 2006. The proposed changes to Section G of the Policy will also enable the Council to meet its safeguarding responsibilities towards the people it supports by being involved in the suitability decision process. By having a section in the Direct Payments Policy regarding Modern Day Slavery (**Appendix 1 paragraph 11**) it will enable the Council to ensure that Direct Payment recipients understand their responsibilities to ensure the staff they employ are safeguarded in relation to Modern Day Slavery.

Statutory and Policy Implications

18. This report has been compiled after consideration of implications in respect of crime and disorder, data protection and information governance finance, human resources, human rights, the NHS Constitution (public health services), the public sector equality duty, safeguarding of children and adults at risk, service users, smarter working, sustainability and the environment and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

Financial Implications

19. The Financial Implications of the proposed changes remain the same as those in the report approved by Policy Committee in July 2018 as below.
20. New DBS checks will cost £51.50 per Personal Assistant, but this will be offset against the savings generated by avoiding the higher cost of using a Direct Payment Support Service as the alternative. The cost associated with bringing the DBS checking process in-house

for all 2,184 PAs is projected to be £112,476 every three years. (1,200 existing PAs and three years' worth of newly recruited Personal Assistants averaging 328 per year). This funding is currently in the individual Direct Payment allocation and if not used is clawed back as a recoup.

21. The administration of the DBS checks will be completed using existing staff resource from within the Strategic Commissioning Team and the Business Hub and Recruitment Team.

Human Resources Implications

22. Whilst this report does not impact on Council employees, in seeking to safeguard service users advice has been taken from relevant HR managers with regard to recruitment and safer working.

Implications for Service Users

23. There will be a requirement for service users who have a Direct Payment to employ Personal Assistants to ensure an Enhanced DBS and Barred list check is undertaken. This may mean that in some cases where a positive disclosure is recorded, a suitability decision is made that would prevent the Direct Payment being used to employ the Personal Assistant. In these situations the service user may then not be able to use the Direct Payment in their preferred method of meeting their support needs.

RECOMMENDATION/S

- 1) That the proposed changes to the Direct Payments Policy, attached as **Appendix 1**, be approved.

Councillor Stuart Wallace
Chairman of the Adult Social Care and Public Health Committee

For any enquiries about this report please contact:

Paul Johnson
Service Director, Strategic Commissioning, Safeguarding and Access
T: 0115 854 6220
E: paul.johnson@nottscc.gov.uk

Constitutional Comments (CEH 04/02/19)

24. The recommendation falls within the remit of Policy Committee under its terms of reference.

Financial Comments (DG 03/12/18)

25. The financial implications are contained within paragraphs 19 - 21 of this report.

Background Papers and Published Documents

Except for previously published documents, which will be available elsewhere, the documents listed here will be available for inspection in accordance with Section 100D of the Local Government Act 1972.

Direct Payments Policy refresh – report to Policy Committee on 18th July 2018

Electoral Division(s) and Member(s) Affected

All.

ASCPH609 final