



Direct Payments Practice Guidance

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Operational Documents

The documents below can be found on the Intranet by following the link: [Direct payments \(sharepoint.com\)](#)

- a) Rules of the Scheme & Reminder of the scheme
- b) Carers Direct Payment Agreement
- c) Details form (change of bank details)
- d) DBS risk assessment
- e) Review Checklist
- f) Letters and information for when someone using a direct payment dies

Also available are the following leaflets

Direct Payments information guide

Direct Payments information guide – employing a personal assistant

1. Introduction

Direct payments are monetary payments that a person can request to receive so that they can commission all or part of their social care arrangements. Direct payments have been in existence for more than 20 years and are a successful mechanism for giving people choice and control over the support they need to live as independently as possible.

- Direct payments are a flexible way to manage support needs, and allow the person choice and control
- Direct payments are to be spent on the **eligible needs** as agreed with the practitioner
- The way those needs are met are varied and can include equipment, activities or personal support
- There is support available to become an employer

The Direct Payment procedures overlap with other responsibilities and procedures in relation to the:

- The Care Act 2014
- Mental Capacity Act 2005
- Various employment laws and best practice
- And our internal Practice Guidance

Additional procedures associated directly with direct payments are in the appendices. Additionally there is also a copy of the current business process map for direct payments; please refer to this diagram as it indicates the most appropriate order of different stages required to set up a direct payment. *See appendix 3*

The implementation of direct payments is supported by the Direct Payments Support team who are available to support people considering or already using direct payments, and practitioners. The Direct Payments Support team can be contacted at direct.payments@bracknell-forest.gov.uk

Pecuniary Interest

A list of staff who have any pecuniary interests connected to home care should be kept. The list will help to avoid conflicts between staff's pecuniary interests and the interests of the Individuals supported via a Direct Payment

It will protect staff when helping people arrange their care via a direct payment comes under scrutiny.

A 'pecuniary interest' is a directorship, shareholding, partnership or other position of influence within a business or other organisation that may have dealings with individuals who receive a direct payment. The statement of interest by a member of staff should be done voluntarily and in a positive way. Individuals can use their common sense judgement as to declaring each interest.

Good practice

You should do the following.

- Include any interests that could result from a staff member, or his or her close friend or relative, being employed by, holding shares in or otherwise being linked with a firm or organisation.
- Keep to the principle that staff should declare all interests if they are not sure whether or not they are relevant to the individual receiving a direct payment.
- Make sure the list contains the name of the person concerned, the company or organisation they have an interest in and the nature of the interest (for example, whether they are employed, hold shares and so on).
- Make sure that the information on the list is signed and dated by the person concerned. Record the date that the person gained an interest in the organisation.
- Make sure any amendments to the list are signed and dated.
- Keep information you gather confidential, but allow the list to be inspected at reasonable times

2. Eligibility

To receive a direct payment the person must meet the eligibility threshold as laid out in **Practice Guidance – Assessment and Eligibility**

3. Indicative financial assessment

If a direct payment is being considered, a financial assessment should be completed before support planning begins, so that the individual understands what their contribution (if any) will be before their service commences. If someone has an existing service please check their financial assessment has been completed. The Financial Assessment and Benefits (FAB) team aim to complete the financial assessment as soon as possible of the initial request through LAS.

The outcome of the financial assessment is crucial to whether or not someone will receive a direct payment, as the individual's contribution is deducted from the payment.

So, if their assessed contribution is greater than the indicative allocation as determined by the indicative allowance then they may not be able to receive a monetary payment. Therefore the financial assessment should be conducted before any formal discussions take place so that no one is offered a direct payment before the Practitioner is sure that they will receive one. If the person has a commissioned service as well as a direct payment they will have their contribution deducted from their direct payment and will not receive an invoice for the financial contribution. Where the FAB team supports someone to apply for benefits the outcome of any application(s) may affect their financial assessment and whether they are able to receive a direct payment.

If the person needing a service is assessed to make a financial contribution, this contribution must be paid into the same account that their direct payment is paid into so that the entire budget can be used as one budget. If their contribution will outweigh the amount they will be paid in direct payments it still needs to be entered on LAS as a direct payment service. This is because if the person's financial assessment reduces their assessed contribution, the system will automatically indicate that the person should be paid the direct payment they are entitled to. This will then be communicated to the practitioner who will need to visit and check that the support plan still meets the needs of the person and that a direct payment is still appropriate before it is set up and paid.

4. Referral to Direct Payments Support team

The practitioner should refer the individual considering direct payments to the Direct Payments Support team via email. A Direct Payments Advisor usually only speaks to the individual when they require specialist advice about becoming an employer. However, the Direct Payments Support team will be able to offer information to anyone thinking about using a direct payment. If it is required, a Direct Payments Advisor will talk with the person requesting a direct payment (usually within 5 days) and begin to discuss with them direct payments in more detail.

Details of information and support given will be detailed in the individual's case notes on LAS.

5. Support planning

For detail, please **Practice Guidance– Care and Support Planning**.

It is the practitioner's responsibility to assess whether the person understands direct payments, and how they would manage the payments and any employment

responsibility, or whether there may be another person to manage the direct payment on their behalf (see below). The Direct Payments Support team are available to make suggestions in complex or unusual circumstances.

The plan must include costs and a breakdown of how the personal budget is going to be spent, and what proportion is to be used as a direct payment. The contents of this plan must also demonstrate that the plan is what the individual wants, is safe and legal (**Practice Guidance - Care and Support Planning**). If all or some of the personal budget is going to be taken as a direct payment to employ a PA, the Direct Payments Support team **must** be asked to advise on how to budget and take into account any employment responsibilities the person might have once the plan is put into place. As part of the paperwork submitted in order for the support plan to be authorised, the Practitioner must complete a Direct Payments Calculator to show the breakdown of the costs of the direct payments. Please see the approvals guidance within this guidance for more information.

Direct payments can be used for activities that meet the person's eligible needs and help them achieve the outcomes and goals as described in the support plan. Investigations into start up and ongoing costs should be made at this point but individuals should not commit themselves to this expenditure until the funding has been agreed.

Where people are considering direct payments to support an individual who lacks capacity to make decisions about their support, or to employ family members in the same household, the practitioner **must** refer to the appropriate procedures within this Chapter before progressing this request any further.

Using Direct Payments to employ a family member living in the same household

In limited circumstances, direct payments can be used to employ a relative, a spouse or partner (hereinafter referred to as "family members") living in the same household. However, the reasons for such circumstances would need to be clear. Such arrangements would only be agreed in circumstances where other arrangements would not meet the eligible needs of the individual requiring support. Examples where this would be the most effective way of meeting the needs of that individual are likely to be due to specific cultural, religious or communication needs.

There is a full procedure to be followed in such circumstances. This includes specific documentation that must be completed and submitted for approval. The procedure must

be followed regardless of whether the arrangement for the direct payment will be temporary or permanent.

Please see [Appendix 2](#) – *Using direct payments to pay a family member living in the same household*

Direct Payments for someone who lacks capacity to consent and/or manage

The regulations for direct payments and who can receive them have been changed. This means that indirect payments can be made to a suitable nominee (where the person with care and support needs has capacity and wishes this to happen) or to a suitable/authorised person on behalf of someone who lacks capacity. The practitioner should note this in the support plan and complete the Direct Payments Agreement with the nominee and the individual requiring support where appropriate.

For those people who lack the ability to consent and/or the capacity to manage a direct payment, the correct process on appointing an 'authorised person' must be followed. Where there is not an authorised person under the Mental Capacity Act 2005, and if direct payments are in the best interests of the person needing care and support, then an authorised person must be sought to manage the payment and any employment responsibilities on their behalf. Appropriate documentation and approvals must be completed.

Please contact the Direct Payments Support team for further information and advice.

Please see appendix 1- Direct payments and consent, capacity and ability to manage.

Direct Payment for a CARER

A carer can now be offered a direct payment to help them sustain their caring role if they meet the eligibility criteria. **Practice Guidance – Assessment and Eligibility and Chapter 2 – Carers.**

At this time there is no need to open a separate bank account and carers are not financial assessed to receive support. A direct payment agreement is still needed

Carers' Direct Payment – Conditions

- The allocation of a direct payment is designed to provide the carer with opportunities for a break and/or to help alleviate some of the pressures that caring brings
- The direct payment cannot be used to for rent/debt/utility bills, or domestic appliances, which do not necessarily assist the carer in their caring role or help the Carer have a break etc. It is not a hardship fund
- A Carers' direct payment cannot be used to purchase something that could bring BFC into disrepute
- It cannot be used to purchase or pay for something retrospectively e.g. a holiday already taken
- A Carers' need for respite or a sitting service should be assessed through the individuals (cared for person) assessment and RAS process
- There will be a Carers Approval Panel for each team which will make decisions on information presented to them. Where insufficient information is presented to them or where the impact of caring is not clearly demonstrated the application will be returned, seeking more detail before re submission to the Panel
- Carers should be made aware that a Carers Direct Payment does not give automatic approval in each subsequent year
- The Panel expects the Carer and the assessment worker to clearly specify the amount being applied for and provide accurate figures for the cost of items being applied for
- The papers must clearly identify HOW the proposed arrangements meet the identified eligible needs

Direct Payments to pay for Short-term care in a care home

Direct payments cannot currently be used to pay for people to live in long-term care home placements. They can be made to enable people to purchase for themselves a short stay in care homes, provided that the stay does not exceed a period of 4 consecutive weeks in any 12-month period. This could be used to provide a respite break for a carer, for example.

The Regulations specify that where the interim period between 2 stays in care homes is less than 4 weeks, then the 2 stays should be added together to make a cumulative total, which should also not exceed 4 weeks if it is to be paid for with direct payments. On the other hand, if 2 stays in care homes are more than 4 weeks apart then they are not added together.

Once a direct payment recipient has had 4 consecutive weeks in care homes, or 2 or more periods separated by less than 4 weeks which added together total 4 weeks, then they cannot use their direct payments to pay for any more care home services until 12 months have passed from the start of the 4-week period. On the other hand, as long as each stay is less than 4 weeks and there is an interim period of at least 4 weeks between 2 or more stays which added together exceed 4 weeks, then the service recipient may use their direct payments to pay for residential breaks throughout the year.

People can receive additional weeks in a care home once they have reached the 4-week maximum. They cannot purchase the stay using their direct payments, but if the local authority and the person agree that a longer stay is needed, it can still arrange and fund stays for the person. There is no restriction on the length of time for which the local authority may arrange such accommodation for someone (see chapter 8 for guidance on choice of accommodation).

Example: Direct Payments for short-term residential care

Mrs. H has one week in a care home every 6 weeks. Because each week in a care home is more than 4 weeks apart, they are not added together. The cumulative total is only one week and the 4-week limit is never reached.

Peter has 3 weeks in a care home, 2 weeks at home and then another week in a care home. The 2 episodes of time in a care home are less than 4 weeks apart and so they are added together making 4 weeks in total. Peter cannot use his direct payments to purchase any more care home services within a 12-month period.

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 local authority should consider whether to conduct a review to ensure that the care plan is still meeting needs.

Planning for Adulthood

Any future involvement of the Adult Social Care teams will be agreed on an individual basis. Planning for adulthood will take place in a timely fashion in advance of the young person reaching 18, in accordance with the Approaching Adulthood Policy. This will include arrangements to be made where a parent has been in receipt of a direct payment. Assessment and determination of eligibility for services as an adult will be in accordance with **Practice Guidance – Assessment and Eligibility**.

If a young person has been in receipt of a direct payment and they are eligible for care and support as an adult, the continuity of their direct payments and care and support may be crucial. Where a parent receives direct payments a decision needs to be made

as to whether they will continue as the nominated/authorised person, or whether the young person should receive the payment, or another nominated/authorised person should be identified.

Safeguarding

Research carried out between 2012 and 2014 by a team at Kings College London found no strong evidence that the use of direct payments or managed personal budgets increased the risks to those people accessing a social care service in that way. However, there are fears amongst many practitioners that the risks are increased when people are using direct payments, particularly when they purchase care and support from unregulated care workers or relatives.

There are a number of steps that practitioners can take to mitigate the risks as far as possible.

- Ensuring the person who would like to use a direct payment has the correct information and the time and opportunity to discuss and understand direct payments as an option
- A clear support plan is crucial in evidencing what has been authorised and what the individual should be spending the direct payment on. Support planning should include
 - information about who to contact if problems arise and
 - contingency planning in case of changes to the person's needs or circumstances, safeguarding issues or where people are employing PAs (for example what to do if they are sick or leave suddenly).
- the practitioner should assess whether the person, their nominee or authorised person is able to manage the extra responsibility of becoming an employer and or making the arrangements themselves (if applicable). Employment law is complex and where employing a PA is the chosen method of support then the practitioner must involve a Direct Payments Advisor.
- In conjunction with the requirements in **Practice Guidance – Reviewing**, practitioners must also follow the direct payment procedure in the Monitoring and Reviews section of this Chapter. This has been designed to highlight specific issues and concerns when people are using direct payments.

Please see [Appendix 1](#) – Direct payments and consent, capacity and ability to manage

Employing a Personal Assistant (PA)

If the person decides that they would prefer to employ someone to support them the Direct Payments Support team **MUST** be involved at the earliest opportunity. Advice and support will include advertising and recruitment, employment advice, payroll, pensions, insurance, appropriate uses for the money, and budgeting.

Please see [Direct payments \(sharepoint.com\)](#) on intranet for information on employing a personal assistant.

Direct Payments Calculator

In order to help calculate the direct payment correctly the practitioner should complete the Direct Payments Calculator form if the individual is going to employ a personal assistant and this should be signed off by the direct payment team. This form ensures that the direct payment is correctly calculated and means that the Access to Resource Team and the Finance teams can input and check the figures before the payment is paid.

Support with Confidence

Support with Confidence is a scheme that provides a list of approved providers of care and support services and of Personal Assistants (PAs) who have undergone the appropriate training and background checks.

The Support with Confidence scheme is run by Action for People in conjunction with Bracknell Forest Council and Trading Standards. For more information please visit www.bracknellforestsupportwithconfidence.co.uk

Using a Care Agency

If the individual has decided that it would be most appropriate for them to use an agency they should start making. An information guide is available from the Direct Payments Support team about contracting with an agency, checking bills, and directing staff. No one should make any contractual agreement with an agency until the support plan and

budget has been authorised by the appropriate officer. **See Practice Guidance - Approvals**

6. Approval of the support plan

The Practitioner should follow **Practice Guidance – Approvals**

7. Bank accounts and pre-paid debit cards

There are two options available for a bank account if the individual has decided they would like to have their personal budget via a direct payment.

Pre-Paid debit card

An individual applies for this card through the Council; it operates as a debit card and as a simple bank account (with online access) into which direct payments can be paid. It is a simpler option for individuals using direct payments, meaning they do not have to open a bank account or send bank statements in. The Finance Team are able to view spending via an online portal. There are certain restrictions regarding where the card can be used (such as betting shops) and there is a limit on cash withdrawals.

Managed bank account

A managed bank account is a bank account set up by an external payroll company; they manage the payments in and out of the account. This option has a cost implication and is only suitable where people are unable to manage the money, have been made bankrupt or there are concerns about them using the direct payment appropriately.

8. Direct Payment Agreement

The Direct Payments Agreement is filled in by the Direct Payment Team and should be signed by them and the person who will receive the direct payments. For Carers direct payments or one off Direct Payments the Practitioner will sign the Agreement with the individual. This should only be done AFTER the plan has been approved. Please see the intranet for the Carers Agreement. Prepaid agreements are available from the Direct payment Team

- This is a legal document which shows that the individual understands and consents to the direct payment. It details the agreement, rules of the scheme, bank details and important contact details.
- The importance of this agreement should be made clear to the person who will receive the direct payment.
- If someone has nominated someone else to manage their direct payment for them (a representative) they will fill in their details and sign in the appropriate box.
- For direct payments to an authorised person on behalf of someone who lacks capacity, the authorised person form must be completed and signed by the Co-ordinator, the Team Manager and the authorised person.
- A copy is kept by the individual and one is kept on the finance file.

Where someone lacks capacity a Suitable Persons form must be completed; more information about this can be found in *Appendix 1 - Direct payments and consent, capacity and ability to manage*.

If the support needs to be started from a particular date, then the Access to Resource Team should be informed of this. Otherwise the direct payments will be started on the Monday after it was authorised by the appropriate officer(s), and the money will be paid on the payment run after the Finance Officer has completed their part of the process in Controcc.

9. Completion and Submission of Paperwork

Practitioner completes/collates:

- Support Plan (and the Support Plan Draft on LAS)
- The Direct Payments Agreement or Authorised Person Form
- The Direct Payments Calculator (if employing a Personal assistant)
- Panel approval on LAS

The Agreement form should be completed and saved in the ESCR. The practitioner will need to send the support plan draft on LAS to the Access to resource team so that they can update the support plan. The DP finance team can only action payment if they have

all the relevant signed paperwork, otherwise there will be a delay in putting the direct payments onto the system for payment.

The payment will be put onto the next available payment run; payment runs take place on a Thursday. The Direct Payments Agreement is scanned into a secure folder as it contains bank details.

10. Monitoring and review

Monitoring

For the first year that a direct payment is in place, the Finance Officer will monitor the bank statements on a quarterly basis. Following this initial year, a risk based approach will determine whether the Finance Officer will complete an audit of the direct payment account or card on an annual, six monthly or quarterly basis. This will depend on the use of the persons direct payment in the initial year and the whether their weekly direct payment exceeds £100 per week. Payments onto the pre-paid debit cards or into a managed bank account will be audited every six months.

During the audit the Finance Officer will monitor the amount of money in the account and inform the practitioner if:

1. The person does not return their bank statements (quarterly returns)
2. There is too much money in the account (one 4 weekly payment + 20%)
3. There is too little money in the account
4. If there is any unusual spending, in order to clarify whether this is part of the agreed support plan
5. To advise the practitioner if the Financial Assessed contribution is not being paid into their direct payment bank account or onto their pre-paid debit card.

Once contacted by the Finance Officer the practitioner should telephone or visit the person receiving the direct payment to understand the reasons for the anomaly and agree an appropriate course of action.

The conversation may explain the situation and the Practitioner may just to have to feedback this information to the Finance Officer and record the conversation on LAS. If this is not the case, or the Practitioner needs further advice and support they should contact the Direct Payments Support team for advice and support.

Review

Reviews must be held in accordance with **Practice Guidance – Reviewing**. There are specific requirements when a person receives a direct payment:

Before the review the practitioner should check with the Finance Officer whether the bank statements have been sent in regularly and if the individual seems to have too little or too much money in their account.

If any areas have been highlighted by the Finance Officer this should be discussed with the individual by the practitioner during this their review. This may only involve a discussion/explanation which can be noted and communicated to the Finance Officer. For example the monies are being accrued in the account to pay for extra care because the carer is going away for the weekend or there is not enough money in the account because the family carer had to go into hospital and extra care was required. The practitioner should then either seek approval (following the usual process) for extra money to be paid or should inform all appropriate persons why there is extra money in the account. If the person needs to return money to the Council, the practitioner should notify the Finance Officer and ask them to request the person return this money.

During the review the practitioner should discuss with the person how well they are coping with the direct payment, whether they need any further support from the Direct Payments Support team and how they will spend their direct payments next year. Any changes to what the direct payment is spent on will require approval as detailed in **Practice Guidance – Approvals**. The practitioner can ask to see receipts and evidence of spending as part of the review. A **mandatory** review checklist (found on the intranet) has been developed and must be completed to help with this process for people who are using their direct payment. Once completed it should be sent to the Direct Payments Support team. If the person does not understand any of the questions this should be noted on the form, the practitioner need not explain the questions. Once received the Direct Payments Support team can review and may contact the person or go out and offer further advice.

If there is going to be a permanent change to the direct payment, the approval process will need to be followed.

Hospital Admissions

When an individual receiving direct payments is admitted into hospital, the direct payments may continue for (a maximum of) four weeks.

If the person is using their direct payment to employ a PA the practitioner should contact the Direct Payments Support team for advice and support.

If the person admitted to hospital uses their direct payments to pay an agency and they are admitted into hospital, the payment should be suspended to avoid the accumulation of unused payments. The practitioner should then inform the Access to Resource team of the discharge date so that the direct payment can be reinstated.

If there is a change in the individual's needs following their hospital admission, a review of their care and support plan should be undertaken. If there is an increase to the support required, a new support plan should be written and approval for the additional funding should be applied for in the normal way. After discharge the person should be supported to review their support planning requirements. **See practice Guidance - Eligibility and Assessment**

For those individuals admitted to hospital who employ a personal assistant (PA) the arrangements for their direct payment should be taken on an individual basis. People receiving a direct payment who are likely to be admitted to hospital will have their employer's responsibilities to consider. As being admitted to hospital may mean the individual is too ill to make arrangements for their employee, this guidance will assist the practitioner in helping support the individual until they become well enough to resume the responsibility of making the arrangements.

The employee will need to be paid for the date until the individual was admitted; the employee will then need to be informed of the course of action whilst the individual is in hospital. The possibility of a hospital admission should have been covered during the employee's induction, particularly if the person they work for is regularly admitted to hospital. However, a flexible approach on an individual basis should be taken during this period. Suggestions for interim arrangements could include banking the employee's hours against future need or paying a retainer to the employee during the period of hospitalisation. Once a medical assessment has been carried out the practitioner and

person receiving direct payments or their family should review the continuation of employee's contract taking into account the anticipated length of time for hospitalisation.

If someone loses capacity to manage a direct payment

If someone using a direct payment loses the ability to consent and understand their direct payment and or the capacity to manage their direct payment, it is extremely important that the correct procedures are followed. The procedure Direct Payments, and consent, capacity and ability to manage are available in the appendix for times for when such situations may arise. The procedures will overlap with obligations under the Mental Capacity Act 2005 and therefore decisions will need to be made using the best interest principles. However, there will be Employment Law implications to be taken into account if the individual was using their direct payment to employ their own PA. The Direct Payment Support team should be contacted as soon as possible.

Please see [Appendix 1](#) – Direct payments and consent, capacity and ability to manage

Death of someone using a direct payment

When someone receiving a direct payment dies, the usual procedures must be followed for someone who dies whilst receiving an Adult Social Care service. However, in addition to this the Direct Payments Support team must be notified so that they can send the standard letter and information guide to the executor or the authorised person dealing with the deceased person's affairs. There will be Employment Law implications to be taken into account if the individual was using their direct payment to employ their own PA.

Although the issues of Data Protection do not specifically arise in relation to a deceased person, the common law principle of confidentiality and the human right of privacy do apply. In situations where there is no designated Executor under a Will or an Administrator (where there is no Will and in accordance with the intestacy rules) please check whether there is a named next of kin on the LAS record or whether the appropriate person is named on the most recent Direct Payments Agreement. The Direct Payments Agreement has a section so that the person receiving a direct payment can record who to contact in the event of their death. Please ask the finance officer to check the secure ESCR drive for a copy to see whether this section has been completed. Where no person has been named in the records please contact the Direct Payments Support Team for further advice.

When someone using a Direct Payment who employs their own Support Workers or Personal Assistants dies, the employment contract with their PA is 'frustrated'. Through no fault on the part of either party, the contract has become impossible to uphold. If a contract of employment is frustrated, the contract simply comes to an end and the parties are discharged from their obligation to uphold the contract.

Key points of law:

- The employee is not dismissed. This is relevant because the employee then cannot claim unfair dismissal.
- This means that the employer's PAs are not entitled to notice pay, however they may be entitled to statutory redundancy pay.

Although the law states that notice pay is not statutory, Bracknell Forest Council (BFC) have taken the view that the equivalent to a weeks notice pay should be paid to any employees working at that time who are not entitled to redundancy pay as a goodwill gesture. This is to reflect that BFC acknowledge the unpredictable nature of working as a PA. Any goodwill payment must come from the executor/ suitable person and not BFC as this could constitute an employer/employee relationship.

The finance officer will issue the executor/suitable person a letter and information document, giving them information about redundancy and equivalent notice period payments. If the executor/suitable person require further information they should contact the Direct Payments Support team. Please refer to the appendices at the front of this Chapter for details of where to find this letter.

The rules of the Direct Payments scheme remain the same and anyone acting on behalf of the deceased person should only using the remaining funds for any bills for support or services outlined in the support plan, or pay outstanding wages to PAs following the individual's death.

Once the final payments have been made out of the account for final wage payments or outstanding invoices, the remainder should be returned by cheque to BFC by the executor or person dealing with the person's finances.

Controcc will work out any overpayment from the date of death when it is input into LAS. However, this amount may not reflect any redundancy or notice pay and this should be entered as a one off payment. Any overpaid financial contribution will have been

automatically deducted from the amount Controcc has determined need to be repaid to BFC.

If significant mismanagement of the Direct Payment is suspected (of more than several hundred pounds) then a discussion between the Self-Directed Support Co-ordinator, Business and Finance Support Manager and the Team Manager/budget holder for this individual's support should be arranged to decide the next steps and whether to request the money is returned from the individual's estate. All decisions should be recorded on LAS.

Terminating direct payments

Direct payments should only be terminated at the request of the person, or where there is clear and serious contradiction of the Regulations or where the conditions in sections [31](#) or [32](#) of the Act¹ are no longer met (except in cases of fluctuating capacity). Local authorities should take all reasonable steps to address any situations without the termination of the payment. Effective, but proportionate monitoring processes will help local authorities to spot any potential issues before a termination is necessary.

If terminating a direct payment, the local authority must ensure there is no gap in the provision of care support. Where a decision has been made to terminate a direct payment, the local authority should conduct a revision of the care and support plan, or support plan, to ensure that the plan is appropriate to meet the needs in question **(Practice Guidance - Reviewing)**.

Reasons for discontinuing direct payments

- a. A person receiving direct payments, 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 circumstances, the local authority should ensure there are no outstanding contractual liabilities and conduct a review of the care plan to consider alternate arrangements to meet needs.
- b. The Care Act also sets out that a local authority shall cease making direct payments if the person no longer appears to be capable of managing the direct payments or of managing them with whatever support is necessary.
- c. Direct payments should 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

¹ These section determine who should be offered a Direct Payment.

home or hospital. Direct payments for after-care services under section 117 of the Mental Health Act would also cease once the clinical commissioning group and local authority are satisfied that the person concerned is no longer in need of such services.

- d. There may be circumstances in which the local authority discontinues direct payments temporarily. An example might be 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 local authority will need to discuss 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 care plan/support plan the local authority must revise the plan to ensure that it is still meeting needs (**see Practice Guidance - Reviewing**).
- e. The local authority might also discontinue payments if the person fails to comply with a condition imposed under regulations to which the direct payments are subject or if for some reason the local authority no longer believes it is appropriate to make the direct payments. For example, the local authority might discontinue the direct payment if it is apparent that they have not been used to achieve the outcomes of the care plan.

The 2009 Direct Payment regulations set out that direct payments 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. The Care and Support (Direct Payments) Regulations 2014 retain this universal restriction.

Where direct payments are discontinued as a result of criminal justice legislative provisions, the local authority should make timely arrangements for services to be provided in lieu of the direct payments, to ensure continuity of support.

How to discontinue direct payments

In all cases, as soon as possible the practitioner should discuss with individuals, their carers and any person managing the direct payments when it is considering discontinuing direct payments to them, in order to explore all available options before making the final decision to terminate the direct payments. For example, if ability to manage is an issue, the individual should be given an opportunity to demonstrate that they can continue to manage direct payments, albeit with greater support if appropriate. The local authority should not automatically assume when problems arise that the only solution is to discontinue or end direct payments.

If the decision is made to withdraw direct payments, the practitioner will need to conduct a review of the plan and agree alternative care and support provision in accordance with **Practice Guidance – Care and Support Planning**, unless the withdrawal was following a review after which it was concluded that the services were no longer needed. A minimum period of notice should be established that will normally be given before direct payments are discontinued. This should be included in the information to be provided to people who are considering receiving direct payments.

It will be extremely unlikely that direct payments will be discontinued without giving notice, although in serious circumstances this may be warranted (for example, the authorised person is not acting in the best interests of the person). Practitioners should explain to people, before they begin to receive direct payments, the exceptional circumstances in which this might occur and discuss with them the implications this has for the arrangements that they might make.

If direct payments are discontinued, some people may find themselves with ongoing contractual responsibilities or having to terminate contracts for services (including possibly making employees redundant). Practitioners should take reasonable steps to make people aware of the potential consequences if direct payments end, and any obligations they may have.

There may be circumstances where the person has lost the capacity to manage the direct payment and there is no-one else to manage the payment on their behalf, or where a person needs additional support to terminate arrangements. In these cases the consideration should be given as to whether support is needed to ensure that any contractual arrangements are appropriately terminated to ensure that additional costs are not incurred.

Complaints

For people using a direct payment to employ a Personal Assistant (PA)

If someone is having a problem with the person they are directly employing with their direct payment they need to refer back to the employers section in the Direct Payments information guide (given to all direct payment Employers) or contact the Direct Payments Support Team for more advice.

For people using a direct payment to purchase support from an agency

The direct payment recipient should contact the agency themselves in the first instance and ask to see a copy of their complaints procedure, which should then be followed. If the direct payment recipient is not happy with the response, the outcome or the way the investigation was carried out, the direct payment recipient can now have the opportunity to contact the Local Government Ombudsman directly. With effect from the 1st October 2010, the Ombudsmen's powers to investigate complaints about privately arranged and funded adult social care were extended. Provision of care that has been arranged by an individual and funded from direct payments comes within this new jurisdiction.

Their contact details are as follows:

The Local Government Ombudsman	Telephone:	0300 061 0614
PO Box 4771	Text 'call back':	0762 480 4323
Coventry	Email:	advice@lgo.org.uk
CV4 0EH	Fax:	0247 682 0001

For problems with support from Bracknell Forest

If the direct payment recipient is dissatisfied with the way their support has been planned or the information they have been given about direct payments or they feel that ASCHH is not doing enough to help, they are entitled to make a complaint regarding this and should be given the following contact details:

Complaints Manager
Adult Social Care, Health and Housing
Bracknell Forest Council
Time Square
Market Street
Bracknell
Berkshire RG12 1JD

Direct line: 01344 351737

Email: asc.complaints@bracknell-forest.gov.uk

Appendix 1: Direct payments and capacity, consent and ability to manage

Direct Payments to adults with capacity

Where Bracknell Forest Council is satisfied that the person has capacity to request a direct payment, it must consider the conditions below. The conditions must be met in their entirety as otherwise the direct payment will be declined:

- the adult has capacity to make the request, and where there is a nominated person, that person agrees to receive the payments;
- the local authority is not prohibited by regulations under section 33 of the Care Act from meeting the adult's needs by making direct payments to the adult or nominated person;
- the local authority is satisfied that the adult or nominated person is capable of managing direct payments either by himself or herself, or with whatever help the authority thinks the adult or nominated person will be able to access;
- the local authority is satisfied that making direct payments to the adult or nominated person is an appropriate way to meet the needs in question.

The Care Act provides a power to enable direct payments to be paid to a nominated person; however the practitioner should be satisfied that the nominated person also meets the above conditions. The nominated person should receive information about the direct payments process and be involved in development of the support plan. However the nominee must sign the Direct Payments Agreement to show that they sign up to the rules of the scheme and agree to manage the direct payment on behalf of someone else. There is space on the Direct Payments Agreement for the person receiving care and support to sign to say they are nominating the person and for the nominee to sign.

This document contains further information and the procedures for how to organise direct payments for someone who has fluctuating capacity or for those people who have lost capacity.

Capacity and consent

To be legally able to consent an individual should be capable of a basic understanding of the nature, implications and consequences of their decisions.

Consent is formalised when the individual or the person named as the authorised person signs the Direct Payments Agreement or Authorised Persons Form. Flexibility should be shown in the person's ability to sign, and other appropriate forms of written consent should be accepted. If the person is physically unable to sign, the Direct Payments Agreement can be signed on their behalf by a person appointed by the individual.

Capacity to consent does not mean that the person understands the intricate details of how direct payments work, but they must be able to understand the options and how direct payments can make a difference to their lives. A person lacking the ability to manage their financial affairs is not the same as a person lacking the capacity to consent.

Assessing the person's understanding of direct payments may be a process involving discussion rather than a single event. Any discussion should satisfy the practitioner that the person understands what is involved in managing direct payments as well as the concept itself. They can then discuss what support will be required to help them manage the payments. It is important for the person who requires a support service to know that direct payments can be made to a nominee who can manage the payments on their behalf.

As well as giving people greater control and independence, direct payments carry responsibilities. The person who requires support or their nominee or authorised person is accountable to the Council for the way the money is spent. People also take on responsibility for obtaining the services they need through their own arrangements, which may involve legal responsibilities.

The practitioner should make clear to the person that they do not have to agree to direct payments and that services can be arranged in another way if they decide not to opt for direct payments. They should also understand that they can decide not to have Direct Payments at any time, and what other options would be available.

The law assumes everyone retains capacity to consent unless proven otherwise.

Any determination of capacity, or decisions made for a person who lacks capacity **MUST** be in line with the **Practice Guidance - Mental Capacity Act**

Authorised person

An authorised person as referred to in the Care Act guidance is authorised under the Mental Capacity Act 2005. There are two kinds of authorised person under the Mental Capacity Act and these roles are described below.

Lasting Power of Attorney

A lasting power of attorney is a legal document appointing someone to act on behalf of someone who lacks capacity and is unable to make decisions. The lasting power of attorney is appointed by the person before they lose capacity. This allows the person to have more control, as they appoint who they think will be the best person to make decisions on their behalf. There are 2 types of LPA:

- property and financial affairs
- health and welfare

Deputy

A deputy is authorised by the Court of Protection to act on behalf of a person who lacks capacity. There are 2 types of deputy:

- property and financial affairs, e.g. paying bills, organising a pension
- personal welfare, e.g. making decisions about medical treatment and how someone is looked after

The court order will specify what kind of deputy has been authorised.

Direct payments for someone who doesn't have the capacity to consent

In situations where the person has been assessed as lacking capacity to consent to the direct payment, an authorised person can request the direct payment on the person's behalf. However, the practitioner must be satisfied that the person meets the five criteria below.

- 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 local authority is not prohibited by regulations under section 33 of the Care Act from meeting the adult's needs by making direct payments to the authorised person, and 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;

- 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 would be used;
- the local authority is satisfied that the authorised person is capable of managing direct payment by himself or herself, or with whatever help the authority thinks the authorised person will be able to access;
- the local authority is satisfied that making direct payments to the authorised person is an appropriate way to meet the needs in question.

In situations where the person requiring support lacks capacity a direct payment is only possible where there is a willing and authorised person able to manage the payments on their behalf. Any authorised person must be accountable to the local authority for the way in which the money is spent; in the same way any other individual would be if they were receiving direct payments directly.

Bracknell Forest Council Appointeeships and Deputyships

If the appointed deputy is the Head of Performance and Resources at Bracknell Forest Council, the person who lacks capacity **may** be able to have a direct payment. This would mean the deputy would become the authorised person; however this would mean that the direct payment could not be used to employ a personal assistant (PA). If Bracknell Forest Council is the appointee for the person requiring support this would need to be changed to deputyship. Deputyship would need to be considered if direct payments are thought to be the best option for the individual. The costs associated with deputyship would need to be paid for from the individual's personal budget, and therefore would need to incorporate the cost of the deputyship fees. Please contact the Appointee and Deputyship Manager for the most up to date fees so that this can be incorporated into the support plan presented for approval.

Due to the possibility of a conflict of interest in the circumstances above, advice should be sought on a case by case basis from the Direct Payments Support team.

What to do if someone receiving a direct payment has lost capacity to understand or consent to their direct payment

The procedures as specified in this document for this situation will overlap with obligations under the Mental Capacity Act 2005 and therefore decisions will need to be

made using the best interest principles. However, there will be Employment Law implications to be taken into account if the individual was using their direct payment to employ their own PA. If someone employing a PA loses capacity during the time when they are employing that person their contract with their employee will become **frustrated**.

Frustration of contract happens when an employer or employee cannot fulfil their contractual obligations because of an unforeseen change of circumstances. If a contract has been frustrated, this means that it no longer exists and neither the employer nor the employee has any obligations under it. ***There is no dismissal, but because the employer does not have mental capacity the employee is no longer legally employed.*** If an employer loses capacity, the practitioner should contact the Direct Payments Support team who will provide advice about how to notify the employee(s). Any PAs should be told as soon as possible that their contract is frustrated and that they need to seek further independent legal advice. Another form of support should be organised in the interim, this may be from an agency or through the individual's natural networks depending on the support they need. If direct payments are still believed to be in the best interests of the person who has lost capacity they should be set up using the procedures above; this will involve an authorised person requesting a direct payment on behalf of the person who has lost capacity.

Employees/PAs should be notified as soon as possible, as not only is the contract dissolved, but as the employer now lacks capacity the employee/PA may not be able to be paid until an appointee is in place and the Employers Liability Insurance may be invalid. If the employee/PA's contract is frustrated they should be paid the notice period specified in their contract. If this is more than one week's notice please contact the Direct Payments Support team for advice.

In situations where direct payments are thought to be in the best interests of the individual it may be beneficial to remain in contact with the PA once they have sought independent legal advice. However, it will be up to the authorised person to decide whether to interview and appoint the PA if direct payments are requested and agreed. The practitioner should not give further advice or support to the PA as, should an employee take this situation to Employment Tribunal, this could be misconstrued as an employer/employee relationship.

The above information relating to the frustration of contracts is for information purposes only and not intended to provide legal advice of any kind. Further, the information documented above should not be taken to be an accurate statement of the law or

procedure relating to dismissal. Where a situation such as the above arises, the Direct Payments Support team will contact the Legal Department at Bracknell Forest Council for the most up to date advice and guidance. Any representative of the Direct Payment recipient should be informed to seek their own independent legal advice on any issues that may arise regarding the dismissal or proposed dismissal of an employee.

Fluctuating capacity

For people whose capacity fluctuates, payments will need to be made to an authorised person at times when they do not have capacity to consent or manage the direct payment.

The practitioner should make sure that the person has as much control over their support as possible. In such situations it may be useful to have a statement of wishes from the individual which is taken into account as a part of the process of managing a fluctuating condition and considered as part of contingency planning.

If the local authority is satisfied that a person previously lacking capacity has regained capacity which is anticipated to be on a long term or permanent basis, then it has a duty to discontinue their direct payments to the authorised person, unless the person with care and support needs requests for this arrangement to remain in place. However, if the person wishes to receive the payments themselves, and they meet the criteria set out in the main guidance, arrangements should be made for the payments to be made to them directly.

Appendix 2: Using Direct Payments to employ a family member

Principles and Standards

Employing family members living in the same household must only be agreed in exceptional circumstances

All alternative options must be thoroughly investigated by the practitioner in conjunction with the person who requires care and support

Preliminary discussion with the Team Manager and agreement in principle from a Chief Officer must be sought **before** the support plan goes to panel to be agreed

Practitioner must complete a support plan and checklist to present to panel and the Chief Officer

The Direct Payments team will only go out to offer advice and support about employment once the plan has been agreed by the Chief Officer and panel; this is to avoid raising expectations.

Introduction

In exceptional circumstances direct payments can be used to employ a relative, a spouse or partner (hereinafter referred to as “family members”) living in the same household. However, the circumstances for a direct payment to be agreed to be used in this way need to be clearly defined and the support planning needs to have followed the correct procedure below, before it can be agreed. This procedure is not designed to prevent someone from employing a family member, but is to ensure that all arrangements are appropriate and adequately safeguard the individual who requires care and support.

This document sets out the procedure to be followed in circumstances where there is a potential that a direct payment could be authorised to employ a family member. The procedure must be followed regardless of whether the arrangement for the direct payment will be temporary or permanent. Situations where employing a family member would be the most effective way of meeting the needs of an individual are likely to be due to specific cultural, religious or communication needs.

It would not be appropriate for the family member who is the employee

- to be the person assisting with the management of the direct payment,

- to be appointed to manage the direct payment,
- to be the spouse or partner of the person appointed to manage the direct payment,
- to be the spouse or partner of the person assisting with the management of the direct payment:

as there are too many inherent conflicts of interest. In situations where it is considered in the best interests of the person that a family member is employed to support them, **but** the person does not have capacity to consent to a direct payment, or is not able to manage the payment or the employment responsibilities, the practitioner **must** consider whether there is another appropriate person to manage the direct payment and any associated responsibilities. This must be approved by a Chief Officer before any further arrangements can be made.

Support planning

During the assessment and support planning stage, the practitioner must investigate all available options. The practitioner must be satisfied that employing a relative, spouse or partner living in the same household through direct payments is:

- (a) necessary to meet the person's needs and
- (b) the most appropriate option after every other avenue has been pursued.
- (c) Where someone lacks capacity to consent or the ability to manage the direct payment; that there is someone **independent of the family** that is able to do this on behalf of the person requiring care and support

When considering necessity and appropriateness, the following are some of the questions to be considered:

- Can the support be provided through an outside agency with guidance from the family?
- Is there a family member not living in the home who could provide support?
- Could the person requiring support be supported by their family to employ a PA who is not a member of the family?
- How does the practitioner anticipate that the employment arrangements will affect the family dynamic and relationships?
- Will the employment arrangements involve conflicts of interest, such as husband employing his wife?

- If there are issues with the quality of support provided, how will these be addressed?
- How are the arrangements to be monitored and reviewed?

If employing a family member is the best available option and the person will **not** be able to manage the direct payment or the employer's responsibilities, the practitioner will need to investigate who else could support the individual with this task. This could be an independent broker, agency, friend or family member not living in the same household. Considerations should be made around potential risks. Potential risks could include but are not limited to:

- situations where one family member is proposing employing another family member to provide care and support, and they all live in the same household as the person requiring care and support **(this cannot be agreed under any circumstances, see above for alternative options)**
- conflicts of interest: the person employed should not be supporting the person to manage their direct payment.
- whether there is someone suitable to check that the appropriate level of care and support is being provided; the wages may be paid but the support may not be provided
- whether the person receiving care and support can contact an independent person for help if required
- whether the family is likely to become dependent on the money earned

The checklist (on page 30) gives space to acknowledge the risks and evidence how these risks are going to be mitigated. Once all options have been considered, if employing a family member is both necessary and the most appropriate choice for that individual, the reasons for this must be clearly stated on the support plan and the checklist must be completed. If this is a temporary situation the end date of the arrangement must be clearly stated on the support plan.

The practitioner should make clear to the family that the support plan may not go ahead if approval is not gained. The approval of the support plan will be subject to a two stage approval process. The support plan, any supporting documentation and checklist (prepared by the practitioner) must have:

- (i) support from the Community Service Manager, and
- (ii) final approval of a Chief Officer

Setting up the direct payment and related arrangements for review and monitoring

Once approved the direct payment can go ahead and be set up in the usual way. The practitioner should contact the Direct Payments Support team for employment advice. Once the support plan has been agreed as above the Direct Payments advisor will conduct a home visit where an individual will be employing a family member and make sure the family have the appropriate information.

The finance officer for Direct Payments should make it clear on the finance file that a family member is being employed through direct payments. Any additional reviews or arrangements agreed by the Chief Officer must be put into place by the practitioner.

CHECKLIST - Using Direct Payments to employ a family member living in the same household

Please see the procedure Using Direct Payments to employ a family member: relative / spouse / partner available in the Practice Guidance – Chapter 9 Direct Payments

Name of person requiring care and support	
LAS number	
Name and relationship of person being employed	
Do they live in the same household as person needing support	Yes <input type="checkbox"/> No <input type="checkbox"/> (if no, this form may not be required please consult the DP team for more advice) Details of household
Details of other options considered, prior to the option of employing a family member living in the same household	
Is this support plan likely to be	Temporary <input type="checkbox"/> Permanent <input type="checkbox"/>
Further details of arrangement (support plan and supporting documentation, if required, should be attached)	
List potential risks identified and suggestions for reducing the risks identified (see procedures titled Using Direct Payments to employ a family member: relative / spouse / partner available on Boris)	
Will the person who requires the support be able to manage the employment responsibility independently (with the help of payroll services and DP team if needed)?	Yes <input type="checkbox"/> No <input type="checkbox"/> Details
If no, please detail the arrangements to be considered?	

Appendix 3: Direct payment process map

