

Guy van Dichele  
Director Adult Social Services (Acting)  
Health and Wellbeing Directorate  
City of York Council  
West Offices  
Sstation Rise  
York YO1 6GA

23 March 2015

Dear Guy van Dichele,

York Independent Living Network (YILN) and Lives Unlimited are disabled people and family-led organisations in York. We are writing on behalf of holders of individual budgets/personal budgets and their families in response to the introduction of a new policy covering direct payments, and the changes in Terms and Conditions. On 9 March the City of York Council ('the Council') wrote to direct payments users informing them of the new policy and the changes in terms of conditions, to enter into force from 1 April 2015.

As outlined in this letter, we believe that the changes are in breach of legislation, and we urge the Council to suspend the policy and the changes to Terms and Conditions **immediately**.

We were astonished by the letter as we weren't aware that the Council was reviewing the direct payments policy and procedures and we haven't seen evidence of consultation, and haven't been invited to take part. It is extremely disappointing that these changes were made without any consultation, especially after we had made plain our desire to engage with the Council on implementing the Care Act 2014.<sup>1</sup> We also refer our event with disabled people and family carers, 'The Care Act and You' on 12 February, where Cabinet Councillor Lindsay Cunningham spoke but disappointingly only one Council officer<sup>2</sup> attended, and they were not from Adult Social Services.

The letter, especially given its tight timescale and the lack of advance warning, has caused considerable stress and anxiety for many disabled people and family carers in York.

The Council's letter sets out the key changes but it did not include the policy and we were not able to find a copy on the Council's website. If the Council introduces a new policy that frames the obligations of direct payments users and the local authority, then individuals should be able to see this policy. Surely this is a core principle of our democratic society; individuals cannot be expected to be bound by the new policy if they have not been able to access the full content, and for this reason alone the changes must be halted.

In the letter, the key changes are set out as follows:

- Customers will have direct payments paid into Cashplus accounts
- Money that is available for regular expenditure will only be allowed to accrue for one month rather than 8 weeks
- The City of York Council will hold all money that is currently held in accounts for redundancy provision, and will make payments for statutory maternity, paternity and sick pay.

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<sup>1</sup> Letters d.d. 15 December 2014 and 8 February 2015; meetings d.d. 26 January and 23 February 2015; email d.d. 25 February 2015

<sup>2</sup> Jessica Haslam (Children's Services)

We organised a meeting on 20 March, where disabled people and family carers talked about the letter and the implications of the changes.

### 1. Compliance with the Care Act 2014

The Care Act 2014 brings together social care legislation from the past 100 years and modernises the duties on local authorities. Central to the Care Act 2014 is the principle that local authorities must promote the wellbeing of disabled people and carers when they make a decision about their care and support. Wellbeing includes “control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided)” (s. 1 (2)(d)).

The Care and Support Statutory Guidance<sup>3</sup> states that the intention behind direct payments is to encourage greater autonomy, flexibility and innovation (see for example, 12.24).

The letter states that the Council has undertaken a review of policies and procedures to ensure compliance with the Care Act 2014. Please could you explain:

- 1.1 If current practice was not compliant with the Care Act 2014, why not?
- 1.2 How do the changes relate to the Care Act 2014 and associated regulations and guidance?
- 1.3 Which specific provisions in the Care Act 2014 mandate the changes you are making to the policy and the Terms and Conditions?

### 2. Consultation/impact assessment

We are not aware that the Council has consulted about the new policy or the changes to Terms and Conditions, or that they have carried out an impact assessment. This is likely to be in breach of the law.

The Care Act 2014 strengthens the duty on local authorities to involve individuals, particularly in the assessment of needs and care and support planning. This builds on the public sector Equality Duty (s. 149 Equality Act 2010). The Equality Duty requires public authorities to have due regard to the need to eliminate unlawful discrimination and harassment, to advance equality of opportunity and to foster good relations.

The principles underpinning ‘due regard’ include the requirement to exercise the duty “in substance, with rigour and with an open mind in such a way that it influences the final decision.” It is also considered good practice to keep an accurate record showing how they have considered the duty and relevant questions.<sup>4</sup> Case law in relation to community care requires local authorities to provide guidance and conduct proper consultation before making changes.<sup>5</sup>

Without consultation or proper impact assessment, the Council cannot have been able to get the evidence base they need to make good decisions.

- 2.1 What, if any, consultation has the Council had; please could you provide names of people/organisations and dates; and what the findings from the consultation are?

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/366104/43380\\_23902777\\_Care\\_Act\\_Book.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366104/43380_23902777_Care_Act_Book.pdf)

<sup>4</sup> R. (Brown) v. Secretary of State for Work and Pensions [2008] EWHC 3158

<sup>5</sup> See R (W and others) v Birmingham City Council [2011] EWHC 1147 (Admin), May 19, 2011; JM & NT, R (on the application of) v Isle of Wight Council [2011] EWHC 2911 (Admin) (11 November 2011)

2.2 Please could you provide a copy of the impact assessment, including the impact on equality of opportunity, choice and autonomy of disabled people?

The letter does not explain what the Council aims to achieve apart from compliance with the Care Act 2014. In the consultation we would expect the Council to set out the objectives of the new policy and changes to Terms and Conditions; and their rationale. For instance, if the intention is to make savings, then we would like to know what savings the Council expects to make. If the objective is to improve monitoring, then we would like to hear what the problems are with the current monitoring arrangements and what other alternatives the Council has considered.

2.3 What are the aims of the changes?

2.4 What is the rationale of the changes to the policy and Terms and Conditions?

2.5 What alternatives has the Council considered?

### **3. Terms and Conditions**

The Council presumes individuals' consent to the Terms and Conditions, and it does not explain what individuals should do if they do not agree. We believe it is usual practice to seek agreement when changing Terms and Conditions or, at the very least, offer individuals an opportunity to challenge if they do not agree with the changes.

3.1 What is the legal basis for presuming consent to changes to Terms and Conditions?

3.2 What is the procedure to follow if individuals disagree with the changes?

3.3 What happens to the direct payments if individuals disagree with the Terms and Conditions?

### **4. Timely information and guidance**

The letter was sent with less than three weeks' notice of the changes; most people received it around 12 or 13 March. It is unreasonable to expect disabled people and family carers to adapt to the changes within such a short time. This is of immense concern because many disabled people who use direct payments are more likely to have difficulties accessing and processing information, understanding the implications, and they will need more time to adapt to the changes.

It is extremely concerning that the phone number on the letter is not answering when called, or that care managers do not seem to be able to answer queries. This is causing anxiety and stress and it is affecting individuals' ability to plan ahead.

To make matters worse, people who do not have their direct payments paid into a Cashplus account will receive further information about the change after this has implemented; this cannot be justifiable.

The easy read letter did not have a signature, so that individuals who received the easy read letter did not know who in the Council wrote the letter.

4.1 Please could the Council explain why they believe it is justified to introduce the changes at such short notice, without prior warning?

4.2 Why is the Council unable to provide further information about the transfer to Cashplus accounts before the implementation date?



The information provided in the letter is woefully inadequate. It leaves open many questions, for instance:

- 4.3 How will the Council deal with one-off purchases or irregular payments? Will direct payments users be given this money to be kept in their accounts without the four weeks' contingency?
- 4.4 Why has the Council decided that money towards short breaks will be "accounted for separately" and what does it mean in practice?
- 4.5 What mechanisms are in place to ensure that employers can access redundancy pay and other statutory pay timely and effectively, and with minimum disruption and distress, in order to meet their obligations?

#### 5. Individual circumstances

The letter states that the Council will consider individual requests to keep existing arrangements if these provide the same level of service as a Cashplus account and because of particular circumstances.

- 5.1 What is the procedure in relation to making individual requests to keep existing arrangements?
- 5.2 Will the Council liaise with care managers, social workers and reviewing officers about individual circumstances, for example if holding only 4 weeks' contingency will cause hardship or difficulty?
- 5.3 What criteria will apply to the decision-making?
- 5.4 Will the Council provide guidance about 'particular circumstances'?
- 5.5 What estimate has the Council made of the number of individuals who may request to keep existing arrangements; and how many of these may be permitted to do so?

#### 6. Cashplus accounts

The Council requires direct payments users to hold the money in a Cashplus account. We believe that this is a breach of the Care Act 2014.

Article 3 of the Terms and Conditions states that the City of York Council will open the account and retain ownership of the account. Article 4 states that money will be paid into this account, and all payments will be made from this account. Article 15 authorises the Council to reclaim surplus money directly from the Cashplus account, with advance notice of 14 days.

However, section 33 (5) of the Care Act gives local authorities the power to require repayment of the whole or part of a direct payment in certain circumstances; we believe that this implies that the Council cannot own or control the account in which direct payments are held.

Furthermore, the Statutory Guidance states that local authorities must not prescribe the way direct payments are held, and gives the example that "pre-paid cards" can be a good option for some people using direct payments, but must not be used to constrain choice or be only available for use with a restricted list of providers." (11.36).

In October 2013, the Council required some direct payments users to use Cashplus accounts (without consultation). Since then, York Independent Living and Lives Unlimited have repeatedly

flagged up difficulties with the Cashplus accounts which have not been addressed.<sup>6</sup> For instance, as well as issues with administration, there are problems with voice recognition and contacting the administrator. Some disabled people are no longer able to manage their direct payments themselves and have to rely on a family member or others, thus reducing autonomy and independence. We also believe that this is in breach of disability discrimination law, as the service places disabled people at a substantial disadvantage.

It appears to us that the imposition of the Cashplus account contravenes the Care Act regulations and the Guidance.

- 6.1 What legal ground does the Council have for mandating Cashplus accounts to individuals?
- 6.2 Has the Council made an assessment of the likelihood of indirect discrimination, discrimination arising from disability and failure to make reasonable adjustments?
- 6.3 What is the Council doing to address the many difficulties individuals experience with Cashplus accounts?

## 7. Contingency of 4 weeks instead of 8

Direct payment users will be allowed up to 4 weeks money as contingency for regular payments. This makes a Personal Budget inflexible; a month is too short a time to allow for financial planning for one-off large, planned or irregular payments, or unforeseen needs. People are feeling their care packages are becoming more restrictive and they are losing choice and control.<sup>7</sup> This is against the spirit of personalisation or the Care Act.

Additionally, it creates particular difficulties for many individuals, for instance because they have fluctuating conditions which may mean, for example, that plans have to be cancelled with limited time or opportunity to make other arrangements. The lack of flexibility will come at the cost of more creative, empowering and fulfilling solutions which should be at the heart of making personal budgets work effectively. Further, many individuals get invoiced after 4 weeks' of service, as is usual practice for many employers. For example, the City of York Council frequently invoices two months late for the use of their hydro pool.

The easy read letter states that "Your money will no longer be able to sit in your account for 8 weeks. This will change to 1 month." This is confusing as it implies that the money will first go to the individual's account and then the other 4 weeks may sit somewhere else.

- 7.1 What happens to the money after it has been in the account for 4 weeks? Will the Council take it back?
- 7.2 What reasons did the Council have to reduce the 'float' from 8 to 4 weeks?
- 7.3 What assessment has the Council made of the impact of the 4 weeks' float on individuals?
- 7.4 Are there any circumstances in which the Council will continue to allow 8 weeks' float?
- 7.5 What steps is the Council taking to avoid negative impact on individuals' ability to manage direct payments?

<sup>6</sup> See YILN's letter d.d. 1 October 2013; Lives Unlimited's note for the meeting of 5 December 2013; Council's response d.d. 13 December 2013; notes d.d. meeting with Council on 4 November 2014

<sup>7</sup> Meeting of disabled people and family carers on 20 March 2015, at St Aelred's Community Centre

## 8 Employers' liabilities – redundancy payments

The new policy changes the way individuals manage their direct payments and discharge their responsibilities as employers, for instance by reducing the amount of payments and the requirement to pay from the Cashplus account.

8.1 What assessment has the Council made of the risks this potentially creates for individuals who employ personal assistants (PAs)?

The Council will reclaim money that is paid to cover redundancy costs; and that they will now pay redundancy costs and other statutory pay upon request and after provision of supplementary documentation. The letter states that this was agreed as "part of its budget process" in February 2014. However at the same time the Council said the 8 weeks' contingency would continue.<sup>8</sup> Furthermore the Council hasn't explained how this would work in practice.

We have serious concerns about this interference with the individual employers' liabilities. The Statutory Guidance states that "if the person meets needs by directly employing someone, they will be responsible for all costs of employment including redundancy payments." (12.29) It further states that "The local authority must ensure that the direct payment is sufficient to meet these costs" (12.29); and advises that "Whatever arrangements are made it is important that the local authority and direct payment holder are both clear as to their responsibilities in this regard to avoid any disputes at a sensitive time for family and carers." (12.31).

We believe that this means that the individual employer should hold the money.

8.2 Can the Council explain how their measures are proportionate and how they will ensure that individuals can meet their obligations effectively?

8.3 Is the Council able to provide guarantees that they will indemnify the individual if redundancy liabilities occur?

## 9 Monitoring

Art. 4 of the Care and Support (Direct Payments) Regulations 2014<sup>9</sup> allow local authorities to subject direct payments to conditions, but they may not require information more frequently and in more detail than is reasonably required, and only to ascertain that making direct payments is an appropriate way to meet the needs in questions, or the conditions upon which is made are complied with.

The Statutory Guidance advises that reporting requirements must not place a disproportionate burden upon the individual and monitoring must be proportionate to the needs to be met and the care package. It suggests that monitoring could be reduced if there have been no issues with the individual for a longer period of time. (12.24).

However the Terms and Conditions state that the Council will have full access to all information and that they can suspend the account at any time (Art. 3); that they have the right to request monitoring information and/or receipts for expenditure as and when required (Art. 14); and that they can reclaim surplus money at any time, with 14 days advance notice (15).

<sup>8</sup> Email from Group Manager (Assessment and Safeguarding Adults) to Lives Unlimited d.d. 27 March 2014

<sup>9</sup> <http://www.legislation.gov.uk/uksi/2014/2871/regulation/4/made>



Without any further conditions or criteria, we believe that this is in breach of the Care and Support (Direct Payments) regulations. The Council does not have the power to access any information, only where it meets the criteria set out in Article 4. Furthermore, it raises issues around privacy, and could create a disproportionate burden on individuals. It raises significant concerns in terms of having the security of the direct payment money to pay people to support individuals and the possibility of not meeting legal responsibilities as an employer if this were to occur.

The care and support assessment and planning process should enable the Council to agree a package that meets the needs of individuals and, alongside the provision of information, training and (peer) support, will ensure that direct payments are used to realise intended outcomes.

9.1 What legal ground does the Council have to be able to impose these requirements?

9.2 What safeguards are in place to ensure that the Council does not use these powers in a way that breaches individuals' human rights and places a disproportionate burden on individuals?

## 9 Right to Independent Living

The UN Convention on the Rights of Persons with Disabilities was ratified by the UK Government in July 2009. It recognises that we are all equal. It states that disabled people should have access to a wide range of support services including personal assistance to prevent isolation and support inclusion.

The Convention sends out an important message that disabled people have the right to make their own decisions, and should be treated with fairness, dignity and respect. It also enshrines the principle 'Nothing About Us, Without Us', so that we are full and equal partners in decisions that affect us directly.

Unfortunately, we have to conclude that on this occasion the City of York Council has shown blatant disregard to disabled people and family carers who live in York.

In our meeting with Jen Re on 23 February and our subsequent email of 26 February we have said that "A key issue for us is about building trust and effective processes that enable all parties - disabled people, family carers, people with lived experiences and CYC representatives - to work together, embracing the full range of everyone's skills and experiences to achieve equality and well informed, high quality services."

For our part, we still want to make this happen because care and support is such a vital matter for disabled people and their families, but the Council needs to play their part too.

We urge you to suspend the policy and the changes immediately and to conduct a full, transparent review, with meaningful involvement of disabled people, family carers and their organisations.

Please reply to this letter within 7 days from the date shown on this letter.

Yours sincerely,



Marije Davidson, Chair, York Independent Living Network, [admin@yiln.org.uk](mailto:admin@yiln.org.uk)

Alison Cowen, Director, Lives Unlimited (York) CIC, [info@livesunlimited.org.uk](mailto:info@livesunlimited.org.uk)

CC Kersten England, Chief Executive, City of York Council  
Michael Melvin, Interim Assistant Director – Adult Social Care  
Sharon Calline, Income Services Manager at City of York Council  
Cllr Linsay Cunningham, Cabinet Member for Health & Community Engagement  
Health Overview and Scrutiny Committee  
Sir Hugh Bayley MP for York Central  
Julian Sturdy MP for York Outer

## **About us**

York Independent Living Network (YILN) is a disabled people-led organisation that enables and empowers disabled people to have our voices heard, influence the services we receive and make the most out of life. Charity no. 1160573 [www.yiln.org.uk](http://www.yiln.org.uk)

Lives Unlimited cic is a family and user led group of people, who are actively working towards enabling disabled people and older people in the York area to have more control over their lives, be included as equal citizens and enjoy the same choices and opportunities as anyone else in their community. [www.livesunlimited.org.uk](http://www.livesunlimited.org.uk)

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