

Cabinet

13 June 2018

**Adult Social Care – Residential
Care Charging Policy and Deferred
Payment Agreement Policy**



Key Decision - CORP/R/18/04

Report of Corporate Management Team

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Purpose of the Report

- 1 This report sets out for Cabinet approval the updated Adult Social Care – Residential Care Charging Policy and Deferred Payment Arrangement Policy.
- 2 These policies have been updated to fully reflect the Care Act 2014 and recently issued Regulations and updates to the Care and Support Statutory Guidance with regards to Deferred Payment Agreements. There are no changes in terms of the basic financial assessment criteria arising from these changes, which remain in line with statutory guidance.

Background

- 3 Councils have a duty under the Care Act 2014 to assess the care needs of individuals with the appearance of need for care and support. If the assessment determines that the person has eligible needs, consideration needs to be given as to how these needs will be met. A financial assessment is required to determine whether the person qualifies for financial support from the council and whether they are liable to make a financial contribution towards their care. There are two outcomes from the financial assessment in respect of a person whose needs will be met by residential care:
 - (a) a person has capital and/or assets of £23,250 or less and will be eligible for financial support from the Council. Arrangements for their care will be made by placing them on the Council's contract;
 - (b) a person has capital or assets of value above £23,250 and will be considered to be a self-funder. In most circumstances the person would be expected to make their own care arrangements directly with

a care provider, however, a self-funder may ask the Council to make arrangements for them to meet their needs for residential care. The council has a power to determine whether to make arrangements in such circumstances and must consider all of the circumstances of the case. The updated Adults Social Care - Residential & Nursing Care Charging Policy indicates circumstances in which this discretion is likely to be exercised.

- 4 Since the Care Act 2014 and supporting regulations were implemented, local authorities in England have had an obligation to offer a Deferred Payment Agreement (DPA) subject to certain criteria being met, so that people are not forced to sell their home in their lifetime to pay for their residential care.
- 5 The Care Act 2014 originally envisaged two types of DPA being made available. A “traditional style” DPA, which would be available for residents placed on local authority contracts and a “loan style” DPA for residents who were self-funding. However, a drafting error in the Regulations meant that effectively local authorities were not obliged to offer a DPA to self-funders who had contracted privately with a residential care provider.
- 6 Amendments to the Care and Support Statutory Guidance and provisions in the Care and Support (Deferred Payment) Amendment Regulations 2017 mean that since April 2018 the Council has a duty to offer both types of deferred payment.
- 7 A traditional style DPA involves the Council contracting with the care provider and payments being made to the care provider at the Council’s contracted rate. A loan-style DPA involves a person contracting privately with the care provider and payments being made by the council to the person by way of a loan to enable the person to pay the care provider directly. In both cases the loan is secured against the value of the person’s home.

Review of Residential Care Charging Policy and Processes

- 8 S.19(1) of the Care Act 2014 provides the council with a power to meet an adult’s needs for care and support, even where there is no duty to do so. The council does not have a duty to meet the residential care needs of a self-funder but the S.19 (1) power may be exercised to meet those needs. The Council’s Adults Social Care - Residential and Nursing Care Charging Policy has been updated to indicate circumstances in which this power is likely to be exercised:
 - (a) when a person is subject to undue influence or coercion or control by another adult and there are safeguarding concerns;
 - (b) when a person has no relatives to assist or support and there is evidence to suggest that they would be incapable of making and sustaining their own arrangements;
 - (c) when a person has a degenerative condition without support which will impact on their health and wellbeing;

(d) when a person is terminally ill.

- 9 In line with the Care Act requirements, referrals for care and support are made to Social Care Direct and passed to the relevant social work team. Following assessment of need, the practitioner will give advice on the appropriate type of care and funding arrangements.
- 10 The Care and Support Statutory Guidance provides scope for a light touch financial assessment, where a person appears to be a self-funder. A light touch financial assessment will be undertaken at first point of contact wherever possible. If it is established that the value of capital and assets exceed the threshold, they are advised to make arrangements with a care provider without a full financial assessment being undertaken.
- 11 Eligibility for residential care can often arise before a full financial assessment can be completed. S.19 (3) Care Act 2014 provides the Council with the power to meet an adult's needs for care and support which appear to be urgent before a needs assessment or a financial assessment is completed. The council's contract provides for such circumstances.
- 12 When the financial assessment has been completed and a person is identified as a self-funder, they will be advised to make their own care arrangements.
- 13 Section 18(4) of the Care Act 2014 places a duty on the Council to make arrangements for people who lack the mental capacity to make arrangements themselves and there is no other person authorised to do so under the Mental Capacity Act 2005 (for example, through deputyship or a relevant lasting power of attorney). This applies regardless of a person's financial circumstances.
- 14 Where there is a family member or a close friend who is able to act as a deputy they will be advised that they should apply to the Court of Protection to take on this role. If they are unwilling to take on this role they will be advised to contact a solicitor to support them in applying to court. The council will continue to make care arrangements for self-funders in these circumstances until a financial deputy is appointed or power of attorney is registered.
- 15 Where the Council takes on the role of deputy it will also continue to care manage and review the case in order to comply with the Office of Public Guardian Deputy Standards and the person will remain on the Council's residential care contract.
- 16 The Care and Support (Charging and Assessment of Resources) Regulations 2014 provide that a person who refuses to engage in a financial assessment is treated as having financial resources which exceed the financial limit. Those who refuse to engage in a financial assessment will be advised to make their own arrangements with a care provider. If a care provision is already in place, fourteen days' notice will be given that it will cease.

Information is provided to the person as to how they should contact the Council when their funds fall below the upper capital threshold limit.

Deferred Payment Agreements

- 17 A review of the Council's residential care Deferred Payment Agreement Policy has also been undertaken to ensure it meets the needs of the requirements of the Care Act 2014.
- 18 Two types of DPA were originally envisaged when the Care Act was introduced – a traditional DPA and a loan DPA. Drafting errors in the original regulations meant that local authorities were not obliged to offer a DPA to self-funders who had contracted privately with a residential care provider.
- 19 The traditional DPA is available to persons placed on local authority contracts, with the Council making payments to the contractor at the agreed local authority rate. The loan DPA is available to persons that contract privately with a care provider with payments made by the Council to them by way of a loan to enable them to make payments for their care directly. In both cases the loan is secured against the value of the person's home.
- 20 The Council has a duty to offer a DPA where a person meets all of the eligibility criteria set out below:
 - (a) anyone whose needs are to be met by the provision of care in a care home as defined in the Care and Support (Deferred Payments) Regulations 2014;
 - (b) anyone who has less than (or equal to) £23,250 in assets excluding the value of their home;
 - (c) anyone who has not had their home disregarded from the financial assessment carried out under Section 17 of the Care Act 2014;
 - (d) the service user or their legal representative must agree to the terms and conditions of the Deferred Payment Agreement;
 - (e) the Council must be satisfied there is sufficient security and in the case of a property be able to register a legal charge on the property at the Land Registry.
- 21 The loan DPA does not provide certainty that payments will be made towards an individual's care costs. Care providers do not however have any recourse against the Council in the event that care home fees are not paid by an individual who has a loan DPA.
- 22 A formal contract is required for both types of DPA. Copies of the updated standard contracts are attached at Appendices 4 and 5.

- 23 The updated DPA Policy makes reference to the Mental Capacity Act 2005 (MCA). The Council can only enter into a DPA where a person has the mental capacity to understand the DPA, or the person has legally authorised a deputy to act as an agent in respect of their financial affairs. The Council has a duty to make the care arrangements whilst and until a Deputy has been appointed. Where no-one is available to apply for Deputyship, the Council will consider applying for Deputyship.
- 24 Section 35 of the Care Act 2014 defines that the deferred payment agreement scheme is run on a cost neutral basis. The Council is able to recoup the costs associated with deferring fees by charging interest on the loan. Compound interest can be charged from the first day of the agreement until the debt is settled in full. The interest rate is based on the cost of Government borrowing as set out in the policy.
- 25 Administrative costs associated with processing DPA's can also be recovered. If an enforced sale of a property has to be instigated to recover any debt in relation to a DPA, an administration fee will be charged together with any other professional costs incurred. The pricing structure that will apply is set out at Appendix 3.

Equality Impact Assessment

- 26 An Equality Impact Assessment has been undertaken and is attached at Appendix 6.
- 27 The people affected by the policies covered by this report have been identified as having protected characteristics of Age; Disability; and Sex (Gender). These can be positively and negatively impacted by these policies, particularly with regards to their eligibility for support as a self-funder, whereas private occupiers' providers can charge more to self-funders than the rate contracted by the Council.
- 28 Whilst not obliged to meet the residential care needs of self-funders the Council can exercise discretion to do so using powers defined by section 19 The Care Act 2014. Where the Council exercises this discretion self-funders will continue to be placed using the Council's contracted rates.
- 29 Throughout the process social work and care co-ordination teams will continue to offer support to individuals in terms of advice and where a financial assessment is requested, if entitlement to state benefits is established the Council will either assist or passport to the relevant agency to provide assistance with maximizing income.
- 30 In cases of short-term or temporary placements, the main home is disregarded for financial assessment purposes. Therefore if a customer's home is their only asset and they have no other form of capital they will not be treated as a self-funder.

- 31 In all cases once a self-funder's capital or assets fall below the £23,250 threshold, they will become eligible for financial support from the Council and the Council may make arrangements for their care by placing them using the Council's contracted rates.
- 32 The introduction of loan style DPA as well as traditional DPA offers self-funders contracting direct with residential care providers the opportunity to defer payments rather than being forced to sell their home during their lifetime.

Conclusions

- 33 This report provides an overview of the work that has been completed to review and update the Council's Adult Social Care – Residential Care Charging Policy and Deferred Payment Policy.
- 34 These policies have been updated to fully reflect the Care Act 2014, particularly the circumstances under which the Council exercises its discretion under s19 of the Care Act 2014 in terms of self-funders, and statutory guidance issued in February 2018 with regards to Deferred Payment Agreements.
- 35 There are no changes in terms of the basic financial assessment criteria from these changes, which remains in line with statutory guidance.
- 36 If the Council considers that it should exercise its discretion to make the placement it also needs to review the individual's care arrangements and allocate a Personal Budget. The fees for residential care in that budget cannot exceed the fees payable by the council under its contract.
- 37 The updated policy at Appendix 2 clarifies the circumstances in which this discretion will be exercised, taken directly from the published statutory guidance.
- 38 Under the previous legislation, local authorities were not required to offer DPAs to eligible individuals unless they were meeting that individual's needs or believed they would meet their needs if asked. A DPA was offered by the Council where they met these needs (under section 19 of the Care Act).
- 39 The amendments to the Care and Support Statutory Guidance provide that the Council will need to offer both types of Deferred Payment, a traditional style DPA where payments are made to the care provider at the Council's contracted rate and a loan style DPA where a person contracts with the care provider and is loaned the money from the Council to pay the care provider direct, secured against their asset.

- 40 Changes to the Care and Support (Deferred Payment Agreements) Regulations 2014 mean that the Council cannot refuse to enter into a loan-type DPA with individuals who qualify for one but whose needs the Council is not meeting. An updated DPA Policy, factoring in the recent statutory guidance is attached at Appendix 3.

Recommendations

- 41 Cabinet is asked to note the report and approve:
- (a) the updated Residential Care Charging Policy attached at Appendix 2;
 - (b) the updated Deferred Payment Agreement Policy attached at Appendix 3.

Background Documents

- The Care Act 2014, the Care and Support Statutory Guidance and the Care and Support (Charging and Assessment of Resources) Regulations 2014 (as amended).

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Appendix 1: Implications

Finance – Councils have an obligation under the Care Act 2014 to assess the care needs of anybody with the appearance of need for care and support. If the assessment determines that the person has eligible needs, consideration needs to be made as to how these needs will be met and a financial assessment is required to determine whether and to what level that person can make a financial contribution towards their care. There are two outcomes from the financial assessment:

- (a) Person has capital and/or assets of £23,250 or below and will therefore, be supported by the Council and placed on the Council's contract;
- (b) Person has capital or assets of value above £23,250 and will therefore, be considered to be a self-funder and, in most circumstances, would be expected to make their own care arrangements directly with the care provider as a private resident. There are exceptions to these rules set out in the regulations and these exceptions have been factored into the Council's Adults Social Care - Residential & Nursing Care Charging Policy.

Since April 2015, under Sections 34 – 36 of the Care Act 2014 and the Care and Support (Deferred Payment Agreements) Regulations 2014, local authorities in England have had an obligation to offer a DPA, so that people are not forced to sell their home in their lifetime to pay for their residential care.

The Care Act 2014 envisaged two types of DPA being made available. A "traditional type" DPA, which would be available for residents placed on local authority contracts and a "loan style" DPA for residents who were self-funding. However, a drafting error in the regulations meant that effectively local authorities were not obliged to offer a DPA to self-funders who had contracted privately.

In February 2018 the Care and Support Statutory Guidance was updated to reflect the amendments to the Care and Support (Deferred Payment) Regulations 2014 made by the Care and Support (Deferred Payment) (Amendment) Regulations 2017. Under the original legislation, local authorities were not required to offer DPAs to eligible individuals unless they were meeting that individual's needs or believed they would meet their needs if asked. As a result of the amended Regulations, LAs are now required to enter into a 'loan-type' DPA with individuals who qualify for one but whose needs the LA is not meeting.

The amendments to the Care and Support Statutory Guidance mean that the Council will need to offer both types of Deferred Payment from 1 April 2018, a traditional type Deferred Payment Agreement, where payments are made to the care provider at the Council's contracted rate and a loan-type DPA where a person contracts with the care provider and is loaned the money by the Council to pay the care provider directly, with the loan secured against their asset.

The Council is able to recoup the costs associated with deferring fees by charging interest. The Council can also recoup the administrative costs associated with processing DPAs, including legal and ongoing running costs, via administration

charges which can be passed onto the individual. The pricing structure (DPA Policy appendix 1) includes a set-up fee and an annual administration charge.

The legislation allows for compound interest to be charged from the first day of the agreement until the debt is settled in full. The interest rate is based on the cost of Government borrowing (the 15-year average gilt yield, as set out by the Office for Budget Responsibility twice a year in their Economic and Fiscal Outlook report). This will be calculated and added to the deferred balance accrued twice yearly.

If the Council has to instigate the enforced sale procedure in order to recover our debt, an administration fee will also be charged, plus any professional costs incurred. All costs can be accrued against the DPA. These costs will be variable depending on the work required.

Staffing – The availability of loans style DPAs could result in increased administrative costs / demands. The Council can also recoup the administrative costs associated with processing DPAs, including legal and ongoing running costs, via administration charges which can be passed onto the individual.

Risk – The council needs to be able to demonstrate that it is complying with the legislation and statutory guidance in its handling of assessments and applications for deferred payment agreements. These risks are mitigated through the Policies appended to this report, which seek to ensure compliance with statutory guidance.

Equality and Diversity / Public Sector Equality Duty – Equality Impact Assessment (EIA) initial screening identified the stakeholders affected by the Policy and highlights those protected characteristics impacted by the Policy. A full EIA was subsequently undertaken and is attached at Appendix 6, which identifies:

The policies ensure that Council fulfils and complies with the legislative requirements of the Care Act 2014 and associated regulations and guidance; the Care and Support (Deferred Payment) Regulations 2014, as amended by the Care and Support (Deferred Payment) (Amendment) Regulations 2017.

The Care Act 2014 obliges the Council to assess the care needs of anyone with the appearance of need for care and support. If the assessment determines that there are eligible needs, consideration must be given to how these needs will be met and a financial assessment made to determine whether and to what level the financial contribution towards the cost will be.

The protected characteristics potentially affected by the policies are Age, Disability and Gender.

The Council is obliged to assess the care needs of anybody with the appearance of a need for care and support to determine eligible needs.

Whilst the Council is not obliged to meet the residential care need of self-funders it can exercise discretion to do so using the powers defined by section 19 The Care Act 2014.

If during the course of the financial assessment potential entitlement to state benefits is established the Council will either assist or passport to the relevant agency to provide assistance with maximising income.

The introduction of loan style DPA as well as traditional DPA offers the self-funders contracting direct with care providers the opportunity to defer payments rather than being forced to sell their home during their lifetime.

Section 18 The Care Act 2018 places a duty on the Council to make arrangements for people assessed as having an eligible need for residential care who lack mental capacity to make arrangements for themselves, if no other person is authorised to do so under the Mental Capacity Act 2005. Therefore where there is a family member or a close friend, or solicitor able to act as a financial deputy they will be advised that they should apply to the Court of Protection to take on this role. However the Council will take on the role of financial deputy in some circumstances including safeguarding enquiries in respect of financial abuse, there are no relatives able to assist or support with welfare matters, the person has a degenerative condition which without support will impact upon their health and wellbeing, the person is subject to undue influence, coercion or control by another.

Accommodation – N/A.

Crime and Disorder – N/A

Human Rights – The Policies have been drafted to ensure that the Council complies with its obligations under the Human Rights Act.

Consultation – The amendments in the two Policies seek to bring these policies in line with statutory guidance and thereby ensure compliance with the relevant regulations. As the report sets out, the basic financial assessment criteria remains unchanged and as such the amendments are not subject to consultation.

Procurement – Heads of Terms for the new contract with Care Home Providers have now been agreed. The Terms and Conditions of that contract (under negotiation) are consistent with the Policies appended to this report.

Disability Issues – N/A.

Legal Implications – The Policies recommended for approval have been written to comply with the council's obligations under the Care Act 2014 and the Regulations made under that Act covering assessment of eligibility and entitlement to access to deferred payment arrangements.