EXPLANATORY MEMORANDUM TO THE NATIONAL HEALTH SERVICE (DIRECT PAYMENTS) REGULATIONS 2013

2013 No. 1617

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

2. Purpose of the instrument

2.1 In the light of the positive evidence from the personal health budget pilot programme (which included direct payments for healthcare), the Government now wishes to enable direct payments for healthcare to be made available across England, not just in pilot schemes. This instrument revises and replaces the current negative instrument which governs the rules for the making of direct payments – The National Health Service (Direct Payments) Regulations 2010, S.I. 2010/1000.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The affirmative Order (the National Health Service (Direct Payments) (Repeal of Pilot Schemes Limitation) Order 2013(S.I. 2013/1563)) which repealed the part of the legislation (sections 12A(6) and 12C(1) to (4) of the National Health Service Act 2006) that stipulates only pilot schemes could make direct payments for healthcare successfully passed through both Houses and was published on 28 June. It will come into force on 1 August 2013. The Order repeals sections 12A(6) and 12C(1) to (4) of the National Health Service Act 2006 (the 2006 Act), which sections were inserted by section 11 of the Health Act 2009. The Order has paved the way for revision of this negative Instrument..

4.2 This Instrument includes incidental, supplementary, consequential, saving and transitional provision as a result of the repeal of sections 12A(6) and 12C(1) to (4) of the 2006 Act and the abolition of the current pilot schemes. This ensures that people receiving direct payments for healthcare as part of the pilots can continue to receive them.

4.3 A public consultation on the policy changes underpinning the regulations ran between 1 March and 26 April 2013. This can be found at http://www.dh.gov.uk/health/2013/03/direct-payments-consultation/ along with the impact assessment for the policy as a whole. Please see Annex B for details of the policy changes considered by the consultation.

4.4 The Government has analysed the responses to this consultation. The analysis and the Parliamentary debates on the Order have informed the revision of the content of this instrument. For further details, please see paragraph 8 and Annex B.

4.5 These negative Regulations will come into force on the same day as the Order (1st August 2013).

4.6 A Government response to the consultation will be published imminently and guidance on the regulations wil be published before 1 August 2013.

5. Territorial Extent and Application

5.1 This instrument applies to England only.

6. European Convention on Human Rights

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

7. Policy background

- What is being done and why?

7.1 The Government piloted personal health budgets between 2009 and 2012. During that time, individual pilot schemes (selected Primary Care Trusts (PCTs)) were given direct payment powers by the Secretary of State for Health which enabled them to give people direct payments for healthcare. The aim of the pilot programme was to explore the use of direct payments for healthcare and personal health budgets more widely, to determine who benefits and how best to implement them. These pilot schemes have been independently evaluated by the Personal Social Services Research Unit (PSSRU), University of Kent. This and the wider learning from the pilot programme supports the use of direct payments for healthcare as a way of giving people more choice and control over how their health needs are met. Please see Annex A for details of the independent evaluation, the final evaluation report and the wider learning from the pilot programme.

7.2 Following the positive evidence from the independent evaluation, the Government announced in November 2012 that personal health budgets, including direct payments, would be rolled out across England from April 2014.

7.3 The aim of personal health budgets is to enable greater personalisation of healthcare services, give people more choice and control, improve patient satisfaction and quality of life.

7.4 A personal health budget is an amount of money that is provided to a patient in lieu of their regular NHS care. The patient and their healthcare

professional agree the desired health outcomes and the individual, with support, is able to plan how to use the money available to meet those needs.

7.5 There are three methods of having a personal health budget: (i) notional, where the money is managed by the NHS; (ii) third-party, where a person or organisation independent of the NHS and the patient manages the budget; or (iii) a direct payment, which is managed by the individual themselves.

7.6 At present, only authorised pilot schemes are able to make direct payments for healthcare. The Government wanted to make it possible for all clinical commissioning groups (as well as the Secretary of State, the National Health Service Commissioning Board and local authorities) across England to be able to give direct payments for healthcare to patients. The affirmative Order makes that possible from 1 August. The independent evaluation of the pilot programme (see Annex A) showed that the patients who benefited most from personal health budgets were those who were able to exercise the most choice and control over their personal health budget, including what it was spent on and how it was managed. This includes having the choice of whether the money should be managed as a direct payment, a third party budget or a notional budget.

8. Consultation outcome

8.1 As described above, a consultation was undertaken on the elements of the National Health Service (Direct Payments) Regulations 2010 that the Government proposes to change. The consultation closed on 26 April 2013 and the analysis of the responses have informed the content of this Instrument.

8.2 Annex B sets out the policy changes considered by the consultation. Full details of the consultation can be found at http://www.dh.gov.uk/health/2013/03/direct-payments-consultation/ along with the impact assessment for the policy as a whole.

8.3 Overall responses to the consultation were positive and this Instrument revises the regulations in line with that consultation. The only exception being remuneration for family members for administration of complex direct payments for healthcare. The consultation asked whether family members should have the option of being paid to manage large budgets or complex packages of care. The responses to this question were mixed and raised a number of issues which need further consideration before Government can make a decision on this.

9. Guidance

9.1 Guidance will be published in due course by the NHS Commissioning Board in advance of the regulations coming into force on 1 August 2013. In the meantime, the guidance to the existing negative Instrumnet, *Direct payments for health care – Information for pilot sites,* will continue to apply.

10. Impact

10.1 The impact on business, charities or voluntary bodies is mainly in terms of their roles as providers of healthcare services. Personal health budgets allow patients to choose the healthcare services, regardless of provider, that allow them to achieve their healthcare goals and needs in ways that work best for them.

10.2 The impact on the public sector also mainly affects healthcare providers. Personal health budgets allow budget-holders to buy any of a variety of services, including from the NHS or from independent or third sector providers. It does not affect providers' ability to provide NHS-funded healthcare but it may mean that patients do not always choose the option of an NHS provider.

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

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Following the removal of the pilot schemes limitation by the affirmative Order, sections 12A to 12D of the NHS Act 2006 will, from 1 August, enable the Secretary of State, the National Health Service Commissioning Board, all clinical commissioning groups and local authorities to give patients direct payments for healthcare if it is appropriate and beneficial for the patient. There will not be a target for how many patients should be given a personal health budget or a direct payment for healthcare.

12.2 There is an objective in the first mandate to the National Health Service Commissioning Board that patients who may be able to benefit will have the option to hold their own personal health budget by 2015. This objective will be reviewed at the time of review of the next mandate.

13. Contact

Anna Farley at the Department of Health, Tel: 020 7210 6876 or email: anna.farley@dh.gsi.gov.uk can answer any queries regarding the instrument.

Annex A: The Personal Health Budget (including Direct Payments for Healthcare)

Purpose of the pilot and objectives of the National Health Service (Direct Payments) Regulations 2010

1. The experience in social care in England and in healthcare systems overseas showed significant gains in health, wellbeing and efficiency are possible when service users have appropriate control of their own health through self-directed care. Building on this experience, we were keen to see whether personal health budgets could offer users of NHS services similar benefits. Given the positive experience in social care and other healthcare systems, one option was to permit and promote personal health budgets for all areas and all long-term conditions. However, while the potential benefits were large, there were also notable risks and uncertainties attached. For example:

- we did not know the likely uptake for personal health budgets;
- the evidence available was limited to social care and healthcare systems outside the UK, with generally limited testing within health and virtually none in the English healthcare system;
- we did not know enough about which individuals and services were likely to benefit most, and what support would be required to ensure that these benefits were realised;
- for some groups of patients, the opportunity costs of budget planning and overseeing personalised plans may have exceeded the benefits; and
- while there was significant enthusiasm for this, there had been little activity in the NHS so far and consequently there was likely to be a long lag time before a significant proportion of patients who could benefit from a personal health budget could be offered one.

2. It was because of these uncertainties that the Government wanted to pilot personal health budgets (including direct payments) with a thorough independent evaluation running alongside.

3. The 2010 Regulations enabled the Secretary of State to make these pilot schemes to allow direct payments for healthcare to be made. They also set out the criteria for these pilot schemes and the rules under which direct payments could be made.

Details of the Personal Health Budget Pilot Programme

4. The Government as a consequence piloted personal health budgets for three years from 2009 to 2012. It involved over 60 pilot sites (around half of Primary Care Trusts (PCTs) in England) and over 2700 patients.

5. The pilots involved people with a range of long-term conditions such as Chronic Obstructive Pulmonary Disease (COPD), stroke, diabetes, neurological conditions and mental health needs. People in receipt of NHS Continuing Healthcare (many of whom previously received personal budgets in social care) are a key group involved in the pilot.

6. An in-depth independent evaluation involving twenty of the pilot sites was carried out by the Personal Social Services Research Unit (PSSRU), University of Kent. The final evaluation report was published on 30 November 2012. This final report and the five interim reports can be found at https://www.phbe.org.uk/.

7. The evaluation suggests that personal health budgets are beneficial, to both the individual and to the health care system, especially when they give the person genuine choice and control.

8. In summary the evaluation showed that:

8.1 Personal health budgets are cost-effective:

- The evaluation shows that they improve or maintain outcomes, and they reduce costs or are cost-neutral. This means they are cost-effective.
- This is especially clear for people eligible for NHS Continuing Healthcare and people with mental health problems.
- When personal health budgets are implemented so that the person has choice over services and how they receive the budget, they are even more cost-effective.
- The reduction in costs is partly due to people choosing to meet their needs in different ways through lower cost interventions - e.g. training their personal assistants to carry out some health tasks, such as changing dressings. This means that their needs are still being met, just in a different way.

8.2 Personal health budgets resulted in an increase in quality of life:

- The study found that effects were greater when people had budgets over £1,000, so those people who have higher levels of health need,
- People also benefited more from personal health budgets when there were fewer restrictions in place around what they could spend the money on and how they received the budget (having a choice of a direct payment, a third party budget or a notional budget.

8.3 Inpatient care costs also fell, suggesting that personal health budgets resulted in fewer admissions to hospital.

Wider learning from the pilot sites

9. The wider evidence and learning from the pilots also shows that:

- Personal health budgets are complex and it takes time to get the right processes and procedures in place;
- having the right information, support and brokerage is key;
- not everyone will want a personal health budget, or want to have a direct payment;
- the majority of people used their budgets for traditional-type services but some use part or all of their budget in different ways, when current NHS services do not meet their needs;

- there is a lot of substitutability between services traditionally classed as “health” or “social care”;
- personal health budges require culture change and a shift in the relationship between health professionals and patients, which takes time.

Conclusion

10. These positive findings have provided the evidence for rolling out personal health budgets, including direct payments for healthcare, beyond the pilot programme and for the consequent revision of the negative Instrument.

Annex B: The Direct Payments for Healthcare Consultation

1. A public consultation on the proposed changes to the National Health Service (Direct Payments) Regulations 2010 ran between 1 March and 26 April 2013. A copy of the full consultation and the impact assessment of the overall policy can be found at http://www.dh.gov.uk/health/2013/03/direct-payments-consultation/.

2. This consultation outlined the changes to the direct payments for healthcare policy, and consequently to the negative Instrument, that the Department believes are necessary based on the learning from the pilot programme. The changes relate to:

- who should be eligible for a direct payment for healthcare proposing that:
  - The individual would need to have a health need that the NHS would normally meet; and
  - The potential benefit of having a direct payment for healthcare outweighs the additional costs (e.g. administrative), so is value for money.

- separating out 'Direct payments for healthcare for children' and 'Direct payments for healthcare for people who lack capacity'.

- what NHS services should be excluded from direct payments for healthcare, proposing that the following be excluded:
  - GP services
  - Unplanned care such as accident and emergency or hospital admission
  - Surgical procedures
  - NHS Charges
  - vaccination/immunisation,
  - screening,
  - the National Child Measurement Programme ,
  - NHS Health Checks.
  - population-wide immunisation programmes as these are centrally funded.

- the negative Regulations do include some areas information, advice or other support provided to individuals by a CCG, other things are being added to this list including:
  - The amount of money that will be in their budget and how this is calculated;
  - Whether and how the patient can request a review of their budget and care plan if they believe either is insufficient;
  - Circumstances in which a direct payment for healthcare may be withdrawn, e.g. if the patient's circumstances change in such a way that they are no longer eligible or if in practice the costs outweigh the benefits.
  - Any restrictions on how the money may be spent;
  - The process of signing off care plans and things that might be considered as part of this; and

- If the patient is also in receipt of a social care budget, how these could be integrated and how the respective health and social care bodies will work together.

- conditions to be applied to making one-off payments, allowing one of payments to be paid into an individual's bank account.

- remuneration for family members for administration of complex direct payments for healthcare .

- that direct payments for healthcare could include some public health services.

3. The consultation also described the policy that the Department does not intend to change in substance (though consequential changes to the National Health Service (Direct Payments) Regulations 2010 were made on 1 April 2013 to take account of the new NHS bodies and responsibilities emanating from the amendments to the 2006 Act made by the Health and Social Care Act 2012). These are:

- who should be able to hold a direct payment for healthcare on someone's behalf;
- things CCGs might want to include in a decision to make a direct payment for healthcare;
- the need for a care plan (and the things that might be included in one) and care coordinator policy remains the same, with some changes to excluded services as described above;
- information provided in relation to direct payments for healthcare.
- amount of a direct payment for healthcare – including that the size of the budget must cover the whole cost of the agreed care;
- review of care plan;
- repayment of a direct payment for healthcare; and
- stopping making a direct payment for healthcare.

4. The current regulations include a part specific to the pilot programme. Following the approval of the affirmative Order, from 1 August, direct payments for healthcare will be more widely available and so this part of the current Regulations has been deleted.

5. The Government has analysed the responses and has revised the negative Regulations in line with the policy changes set out in the consultation, with the exception of paying family members to manage budgets as more work is needed before decision can be made. A formal response will be published imminently.