EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE COMMISSIONING BOARD AND CLINICAL COMMISSIONING GROUPS (RESPONSIBILITIES AND STANDING RULES) (AMENDMENT) (NO. 2) REGULATIONS 2019

2019 No. 1432

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care ("the Department") and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 ("the Standing Rules"), which provide for a range of matters relating to the functioning and commissioning responsibilities of the National Health Service Commissioning Board (known as NHS England ("NHSE")) and clinical commissioning groups (CCGs). The amendments extend the groups of people who have a "right to have" a personal health budget, subject to clinical appropriateness, to include section 117 aftercare users and wheelchair users. Additional detail on the definitions of these two cohorts can be found in section 8.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England only.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 These amendments extend the legal right to have a personal health budget, subject to clinical appropriateness, to two groups which are not currently provided for in legislation. One type of personal health budget – a direct payment – is currently dealt

with in the Direct Payments Regulations 2013 (S.I. 2013/1617, made under section 12A of the National Health Service 2006 Act ("the 2006 Act")).

6.2 Section 117 of the Mental Health Act 1983 ("the 1983 Act"), as amended, requires CCGs and local social services authorities to jointly provide, or arrange, help and support for people who have been detained in hospital under section 3, 37, 45A, 47 or 48 of the 1983 Act when they leave hospital. This is often referred to as Section 117 after-care and must be to meet a need arising from or related to the person's mental disorder and to reduce the risk of a deterioration of the person's mental disorder. People also have the right to Section 117 after-care if they have been discharged onto a community treatment (CTO), granted leave of absence under Section 17, or are a restricted patient on a conditional discharge. The amendments to these Standing Rules, will have no direct impact on the provisions set out within Section 117 of the Mental Health Act 1983.

6.3 The main piece of legislation underpinning the provision of wheelchairs is paragraph 9 of Schedule 1 to the National Health Service Act 2006. This provision allows for CCGs to make arrangements for the provision of vehicles (including wheelchairs) to those people the group is responsible for. One way of currently providing a wheelchair is via a wheelchair voucher, underpinned by the National Health Service (Wheelchair Charges) Regulations 1996/1503. These regulations allow for an NHS Trust to supply, at the request of a user, a wheelchair that is of a more expensive type than is clinically necessary and to make and recover charges in relation to that supply. Personal health budgets operate differently providing that a CCG or NHS England can identify an amount of money that is appropriate for securing the provision of a relevant health service. The Standing Rules require that CCGs and NHS England grant requests for a personal health budget where it is appropriate to secure provision for all or any part of a relevant health service, which as a result of these amendments include wheelchair services.

7. Policy background

What is being done and why?

Personal Health Budgets- Regulation 2

7.1 The NHS Long Term Plan[1], published by NHSE in January 2019, sets out the NHS vision for a more personalised approach to health and care that give people choice and control of their mental and physical health. A growing body of evidence shows that better outcomes and experiences, as well as reduced health inequalities, are possible when people have the opportunity to actively shape their care and support. Personal health budgets are one such mechanism to achieve this.

7.2 A personal health budget is an amount of money to support a person's identified health and wellbeing needs, planned and agreed between the person and their CCG. It can be managed in one of three ways:

a) as a direct payment to the patient or their representative;

b) as a notional budget (where the application of the amount of money available to spend is discussed and agreed between the patient and the CCG); or

[1] https://www.longtermplan.nhs.uk/online-version/

c) via a third party (where the money is transferred to an organisation or trust which assists the patient in choosing their package of care and which then buys that care with the agreement of the CCG).

7.3 Currently, only adults in receipt of NHS Continuing Healthcare, and children and young people in receipt of continuing care, have the 'right to have' a personal health budget, including a direct payment, as provided by the Standing Rules. Given the positive evidence, and following consultation as described below, the Department are now extending these legal rights to a personal health budget to two additional groups defined in Regulation 2, as well as below.

7.4 Regulation 2 inserts two new groups to the lists of people that NHS England and CCGs will be required to offer at least one kind of personal health budget to and give due considerations to requests for them. These groups are:

a) **Those eligible for Section.117 aftercare services.** This means the provision or arrangement of help and support for people who have been detained in hospital under section 3, 37, 45A, 47 or 48 of the Mental Health Act 1983, when they leave hospital. Section 117 after-care services include healthcare, social care and employment services, supported accommodation, and services to meet people's social, cultural and spiritual needs – as long as the needs arise from or are related to the person's mental condition and helps reduce the risk of their mental condition getting worse. It also applies to people if they have been discharged onto a community treatment order (CTO), granted leave of absence under section 17 leave and are s117, or are a restricted patient on a conditional discharge.

b) **Those eligible for wheelchair services**. This means people who are referred and meet the eligibility of their local wheelchair service, as well as people who are already registered with the wheelchair service, will be eligible when they require a new wheelchair, either through a change in clinical needs or in the condition of the current chair.

7.5 This is one component of a wider package of changes that will instate personalised care as business as usual throughout the NHS within the next decade. *Universal Personalised Care* provides further detail on how this will be achieved[2].

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 This is a minor amendment to extend the relevant health services for which eligible patients have a right to a personal health budget, and does not affect the substantive content or the operation of the regulations. As a result the Department does not consider it necessary to consolidate the legislation.

[2] NHS England, (2019), https://www.england.nhs.uk/publication/universal-personalised-care-implementing-the-comprehensive-model/

10. Consultation outcome

10.1 The Department and NHSE launched a consultation that ran from 6th April 2018 until 8th June 2018, exploring extending the legal rights to a personal health budget to an additional five groups[3]. Those groups were:

a) *People with ongoing social care needs, who also make regular and ongoing use of relevant NHS services.*

b) *People eligible for Section 117 aftercare services, and people of all ages with ongoing mental health needs who make regular and ongoing use of community based NHS mental health services.*

c) *People leaving the Armed Forces, who are eligible for ongoing NHS services.*

d) *People with a learning disability, autism or both, who are eligible for ongoing NHS care.*

e) *People who access wheelchair services whose posture and mobility needs impact their wider health and social care needs.*

10.2 The response to the consultation[4] was highly positive, with 87% of respondents, on average, agreeing with each proposal. Following the consultation exercise, the two groups identified within this instrument were prioritised for the next wave of legislation, on the basis of system readiness to deliver and the strength of evidence that these groups can benefit from a personalised approach to their care.

10.3 Work continues on the other groups consulted on, and the Department will announce next steps on these groups, along with possible others, in due course.

11. Guidance

11.1 NHS England published updated guidance on personal health budgets in 2017, entitled the 'Personalised Health and Care Framework'[5]. This guidance provides best practice advice for NHS and local government professionals when delivering personalised care; including when implementing personal health budgets.

11.2 Guidance has also recently been published by NHS England and NHS Improvement, specific to the two groups this legislation extends the legal right to a personal health budget. This guidance; co-produced by stakeholders, can be found at: https://www.england.nhs.uk/personal-health-budgets/phb-support-and-resources-for-professionals/.

12. Impact

12.1 A full impact assessment has not been produced for this instrument as no significant additional impact on the private, voluntary or public sector is foreseen. An assessment was previously conducted, when the legal right to a personal health budget was initially established.

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[3] DHSC, (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697825/personal-health-budgets-and-integrated-personal-health-budgets-consultation.pdf

[4] DHSC, (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780330/Extending_legal_rights_to_health_budgets_consultation_response.pdf

[5] NHS England, (2017), https://www.england.nhs.uk/personalised-health-and-care-framework/

12.2 A separate equality assessment has also been produced for the purposes of extending the legal right to a personal health budget to the two groups outlined within these regulations. That equality assessment has been laid alongside this memorandum.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is to review and update the 2012 Regulations (which these Regulations amend) as required.

15. Contact

15.1 Gareth Owen at the Department of Health and Social Care [Tel: 02072106350 or email: Gareth.owen@dhsc.gov.uk] can be contacted with any queries regarding the instrument.

15.2 Philippa Baker, Deputy Director for Commissioning and Integration at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Caroline Dinenage at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.