EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (DIRECT PAYMENTS) (AMENDMENT) REGULATIONS 2017

2017 No. 219

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument amends the National Health Service (Direct Payments) Regulations 2013 (S.I.2013/1617) ('the Direct Payments Regulations')[1] which govern the rules for the making of direct payments for health care to secure the provision of certain health services under the National Health Service Act 2006.

2.2 The purpose of this Instrument is to make minor amendments to the Direct Payments Regulations so as to-

(a) allow a third party to hold a direct payment on behalf of an individual patient or representative of a patient and provide administrative support while the patient or representative maintains responsibility, both for ensuring that it is spent according to the patient's care plan and for all contractual arrangements entered into to secure the provision of services by way of a personal health budget.

(b) clarify the policy intention that an individual who is a spouse, family member or friend of the recipient of a personal health budget and who also lives in the same household as the recipient can only receive payment for providing care where it is necessary to meet the recipient's needs.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The Direct Payments Regulations allow for the making of direct payments for health care to secure the provision of certain services under the National Health Service Act 2006 by a health body (a clinical commissioning group, NHS England, a local authority or the Secretary of State), or in the case of a clinical commissioning group or NHS England, under any other enactment). The Direct Payments Regulations came into force on 1st August 2013.

[1] http://www.legislation.gov.uk/uksi/2013/1617/contents/made

4.2 This instrument is being made to make further minor amendments to those Regulations.

5. Extent and Territorial Application

5.1 This instrument extends to England only.

5.2 This instrument applies to England only.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 The Government piloted personal health budgets between 2009 and 2012. Following the positive evidence from an independent evaluation conducted by the Personal Social Services Research Unit, University of Kent, the Government announced in November 2012 that personal health budgets, including direct payments, would be rolled out across England.

7.2 The aim of a personal health budget is to enable greater personalisation of healthcare services and to improve patient satisfaction and quality of life by giving people more choice and control. It is an amount of money provided to a patient in lieu of their regular NHS care. The patient and their healthcare professional agree the desired outcomes and the individual, with support, is able to plan how to use the money available to meet those needs. This plan is agreed with the NHS.

7.3 There are three methods of receiving a personal health budget, one of which is via direct payments. This differs from a notional budget where the money continues to be managed by the NHS and to a third-party budget where a person or organisation independent of the NHS and the patient manages the budget. With a direct payment, the patient manages their budget themselves according to their care plan.

7.4 Some minor amendments are required to the Direct Payments Regulations to ensure that they reflect the policy intention and future direction of personal health budgets in the NHS. These amendments would also bring the Direct Payment Regulations closer into line with the Care and Support (Direct Payments) Regulations 2014 (S.I.2014/2871)[2], which govern the rules for the making of direct payments by a local authority to an individual for care and support services under the Care Act 2014. The direction of Government policy is to enable the integration of personal health budgets and personal budgets in social care for those with the highest and most complex levels of need. Bringing the two sets of Direct Payments Regulations closer into line is a means of facilitating effective integration and continuity for patients who will receive an integrated personal budget to cover their health and social care needs.

Managed accounts

7.5 An option for administrating a social care budget from a local authority is via a managed account. This is where a third party holds the money for the individual but does not take any responsibility for the way it is spent or enter into contractual

[2] http://www.legislation.gov.uk/uksi/2014/2871/contents/made

arrangements on behalf of the individual. The individual gives all the direction as to how the budget should be managed and where it should be spent, thus maintaining the control that personal health budgets are designed to allow.

7.6 The lack of managed accounts in the NHS restricts certain cohorts of patients from receiving their personal health budget as a direct payment which has been demonstrated to be beneficial. This includes those who cannot open their own bank account for personal reasons and patients who may want to maintain control but are unwilling or unable to take on the added burden of managing their own account. It also affects people who are transitioning from a social care personal budget to an integrated personal budget and want to have this paid into a managed account for continuity. The amendments made by this instrument ensure that people in receipt of a personal heath budget via a direct payment would have the option of administrating the direct payment via a managed account.

Direct payments to family carers

7.7 Government policy is that making direct payments to family carers (a family member or a friend who also lives in the same household as the patient) should only be permitted when it is necessary to meet the patient's needs. The relevant paragraphs in the Direct Payments Regulations do not clearly reflect this policy intention and have been interpreted as also placing a restriction on family members and friends who do not live in the same household as the patient, leading to some clinical commissioning groups receiving legal advice that differs to Government policy. This instrument amends the Direct Payments Regulations to clarify the policy intention with regard to the payment of family carers. The amendment also serves to reflect the policy set out in the Care and Support (Direct Payments) Regulations 2014, thereby ensuring further alignment with those Regulations.

Consolidation

7.8 There are no plans to consolidate the Direct Payments Regulations but this will be kept under review.

8. Consultation outcome

8.1 A targeted consultation was undertaken on the elements of the Direct Payments Regulations that the Government proposes to change. The consultation closed on 16th September 2016.

8.2 44 organisations were contacted, including voluntary sector organisations, professional bodies, clinical commissioning groups and commissioning support units. The consultation asked whether a restriction on friends and family members receiving payment for care should only be placed on those living in the same household as the personal health budget recipient and whether the option of using a managed account to administrate a personal health budget should be included in the regulations.

8.3 61% of those organisations responded to the consultation, the majority of which were representatives of professional bodies or clinical commissioning groups. All respondents agreed that a restriction on friends and family members receiving payments for care should only be placed on those living in the same household as the recipient and that the option of payment into a managed account should be included in the Regulations.

9. Guidance

9.1 NHS England will shortly publish updated guidance to assist with the interpretation of the Direct Payment Regulations and this amendment. The guidance will be published on NHS England's website http://www.england.nhs.uk/

10. Impact

10.1 The impact on business, charities or voluntary bodies is mainly in terms of their roles as providers of healthcare services. In relation to overall personal health budget policy, patients are able to choose the healthcare services, regardless of provider, that allow them to achieve their healthcare goals and needs in ways that work best for them. In relation to this instrument, third party organisations are able to provide managed account services to the recipient of a personal health budget.

10.2 The impact on the public sector is also mainly in terms of healthcare providers. In relation to overall personal health budget policy, budget holders are able to buy a variety of services from independent or third sector providers. It does not affect providers' ability to provide NHS-funded healthcare but it might mean that patients do not always choose the option of a NHS provider. This instrument itself has no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument as the instrument itself has no impact on the private sector or the voluntary sector. A full impact assessment was produced in relation to the overall personal health budget policy which includes direct payments for healthcare and a copy is available at http://www.dh.gov.uk/health/2013/03/direct-payments-consultation/

11. Regulating small business

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

12. Monitoring & review

12.1 The Department of Health and NHS England will monitor the changes made by this instrument through regular contact with the personal health budget network and other interested stakeholders.

12.2 People in receipt of NHS Continuing Healthcare currently have the right to have a personal health budget. The Mandate to NHS England sets an expectation that personal health budgets will be expanded to other patient cohorts, with 50,000-100,000 people receiving a personal health budget by March 2021. This figure will include personal health budgets that are direct payments administrated by a managed account. Progress against this target will be monitored and reviewed as part of the overall Mandate assurance process.

13. Contact

13.1 Gareth Owen at the Department of Health, Telephone: 020 7210 6350 or email: gareth.owen@dh.gsi.gov.uk, can answer any queries regarding the instrument.