NHS
Bath and
North East Somerset
Clinical Commissioning Group

# NHS
# Bath and North East Somerset
# Clinical Commissioning Group
# Personal Health Budgets Policy

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| **1.1** | | **This policy is based on the Wiltshire CCG Policy.** | **(Wiltshire CCG)** |
| **1.2** | **20/12/2018** | **BaNES CCG Policy reviewed amended and aligned with Wiltshire's Policy.** | **Sarah Jeeves, BaNES CCG Carolyn Hamblett, Virgin Care Ltd Adult Social Care** |
| **1.3** | **26/4/2019** | **Reviewed, added references to NHS Plan, wheelchair PHB's and CHC domiciliary care. Also option for extending PHB's within the CCG if required, added to decision making section preference for Single Panel process to be used for ratification.** | **Val Janson, BaNES CCG.** |

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## 1. Purpose & Introduction

This document sets out the policy and practice guidance developed to ensure the consistent and transparent delivery of Personal Health Budgets (PHBs) for eligible individuals. This includes both children and adults.

The following NHS England Guidance documents that relate to PHBs have been referenced for the purpose of writing this document:

- Guidance on Direct Payments for Healthcare: Understanding the Regulations issued March 2014
- Guidance on the "right to have" a Personal Health Budget in Adult NHS Continuing Healthcare and Children and Young People's Continuing Healthcare issued September 2014
- Integrated Personal Commissioning (NHS England, May 2016) https://www.england.nhs.uk/wp-content/uploads/2017/06/ipc-emerging-framework.pdf
- Personal Wheelchair Budgets (NHS England, May 2016) https://www.england.nhs.uk/personal-health-budgets/personal-wheelchair-budgets/

These documents provide detailed guidance on the National Health Service (Direct Payments) Regulations 2013.

NHS Bath and North East Somerset Clinical Commissioning Group (BaNES CCG) and the provider service will ensure that PHBs are effective and value for money for patients and the CCG by robust support planning and effective monitoring of direct payments. The processes underpinning PHBs delivered as a direct payment are available in the policy for direct payments https://www.bathnes.gov.uk/sites/default/files/sitedocuments/Social-Care-and-Health/Personal-Budgets-Charging/final_direct_payments_policy_20171208.pdf and must be referred to with regard to the provision of direct payments across adults, children and health.

## 2. Scope

This policy applies to all employees of BaNES CCG and NHS Providers commissioned to deliver services for BaNES CCG.

### 2.1 Other Relevant Legislation

- Care Act 2014, HM Government. London
- Human Rights Act 1998, including the Article 8 Right to respect for private and family life, and Article 14 Prohibition of discrimination
- The Data Protection Act 1998.

- The Carers (Equal Opportunities) Act 2004. This provides carers with the right to receive assessment for support and a duty on various public authorities to give due consideration to a request to provide services to carers.

- The Mental Capacity Act 2005 ("MCA"). The Mental Capacity Act provides a framework for decision making applicable where people lack capacity to make a decision for themselves.

- The Equality Act 2010. The Equality Act brought together the various earlier discrimination laws under one statute. It is unlawful to act in a discriminatory manner against any "protected characteristics", including race, sex and disability.

- The Children and Families Act 2014. This Act intends to improve services for key groups of vulnerable children (e.g. those in adoption and those with special educational needs and disabilities).

- The National Health Service (Direct Payments) Regulations 2013 (SI 2013 No.1617)

- The National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2013. These Regulations set out the duties of CCG's relating to NHS Continuing Healthcare rights and personal health budgets.

- NHS England – The Forward View into action: Planning for 2015 / 2016

- Department of Heath The Government's Mandate to NHS England 2016 / 2017

- The NHS Long Term Plan to improve the quality of patient care and health outcomes (January 2019)

## 3. Overview

### 3.1 History

Following a successful pilot programme by the Department of Health, which ended in October 2012, the Government announced that from April 2014, CHC Eligible Persons will have the "right to ask" for a PHB. From October 2014, this right to ask was converted to a "right to have" a PHB, specifically for NHS Continuing Health Care (CHC) and Continuing Care (CC) for children with complex care needs.

**Continuing Healthcare** means a package of ongoing care that is arranged and funded solely by the National Health Service (NHS) where the individual has been

assessed and found to have a 'primary health need' as set out in this National Framework. Such chare is provided to an individual aged 18 or over, to meet health and associated social care needs that have arisen as a result of disability, accident or illness.

This development mirrors other changes within the NHS, including the drive for greater patient choice, shared decision making and innovation in managing funds. The Government has confirmed a commitment in the Mandate to NHS England (2016-2017) that PHB's including direct payments, should be an option extended to anyone who could benefit from a PHB from April 2015. Furthermore NHS England expects that unless there are exceptional circumstances, everyone living in their own home who is in receipt of NHS CHC funding will have a Personal Health Budget from April 2019, which also aligns with the requirement to move to more integrated personal budgets across the health and social care landscape.

### 3.2 What is a Personal Health Budget (PHB)?

PHBs are the allocation of NHS funding which individuals, after an assessment and planning with their NHS clinical team, are able to personally control and use the services they choose to support their health needs. This enables them to manage identified risks and to live their lives in ways which best suit them. Enabling people to exercise choice and control over their lives is central to achieving better outcomes for individuals.

For Eligible Persons there is a duty on CCGs to:

- Inform them of their right to have a PHB (October 2014)
- Provide information, advice and support in relation to PHBs.
- Consider any request for a PHB;

There are five essential characteristics of a PHB.

The person with the PHB (or their representative) must:

1. Be able to choose the health outcomes they want to achieve
2. Know how much money they have for their healthcare and support
3. Be enabled to create their own care plan, with support if they want it
4. Be able to choose how their budget is held and managed
5. Be able to spend the money in ways and at times that make sense to them, as agreed in their plan.

The CCG is committed to promoting service user choice, while supporting them to manage risk positively, proportionately and realistically. In keeping with good practice, health care professionals should support and encourage service users' choices as much as possible and keep them informed in a positive way, of issues associated with those choices and how to take reasonable steps to manage them.

### 3.3 Principles

There are six key principles for PHBs and personalisation in health:

1. *Upholding NHS principles and values* - The personalised approach must support the principles and values of the NHS as a comprehensive service which is free at the point of use, as set out in the NHS Constitution. It should remain consistent with existing NHS policy, including the following principles:

    - Service users and their carers should be fully involved in discussions and decisions about their care using easily accessible, reliable and relevant information in a format that can be clearly understood;
    - There should be clear accountability for the choices made;
    - No one will ever be denied treatment as a result of having a PHB;
    - Having a PHB does not entitle someone to additional or more expensive services, or to preferential access to NHS services;
    - There should be efficient and appropriate use of current NHS resources.

2. *Quality* – safety, effectiveness and experience should be central. The wellbeing of the individual is paramount. Access to a PHB will be dependent on professionals and the individual agreeing a care plan that is safe and will meet agreed health and wellbeing outcomes. There should be transparent arrangements for continued clinical oversight, proportionate to the needs of the individual and the risks associated with the care package.

3. *Tackling inequalities and protecting equality* – PHBs and the overall movement to personalise services could be a powerful tool to address inequalities in the health service. A PHB must not exacerbate inequalities or endanger equality. The decision to set up a PHB for an individual must be based on their needs, irrespective of race, age, gender, disability, sexual orientation, marital or civil partnership status, transgender, religion, beliefs or their lack of the requisite mental capacity to make decisions regarding their care.

4. *PHBs are purely voluntary* - No one will ever be forced to take more control than they want.

5. *Making decisions as close to the individual as possible* - Appropriate support should be available to help all those who might benefit from a more personalised approach, particularly those who may feel least well served by existing services / access, and who might benefit from managing their budget.

6. *Partnership* - Personalisation of healthcare embodies co-production. This means individuals working in partnership with their family, carers and professionals to plan, develop and procure the services and support appropriate for them. It also means CCGs, local authorities and healthcare providers working together to utilise PHBs so that health, education and social care work together as effectively as possible.

### 3.4 Standards for self-directed health support

The following standards for self-directed support are followed nationally and locally. These seven outcomes will be delivered through the implementation of this policy:

Outcome 1 - Improved health and emotional well-being: To stay healthy and recover quickly from illness.

Outcome 2 - Improved quality of life: To have the best possible quality of life, including life with other family members supported in a caring role.

Outcome 3 - Making a positive contribution: To participate as an active citizen, increasing independence where possible.

Outcome 4 - Choice and control: To have maximum choice and control.

Outcome 5 - Freedom from discrimination, harassment and victimisation: To live free from discrimination, harassment and victimisation.

Outcome 6 - Economic well-being: To achieve economic well-being and have access to work and / or benefits as appropriate.

Outcome 7 - Personal dignity: To keep your personal dignity and be respected by others.

## 4. PHB eligibility

### 4.1 Who can have a PHB?

From 1 October 2014, all Eligible Persons acquired a ‘right to have’ a PHB including by way of a direct payment. Whilst the offer was initially only for CHC eligible individuals, CCG’s can at their discretion offer this to a wider group of people who may benefit from a PHB.

For BaNES CCG this includes:

1. People who are eligible for fully funded NHS continuing healthcare (adults), including people with a learning disability, mental health difficulties who have complex health needs and or challenging behaviour, and long term conditions
2. Families of children eligible for Continuing Care (refer to 3.1.2)

3. Adults who have learning disabilities and mental health with complex health needs or challenging behaviour, who are in receipt of a joint funding arrangement with BaNES CCG and Bath and North East Somerset Council, have the right to explore whether their needs can be met by utilising a personal budget.
4. Children Complex Care - In the case of children where continuing care is being received, the child and or family will have an, education, health and social care plan in place. For children, personal health budgets can contribute to some or all of the social, health and educational elements of this plan.
5. In response to the consultation on extending legal rights for PHBs the integrated budgets, the Department of Health and Social Care published a proposal on 21/02/2019 to include people eligible for an NHS wheelchair and people who access aftercare services under section 117 of the Mental Health Act. BaNES CCG will also explore other opportunities to develop PHB's if need arises.

### 4.2 Exclusions for PHBs

If an individual comes within the scope of the "right to have" a PHB, then the expectation is that one will be offered. However, the NHS England guidance states:

*"There may be some exceptional circumstances when a CCG considers a personal health budget to be an impracticable or inappropriate way of securing NHS care for an individual. This could be due to the specialised clinical care required or because a personal health budget would not represent value for money as any additional benefits to the individual would not outweigh the extra cost to the NHS."*

## 5. Options for managing PHBs

The most appropriate way to manage a PHB will be discussed and agreed with the individual, their representative or nominee as part of the care planning process. PHBs can be received and managed in the following ways, or a combination of them:

a) **Notional budget** – where an individual is informed of the amount of funding available to them and decides how the budget is used for their care but the CCG continues to commission services, manage contracts and make purchases etc. Notional budgets could be an option for individuals who want more choice and control over their healthcare but who do not feel able or willing to manage a budget.

b) **Third party budget** – A non-NHS support service organisation, legally independent of both the individual and the NHS, holds the money for the individual and arranges and pays for all of the services on behalf of the individual in accordance with the care plan.

c) **Direct payments**:

Can differ whether a person lacks or retains capacity:

Direct payments for people *with capacity* – where the individual receives the funding that is available to them and they purchase the services and support they want in accordance with the agreed care plan (with or without assistance). The individual can elect to receive and manage the payment themselves or decide for it to be received and managed by a person of their choosing (a nominee). If the individual chooses a nominee, that nominee becomes responsible for managing the funds and services and accounting for expenditure. Support from CCG recommended support services are available for all direct payment recipients.

Direct payments for people who lack capacity – where the individual lacks capacity, an 'authorised representative' (agreed by the CCG) receives the funding that is available to the individual as a direct payment. The authorised representative is responsible for managing the funds and services and accounting for expenditure.

The 'authorised representative' must involve the individual as much as possible and all decision making must be in line with the individual's best interests. Support services recommended by the CCG are available for all direct payment recipients.

In the case of children, direct payments can be received by their parents or those with parental responsibility for that child.

## 6. How do PHBs work?

### 6.1 Informing people about PHBs

All policies relating to NHS Continuing Healthcare continue to apply alongside the law and guidance on PHBs. The named health professional will inform Eligible Persons of their right to have a PHB at the initial assessment, and any subsequent CHC reviews.

The CCG has made arrangements for non-NHS support services to provide information, advice and guidance to prospective and existing PHB recipients, and their families

The services provided by these organisations will include:

- Information on how a PHB can be used and managed
- Guidance on producing a personalised care / support plan
- Advice and support to manage a PHB, including a direct payment
- Guidance on record keeping requirements
- Information about direct payments, including the responsibilities around financial monitoring that will need to be taken on by the recipient of the direct payments.

Patients and families who wish to consider and explore PHBs further will be offered a referral to a non-NHS support service by the lead health professional as required.

### 6.2 Budget Setting

The primary focus of a budget setting process is to develop a realistic indicative budget after carrying out a needs assessment.

Under the traditional model of CHC, an assessment would be followed by the named health professional producing a care plan, i.e. a schedule prescribing episode of care and defining specific tasks for the care worker. Under PHBs, after a PHB budget assessment an 'indicative budget' will be set, using locally defined methods.

### 6.3 PHB care planning

Everyone who has a PHB will go through a care planning process, which leads to a person-centred Care Plan.

A PHB Care Plan is developed jointly by the individual, their family (if appropriate), and /or a non NHS support services planner, and/or the individual's lead health professional. The process should be driven by the individual's choices and the Care Plan should clearly show how a PHB will be used to achieve the individual's identified health and care outcomes. This includes:

- The health needs of the individual and the desired outcomes;
- The amount of money available under the PHB;
- What the PHB will be used to purchase;
- How the PHB will be managed;
- Who will be managing the budget;
- Who will be providing each element of support;
- How the plan will meet the agreed outcomes and clinical needs;
- Who is responsible for monitoring the health condition of the individual;
- Who the individual should contact to discuss any changes in their needs;
- The anticipated date of the first review;
- How the individual has been involved in the production of the plan;
- How any training needs will be met;
- Identifying any risks, consequences and mitigating actions;
- Contingency planning.

The NHS (Direct Payments) Regulations 2013 ("the regulations") and associated guidance set out what direct payments (using NHS money) can and cannot be used for, and how they should be administered. The CCG will apply the regulations to all forms of PHB as far as possible, whether it is received/managed by way of direct payments or otherwise.

Delay in arranging PHBs should be avoided. Where delay is unavoidable (for example, where circumstances make it difficult to plan for a person's ongoing care) the reasons for it must be made clear to the individual.

Regular review should take place so that a person's PHB can be put in place as soon as practicably possible. An interim care package may be offered to avoid such delay.

### 6.4 Representatives for children and people who lack capacity

A PHB arrangement for a person who lacks capacity will require the appointment of an authorised person. An authorised person is someone who agrees to act on behalf of someone who is otherwise eligible to receive a PHB but cannot do so because they do not have capacity to consent to receiving one or because they are a child.

An authorised person could be anyone deemed suitable by the CCG, and who would accept the role. The authorised person can be:

- a friend, carer or family member;
- a deputy appointed by the Court of Protection;
- an attorney with health and welfare or finance decision-making powers created by a lasting power of attorney;
- someone appointed by the CCG.

In the case of adults who lack capacity, when choosing the authorised person, the CCG must adopt a decision-making process in line with the requirements of the MCA and within the context of the individual's best interests as per the checklist at s.4 of the Act. This includes seeking the views of the individual, where possible, about who they would want to manage their PHB.

The decision making process for the appointment of the 'representative' must be documented and discussed as part of care planning process, and agreed by the CCG.

The authorised person will take on the responsibilities associated with the PHB. Where it is believed to be appropriate to provide a PHB by way of direct payments, the authorised person must be fully informed about, and consent to accepting, the responsibilities relating to the receipt and management of the direct payment on the individual's behalf.

The involvement of the authorised person should be reviewed if the individual regains capacity and/or reaches the age of 16.

### 6.5 Lead Health Professional

A lead health professional will be named in an individual's Care Plan. This should be someone who has regular contact with the individual and their representative or nominee if they have one. It is likely that the lead health professional will be the most appropriate person to undertake this role. The lead health professional is responsible for:

- Managing the assessment of the health needs of the individual as part of the care plan;

- Ensuring that the individual, representative, CCG clinician have agreed the care plan;
- Undertaking or arranging for the monitoring and review of the care plan and health of the person;
- Liaising between the individual (or their representative or nominee) and the CCG as the primary point of contact.

### 6.6 Approval of Care Plan

PHB Care Plans are agreed in principle by the named professional. However, all PHB Care Plans will also need to be signed off by the CCG. In some instances this may be by a CCG PHB Panel process. The purpose of the panel process is to provide robust governance processes, to ensure that the PHB support plans are clinically safe and meet the needs of the individual. This process includes reviewing, agreeing and signing off the Care Plan which includes a risk identification and management plan.

The CCG named professional will not agree to any services named in the Care Plan if they believe that the potential health outcomes are outweighed by significant risks to the individual's health. However, the CCGs will not impose blanket prohibitions and will remain open to considering different approaches to achieving outcomes other than those traditionally used, considering the particular circumstances of the individual and balancing the risks and benefits accordingly.

If a service named in the Care Plan is not agreed, the case manager will provide the individual, representative or nominee the reasons why this decision has been reached. The individual or their representative may ask the CCG named professional to reconsider their decision and provide additional evidence or information to inform that decision. The CCG will review their decision in a timely manner upon such a request being made. The case manager will notify and explain the outcome in writing to the individual.

If a part of the Care Plan is refused, the CCG should make every effort to work in partnership with the individual, their representative or nominee to ensure their preferences are considered and taken into account.

### 6.7 PHB Agreement

When taking up a PHB, the individual, their representative and / or their nominee must sign a 'PHB agreement', which explains the responsibilities associated with the PHB and sets out the agreement that the PHB will be spent as set out in the Care Plan.

If the patient is receiving the PHB as a direct payment, the PHB agreement will confirm that the PHB will be spent in accordance with the NHS (Direct Payments) Regulations 2013.

## 6.8 Assistance to manage PHBs

The CCG has arranged for non-NHS support services to provide support to individuals in receipt of PHBs. A support service can assist those in receipt of a direct payment. It can also support individuals in activities such as recruiting, employing staff and payroll. These support services can assist individuals with services for those with third party budgets.

The costs associated with utilising a non-NHS support service will be met from the PHB allocation. If the direct payment recipient chooses to use their direct payment to purchase support from a home care agency, they are still able to access a managed account from a direct payment support service of their choosing, but they must fund this themselves. The cost of the direct payment support service must not come out of their direct payment.

## 6.9 Monitoring and Review

Regular review is required in order to ensure that an individual's Care Plan continues to meet their needs.

In respect of CHC for adults, this review is carried out in line with the NHS Continuing Healthcare National Framework, (revised Oct 2018).

In respect of continuing care for children, the care package should be reviewed after three months and then at least every six months to ensure it continues to meet the child or young person's needs. Reviews will also confirm whether or not the child or young person still has continuing care needs.

Reviews may need to take place sooner or more frequently if:

- the health needs of the individual have changed significantly;
- the care plan is not being followed or expected health outcomes are not being met; or
- the individual, their representative or their nominee requests it.

It should be made clear under the Care Plan who the PHB holder should contact to discuss changes to their PHB should their needs change. In most cases, the Case Coordinator will be best placed to undertake this role.

## 6.10 Stopping or reclaiming PHBs

Arrangements under PHBs can be stopped and, where applicable, money can be reclaimed. The details of this are set out within the National Health Service (Direct Payments) Regulations 2013.

## 7. Direct Payments

The National Health Service (Direct Payments) Regulations 2013 set out how direct payments should be administered and on what they can be spent.

### 7.1 Considerations when deciding whether to make a direct payment

The CCG will adhere to the requirements as detailed at Regulation 7 of the NHS (Direct Payments) Regulations 2013 when deciding whether to make a direct payment, including whether an individual (whether the individual or their representative) is able to manage direct payments.

There are certain circumstances as detailed in the NHS (Direct Payments) Regulations 2013, Regulations 3, 4 and 5.

### 7.2 Deciding not to offer a direct payment

In addition to above, a CCG may decide to refuse to make a direct payment if it believes it would be inappropriate to do so, for example:

- if there is significant doubt around an individual's or their representative's ability to manage a direct payment;
- if there is a high likelihood of a direct payment being abused;
- if the benefit to the particular individual of having a direct payment does not represent good value for money;
- if it considers that providing services in this way will not provide the same or improved outcomes.

Such a view may be formed from information gained from anyone known to be involved with the individual, including health professionals, social care professionals, the individual's family and close friends, and carers for the individual.

If a direct payment is refused, other options to personalise the package of care for the individual should be explored and facilitated as much as is possible, and other forms of PHB, such as a notional budget or third-party budget, should be considered.

## 8 Decision Making

Where there is a recommendation for a direct payment, the CCG will use either the CHC authorisation of a package of care process or the Single Panel process to consider this recommendation. Single Panel is the preferred option providing there is CCG.

The Panel will consult the appropriate Terms of Reference when making its decisions.

### 8.1 Request for review of a decision

Where the CCG decide that a direct payment would be inappropriate, the individual or their representative may request the CCG to reconsider the decision, submitting additional information to support the deliberation. The CCG will reconsider its decision in a timely manner upon such a request being made. The review will be considered in line with the CCG Choice and Equity Policy.

The individual or their representative must be informed in writing of the outcome of the review and the reasons for the decision.

## 9. What can and cannot be bought with direct payments

The NHS direct payments regulations and associated guidance set out what direct payments (using NHS money) can and cannot be used for, and how they should be administered.

A direct payment can be spent on a range of services and equipment that will lead to health outcomes, but only if they have been agreed in the Care Plan. The person receiving the direct payment (whether it is the individual requiring support or their representative) is responsible for ensuring that it is only used as specified in the care plan. If it is not, the direct payment may have to be stopped and the law allows for certain payments which have been mis-spent to be reclaimed.

There are some restrictions on how PHBs can be used. These are not intended to reduce choice and control for individuals, but to ensure that PHBs are used for maximum benefit and to ensure they are administered consistently and fairly for everyone.

Direct payments cannot be used for certain circumstances which are clearly identified in the National Health Service (Direct Payments) Regulations 2013 (Section 8) and including being unable to pay for the following:

- alcohol
- tobacco
- gambling
- debt repayment (other than for a service specified in the support plan)
- core GP services
- planned surgical interventions
- pharmaceutical charges
- services provided through vaccination or immunisation programmes
- any service provided under the NHS health check or National Child Measurement Programme
- urgent or emergency treatment services

For the avoidance of doubt, BaNES CCG will apply the regulations to any form of PHB insofar as it is possible.

It is expected that when a care plan is being devised that the health needs will be clearly identified and that any non-health needs requiring support will be sourced though the appropriate allowances still available to the individual.

## 10. Receiving a direct payment

Direct payments will be paid every two weeks and are paid in arrears. Direct payments must be paid into a separate bank account used specifically for the direct payment. The bank account must be in the name of the person receiving the care, or their nominee or representative.

When receiving direct payments, the account holder should keep a record of both the money received and where it is spent. They are responsible for keeping hold of statements and receipts for auditing.

### 10.1 One-off payments

A one-off payment is used to buy a single item or service, or a single payment for no more than five items or services, where the individual is not expected to receive another direct payment in the same financial year.

When someone is receiving a one-off direct payment, it can be paid into the individual's ordinary bank account (or that of a nominee or representative). Individuals will need to provide evidence that the direct payment was used as agreed in the Care Plan, for example, by producing receipts of items/services purchased.

### 10.2 Monitoring and review of direct payments

As a minimum, a clinical review of an individual's direct payments should be performed within three months of the first direct payment and then annually. Financial monitoring will take place quarterly. Financial reviews will also be completed by the non-NHS support service as required.

There must be a review if the CCG become aware that direct payments have not been sufficient to secure the services specified in the care plan. If someone wishes to purchase additional care privately, they may do so, as long as it is additional to their assessed needs and it is a separate episode of care.

Where concerns are raised regarding how the PHB is being spent, the non-NHS support service will inform the CCG to alert them to any concerns.

These considerations are in addition to those set out, which requires review of an individual's Care Plan to ensure it remains appropriate to meeting the individual's needs.

## 10.3 Stopping or reducing direct payments

There is an ongoing duty to ensure that direct payments are reviewed by the CCG. The amount provided under direct payments may be increased or decreased at any time, provided the new amount is sufficient to cover the full cost of the individual's care plan. PHBs and direct payments are not a welfare benefit and do not represent an entitlement to a fixed amount of money. A surplus may indicate that the individual is not receiving the care they need or too much money has been allocated. It should be noted that a surplus is different to a contingency – it is permissible to include an amount for contingency in a PHB, for example, to cover employment costs such as redundancy. As part of the review process, CCG should establish why the surplus has built up.

BaNES CCG Redundancy Risk Sharing Agreement (October 2017) indicates that for individuals who employ their own staff, they must ensure they have adequate employer's liability insurance policy in place. This insurance must include redundancy cover and should be funded through the Direct Payment. The Commissioner has no liability in relation to redundancy payments for any staff.

Where direct payments have been reduced, the individual or their representative may request that this decision be reconsidered and may provide evidence or relevant information to be considered as part of that deliberation. Where this happens, the individual or representative must be informed in writing of the outcome of the reconsideration and the reasons for this decision. If the individual remains unhappy about the reduction, they should be referred to the local NHS complaints procedure.

The CCG will stop making direct payments where:

- A person with capacity to consent, withdraws their consent to receiving direct payments;
- A person who has recovered the capacity to consent, does not consent to the direct payments continuing; or
- A representative withdraws their consent to receive direct payments, and no other representative has been appointed.
- the money is being spent inappropriately (e.g. to buy something which is not specified in the support plan);
- direct payments are no longer a suitable way of providing the person with care;
- where there has been theft, fraud or abuse of the direct payment; or
- if the individual's assessed needs are not being met or the person no longer requires care.

Where PHBs and direct payments are stopped, the CCG will give up to 28 days' notice to the individual, their representative or nominee in writing, explaining the reasons behind the decision. However, in some cases, it may be necessary to stop the direct payment immediately, for example, if fraud or theft has occurred.

Failure to provide evidence of expenditure, when due or requested, through the submission of quarterly returns (if appropriate), bank statements, timesheets and other required documentation could be reported to the Local Counter Fraud Specialist under the Fraud Act 2006 offence of Failure to disclose Information (Section 3). The CCG can suspend payment of the PHB pending the supply of this information.

### 10.4 Reclaiming a direct payment

The CCG can claim back direct payments where:

- they have been used to purchase a service that was not agreed in the care plan;
- there has been theft or fraud; or
- the money has not been used (e.g. as a result of a change in the care plan or the individual's circumstances have changed) and has accumulated.

If a decision to reclaim payments is made, reasonable notice must be given to the individual, their representative or nominee, in writing, stating:

- the reasons for the decision;
- the amount to be repaid;
- the time in which the money must be repaid; and
- the name of the person responsible for making the repayment.

The individual, their representative or nominee may request that this decision be reconsidered and provide additional information to the CCG for reconsideration. Notification of the outcome of this reconsideration must be provided in writing and an explanation provided.

## 11. Using a direct payment to employ staff or buy services

### 11.1 Using a direct payment to employ staff

People may wish to use their direct payment to employ staff to provide them with care and support. In so doing, they will acquire responsibility as an employer and need to be aware of the legal responsibilities associated with this. This should not discourage people who would otherwise be willing and able to manage a direct payment. In order to ensure that people are appropriately informed and supported in meeting their duties as an employer, the CCGs have arranged for non-NHS support services. This includes support in relation to payroll, Human Resources and other employment related services. People should be made aware of the availability of these services. Individuals and their representatives employing staff are strongly recommended to utilise the information, advice, guidance and payroll and HR facilities of non-NHS support services to ensure the legal responsibilities of being an employer are satisfied.

The costs associated with utilising a non-NHS support service are met from the PHB allocation. This cost should be factored in when setting the budget.

### 11.2 Employing a family member or person living in the same household

A direct payment can only be used to pay an individual living in the same household, a close family member or a friend if the CCG is satisfied that to secure a service from that person is necessary in order to satisfactorily meet the individual's need for whom direct payments are being made. It is anticipated that this will be permitted in very limited circumstances. The CCGs must make judgements on a case by case basis.

Any arrangement of this nature must be formally agreed by the CCG, and recorded in writing in both the care plan and the PHB agreement.

This restriction is not intended to prevent individuals from using direct payments to employ a live-in personal assistant. The restriction applies where the relationship between the two people is primarily person rather than contractual (for example, if the people concerned would be living together in any case).

### 11.3 Safeguarding and employment

People may wish to use their direct payment to employ staff to provide them with care and support. When deciding whether or not to employ someone, patients and their families should follow best practice in relation to safeguarding, vetting and barring including satisfying themselves of a person's identity, their qualifications and professional registration if appropriate and taking up references.

The CCGs have made arrangements with non-NHS support services to provide advice and accessible services in relation to the provision of DBS checks for individual employers.

Individuals cannot request DBS checks on other individuals. However, an individual or their representative may wish to ask the CCG or another Umbrella Organisation e.g. a non NHS support service, if it is possible to arrange for the prospective employee or contractor to apply for an enhanced DBS check with a check of the adults (or children's) barred lists when employing or contracting with people who are not close family members or people living in the individual's household providing care to the individual but who are:

- regulated health care professionals – for example, nurses or physiotherapists
- people providing healthcare under the direction or supervision of a health care professional
- people providing personal care

## 12. Indemnity

Direct payments can be used to pay for a personal assistant (PA) to carry out certain personal care and health tasks that might otherwise be carried out by qualified healthcare professionals such as nurses, physiotherapists or occupational therapists. In such cases the healthcare professional and / CCG will need to be satisfied that the task is suitable for delegation, specify this in the Care Plan and ensure that the PA is provided with the appropriate training and development, assessment of competence and have sufficient indemnity and insurance cover.

Lead health professionals, and the CCGs will need to consider and discuss with the person, their nominee or representative, the potential risks associated with the clinical tasks being carried by the PAs on a case by case basis. This needs to form part of the risk assessment and care planning process and outcome recorded in the Care Plan.

The person buying services needs to be aware of whether the provider needs to comply with prospective legislation discussed above. If the provider does not need to comply people may, if they wish, buy services from providers who have limited or no indemnity or insurance cover. So long as the person buying the service is aware of the potential risks and implications, limited or no indemnity should not automatically be a bar to purchasing from a provider. This should be included in the discussion around risks when developing the Care Plan and Risk assessment.

In the first instance, it will be the responsibility of the person buying the service to check the indemnity cover of the provider from which they are buying services. They must make enquiries to ascertain whether the provider has indemnity or insurance, and if so, whether it is proportionate to the risks involved, and otherwise appropriate.

If the person buying the service asks the CCG to undertake these checks on their behalf, the CCG must do so.

Regardless of who carries out the initial check, the CCG will review this as part of the first review, to ensure the checks have been made and are appropriate.

## 13. Registration and regulated activities

If someone wishes to buy a service which is a regulated activity under the Care Act (2014), they will need to inquire as to whether their preferred provider is registered with the Care Quality Commission (CQC).

If a person or related third party employs a care worker directly, without the involvement of an agency or employer, the employee does not need to register with CQC. A related third party means:

(a) an individual with parental responsibility for a child to whom personal care services are to be provided

(b) an individual with power of attorney or other lawful authority to make arrangements on behalf of the person to whom personal care services are to be provided

(c) a group or individuals mentioned in a) and b) making arrangements on behalf of one or more persons to whom personal care services are to be provided

(d) a trust established for the purpose of providing services to meet the health or social care needs of a named individual

This means that individual user trusts, set up to make arrangements for nursing care or personal care on behalf of someone, are exempt from the requirement to register with the CQC.

If someone wishes to use a direct payment to purchase a service which is not a regulated activity, they may do so.

## 14. Service User Evaluation

It is vital that CCG's have systems and processes in place to review the effectiveness of PHB's to provide assurance that the individual support plans are; clinically safe, effective and meeting individual needs and outcomes.

PHB reviews will be undertaken at three months after the setting up of the PHB and thereafter at least yearly or at times of changes in clinical needs.

## 15. Further Information

The NHS England website has a section dedicated to PHBs. This has information about national policy, the implementation toolkit, stories and other resources.

https://www.england.nhs.uk/personal-health-budgets/

The Peer Network, a user-led organisation for PHBs, has its own website:

http://www.peoplehub.org.uk/