

OPERATIONAL GUIDANCE ON IMPLEMENTATION OF THE CARE CAP

BRIEFING NOTE FOR CARE
PROVIDERS

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1. INTRODUCTION

- 1.1 This paper is an analysis of the consultation document issued by the government in March 2022; **Operational guidance to implement a lifetime cap on care costs ('the Guidance')**. The briefing highlights for care providers the potential impact of the changes and addresses in more detail the proposed changes which will be made in connection with the following aspects of care funding:
- assessments (including financial assessments);
 - the choice of accommodation regime, and the extension of first-person top-up payments to all residential care;
 - the proposed changes to the eligibility thresholds for deferred payments; and
 - the extension of direct payments to residential care settings.
- 1.2 This briefing note should be read alongside the other briefing notes we have produced in this series:
- DHSC White Paper: People at the Heart of Care;
 - Impact of the proposed implementation of Section 18(3) of the Care Act 2014 for residential care; and
 - Market Sustainability and Fair Cost of Care Fund 2022-2023.
- 1.3 The consultation on the Guidance closed on 1st April 2022 and the timescales for any amended guidance are as yet unknown but given that 5 pilot local authorities have now been identified who will need to have systems in place well before January 2023 when the pilots are meant to go live it is not thought the revised guidance will be delayed very long.

2. PROPOSED CHANGES IN LEGISLATION AND GUIDANCE

- 2.1 The legislative changes that will be made as a result of the implementation of the care cap will primarily involve the development of new chapters in the Care and Support Statutory Guidance to the Care Act 2014 ("**the CASS Guidance**") which extensively supplements and imposes binding obligations on local authorities to implement the provisions of the Care Act 2014 ("**the Care Act**"). The government proposes to add 3 new chapters to the Guidance which are set out in a separate paper "Implementing the cap on care costs; draft Operational Guidance ([Implementing the Cap on Care Costs : Draft Operational Guidance, 4 March 2022](#)) which sets out, in similar form to the existing chapters of the Guidance, the new obligations which local authorities will need to take into account when implementing the cap and the other changes mentioned in this note.
- 2.2 Although the Guidance will be accompanied by the implementation of certain clauses in the Care Act which were not brought into force in 2015, it also highlights that other legislative changes will be required to the following:
- Care and Support (Charging and Assessment of Resources) Regulations 2014;

- Care and Support and After-care (Choice of Accommodation) Regulations 2014;
- Care and Support (Deferred Payment) Regulations 2014; and
- Care and Support (Direct Payments) Regulations 2014.

The 3 new chapters are, broadly speaking, functional and do not go much further than create the administrative framework in which the care cap will operate: through the cap itself; the development of the individual's care account to allow progress towards the cap to be monitored; and to establish how each person's personal budget is to be set.

The consultation period for the Guidance was short and the actual changes to the legislation have yet to be finalised, but the consultation paper does give an indication as to what the government's intentions are with regard to the changes which means that the impact of the changes on providers can start to be assessed. Each of the following sections deals with a separate element of the proposals and how they may impact on care providers, and in particular the ability of providers to recover a fair price for the care they are providing:

- independent personal budgets,
- first party top-ups and choice of accommodation;
- deferred payment agreements;
- direct payments.

2.3 It is also necessary, when considering the proposed changes, to identify the potential options for local authorities in terms of implementation and the extent to which they are given discretion by virtue of the Care Act and the supporting guidance and legislation to choose the extent to which they deliver on certain obligations. It is telling that there are no fundamental changes in terms of the focus of the Care Act on choice and control supposedly being vested in individuals in receipt of care services. Such aspirations, particularly in the case of older people's residential care services, are widely ignored by local authorities whose focus when commissioning older peoples' services is almost entirely on price.

2.4 It is also helpful to consider the draft regulations which were issued in 2015 to support the introduction of the care cap under Part 2 of the Care Act (the so called Dilnot Reforms) as well as the debates in Parliament in 2014 prior to the implementation of the Care Act to discern what the new regulations, when they are actually published, might say.

3. INDEPENDENT PERSONAL BUDGETS (“IPB”)

3.1 The idea of personal budgets has been a feature of the care landscape for many years, preceding the Care Act. The concept was developed in detail in the Care Act and the CASS Guidance, and the same concepts are going to be applied in connection with the establishing of the amount which will contribute to each individual reaching their care cap, under the Guidance.

- 3.2 Despite the fact that there is already a positive obligation that every individual should be given a personal budget in writing, as part of the care assessment process, the obligation is routinely overlooked by local authorities and most local authorities purchase purely by reference to the rates they have established either generally in their area or by reference to particular arrangements with certain care homes.
- 3.3 The Guidance states that facilitating greater choice is a key objective of the reforms, but this will require a fundamental shift in local authority thinking if it is to be achieved for older people's services. Additional features which are intended to maximise choice include first party top-ups, direct payments and the extension of deferred payments, which are dealt with below. The introduction of s.18(3) of the Care Act will enable self-funders to take advantage of the local authority's "buying power" when choosing care which may give rise to more choice being available. However, local authorities can charge private payers for making such arrangements, so they will be able to determine the extent to which they embrace this opportunity to make arrangements for self-funders through the rate at which they set the arrangement fee.
- 3.4 What is clear is that, because a larger and better-informed group of consumers will have to engage with the idea of personal budgets, more attention will be given to them and in turn to the underlying CASS Guidance on them. We can discern what the approach to setting personal budgets should be from the extensive case law that has developed since the Care Act 2014 has been in force. Most of such case law is derived from cases involving working-age individuals with learning disabilities or physical disabilities rather than older people, but the following points are worthy of note when considering the issues in practice. This is by no means a comprehensive summary as the regulations and case law are very extensive.
- 3.5 The duty on local authorities to assess care needs is the fundamental duty of the Care Act 2014. The obligation has a low threshold and the process should include an assessment of the adult's well-being and the outcomes they wish to achieve. Assessments are meant to be holistic and involve the individual concerned and relevant family members, in a meaningful way. Supported self-assessment is possible and local authorities have an obligation to ensure cooperation between all agencies involved in the potential care being required. Local authorities are obliged to provide information about the timescale for the assessment and must complete each assessment within a reasonable period of time. Assessments must be in writing and provided to the individual without request.
- 3.6 The eligibility of an individual for care and support is established by reference to specific outcomes specified in the Care Act. If the person is unable to achieve 2 of the outcomes and that failure could have a significant impact on the adult's well-being, that gives rise to the duty to provide support.
- 3.7 The required outcomes of the assessment process (which must be completed before the care planning process starts) are a written assessment of:
- the needs for care and support;

- which of the needs are eligible needs; and
 - what could be done to meet those needs.
- 3.8 Once the assessment is completed, a care planning process must then be undertaken in which the local authority should do its best to put the individual at the centre of the process and to meet their needs in accordance with that person's wishes. As with the assessment, the local authority is under an obligation to give the individual a copy of their care plan and the CASS Guidance contains prescriptive requirements as to what that plan should contain.
- 3.9 Every care and support plan must include a personal budget which is an estimated cost of how the eligible needs will be met, including any financial contribution to be made by the individual. It is important to note that where care is being arranged under s.18(3) of the Care Act the local authority is only obliged to assess the persons eligible needs and to set the personal budget, there is no obligation to establish a care plan (although it could do so) so the decision about how the eligible needs are met will be that of the individual in such cases.
- 3.10 The personal budget should be transparent, reasoned and objectively sufficient to meet the individual's needs. The fundamental purpose of this is meant to help the individual to decide whether or not to take a direct payment in which they receive cash to arrange their own care. To date, direct payments have not been available for residential care and therefore local authorities have broadly ignored the requirement to provide a written personal budget for care home placements. It appears that this will no longer be the case on the introduction of the funding reforms, which should make a profound difference to how older people's services are operated.
- 3.11 Where the care needs assessment establishes that a certain type of setting is appropriate for the individual, local authorities must ensure that the individual has a reasonable choice of accommodation that meets their needs without having to resort to "top-ups". If the local authority cannot offer a reasonable choice it must meet the full cost of accommodation, even where that is more than the local authority would usually pay. Direct payments must be made available when the relevant conditions are met; the local authority cannot refuse to offer them, including in circumstances where the person concerned does not have the necessary capacity to manage the payment.
- 3.12 Local authorities have a discretion whether to charge for most adult care services, if it wishes to do so. It has to have a lawful charging policy and also to follow the CASS and other guidance. The fundamental principles to be followed are that people should only be required to pay what they can afford and that they are provided with adequate information and advice so that any charging policy is clear and transparent. Although local authorities can charge the individual for the cost of making arrangements, even if someone has their own resources to meet their needs, the charges should be limited to the costs actually incurred in making the arrangements. Paragraph 8.60 of the CASS Guidance states: '*Local authorities **must not** charge people for a financial assessment, a needs assessment or the preparation of a care and support plan*'.

- 3.13 Where a charge for services might be appropriate, there are detailed provisions which effectively create a means test for such contributions, and contain very strong obligations for local authorities to complete the process in a fair and transparent manner. Local authorities have, in some cases, developed sophisticated means to ensure that people have not deprived themselves of assets to avoid payment, and others have developed deferred payment offers (see below).
- 3.14 The charging provisions also cover the rights of individuals to exercise a choice over their accommodation by choosing more expensive accommodation if a third party can make a payment of the difference between the cost of the chosen care home and what the local authority could obtain elsewhere (provided that alternative is genuinely able to meet the person's needs); the so-called "third party top-up". Although individuals have the right to request a third party top-up, local authorities are entitled to set policies which protect their financial position, and often do so. The reason for this is that local authorities remain responsible for the full fee (including the top-up) so need to be assured that the third party will always make the top-up payments.
- 3.15 It seems unlikely that individuals will be willing to accept that the progress towards the care cap will be slower than necessary if local authorities set their personal budgets at too low a level, and providers will need to be alive to the opportunity that this represents to assist people looking for care home places who are private payers but who wish to take advantage of the new regime. The Guidance indicates that a person should progress towards the cap based on "what the costs should be" to the local authority if it were meeting the person's eligible care and support needs, but that phrase leaves plenty of room for argument about what level of sophistication ought to be applied to the calculation of the individual budget in individual cases.
- 3.16 The IPB is the concept adopted by the Guidance for this nominal cost is the independent personal budget which in many cases could be less than the actual costs of care. It will be used in the context of s.18(3) arrangements and where first party top-ups are in place (see below). The Guidance emphasises that a core objective of IPBs will remain that of supporting choice and personalisation. The Guidance also references Section 26 of the Care Act and states that the same principles which underpin the calculation of personal budgets (see above) should apply to IPBs, namely: transparency; timeliness and sufficiency. This will also bring into play the extensive guidance in paragraphs 11.15 to 11.21 and Chapter 3 of the CASS Guidance. There will undoubtedly be challenges against how IPBs are set where they fail to match the actual costs of care as setting cost low will delay the individual reaching the care cap. Individuals will have a vested interest in securing appropriate rates for their IPBs.
- 3.17 Depending on how pricing for services changes as a result of the reforms there may also be arguments where the assessment of how needs are to be met starts to point more obviously to residential care being a better (or, rather, more financially acceptable) option compared with extra care accommodation or home care. The approach to meeting eligible care needs includes the choice of setting for the care so this issue will be closely monitored by individuals wishing to stay in their own home or chose forms of retirement

living accommodation. Local authorities can expect disputes to arise where they try and impose residential care as a cheaper alternative. The extensive case law dealing with eligible needs will provide guidance about how such disputes might be resolved. Providers should be aware of these issues, particularly if local authorities are putting individuals under pressure to choose forms of care on costs grounds.

- 3.18 When considering the IPB it is also sensible to note that the daily living costs allowance for every individual (which is set at £200 per week) is explicitly a notional figure and there is no intention that it be used as anything else. Local authorities and providers should not be looking to identify such living costs separately given the risk that arguments about the level of such costs would inevitably follow. However, this does not mean that providers should not maintain a clear position on what their actual costs are, particularly given the potential results of first party top-up arrangements (see below) namely a care sector in which the type of care offered by local authority funded homes becomes more strongly differentiated from those funded by private payers.

4. FIRST PARTY TOP-UPS

- 4.1 The Funding Reforms include the extension of first party top-ups to all residential care placements as part of the emphasis on extending individual choice. The Guidance contains an unfortunate error in stating that generally people receiving care can make additional payments for a preferred choice of accommodation. This is simply untrue in respect of residential care homes unless the person is benefitting from a 12-week disregard or has a deferred payment arrangement with the local authority. As such arrangements are relatively rare, first party top-ups are not a significant feature of the residential care landscape for older people's services, and although most providers will be familiar to some extent with third party top-up arrangements they too are not that common. It seems highly likely, as a result of the continuing gap between what local authorities will pay for care and what the actual costs of care are, that providers will look to use first party top-ups as a means of bridging that gap for more residents, particularly those who are self-funding.
- 4.2 It appears that the funding reforms will establish a clear fault line between the desire of the local authority to ensure that a resident contributes as much of their own money as possible within the IPB set, and that of the care provider who will want where possible to persuade the resident to pay more for better quality services or their choice of accommodation, and use such resources as they have to fund the difference. Local authorities are explicitly permitted to take into account the long-term affordability of top-ups so this fault line could easily result in top-ups being discouraged. Providers will need to monitor this very carefully and engage with residents and their families to consider how local authorities' refusals to allow first party top-ups to secure a choice of accommodation can be challenged and alternatives put forward, including third party top-ups to supplement and then replace first party top-ups if they fail.
- 4.3 It is also vital that providers understand how the Choice of Accommodation Regulations work. It is still widely assumed that if someone wishes to choose more expensive

accommodation, they must find a third party to top-up the fees, and even then the local authority may not agree to the arrangement if it is concerned about the level of top-up and the ability of the third party to pay it over the long-term. However, the starting point should be to put the local authority to proof that there is a suitable alternative location actually available to the individual that would meet their assessed needs. If no such provision is available the local authority is obliged to pay the full rate for the service.

- 4.4 Particularly for older people, the prospect of moving away from an established community and the diminishing links they may have with family and friends, can often provide a strong case that a home in a different geographical location is not a suitable alternative. The law is that, if no suitable alternative is available, then the local authority is obliged to pay the actual costs being charged (usually at the private pay rate) by the provider. This will be an important consideration, particularly at the outset of the new arrangements from October 2023, if local authorities come under pressure to seek a move for people on affordability grounds, and also in the longer term in cases where more informed consumers wish to make a choice and are more able to assert their right to do so.

5. DEFERRED PAYMENTS

- 5.1 The current regime creates a duty on local authorities to offer deferred payment arrangements, where they have the power to do so, to avoid people having to sell their home to pay for their care. The cumbersome administrative requirements have led to many local authorities discouraging such arrangements and often families take matters into their own hands in making arrangements direct with care homes to facilitate the planned disposal of property. The duty only arises where the person has other assets worth less than £23,250.
- 5.2 There is no fundamental change to the deferred payment arrangements ('DPA') regime, but the increase in the eligibility criteria to reflect the much higher upper capital limit from £23,250 to £100,000, may only be a first step, as the Guidance also talks about the government wishing to review the existing scheme to understand how best to provide even more flexibility for people to defer their care payments. One means by which this could be done is to allow care providers to offer their own deferred payment scheme; this is currently difficult because of the expense of complying with the Financial Services and Markets Act and Consumer Credit Act regimes, so some exceptions to those regimes would be necessary to make that a viable alternative.
- 5.3 There is clearly more scope for individuals to argue that, if they have a Deferred Payment Agreement and will eventually be able to afford higher fees generally, fees at a higher rate than suggested by the local authority's IPB should count towards the cap, on the basis that the choice of home is the exercise of a genuine choice and should not be limited to the cost that "would have been" incurred by the local authority.

6. DIRECT PAYMENTS

- 6.1 Notwithstanding that the Guidance refers specifically to the extension of direct payments to residential care services (they have not previously been available for residential care, although they are available for community-based services generally) there is very little in the Guidance that explains what the impact of direct payments being introduced for residential care might be. Local authorities are encouraged to follow the same principles as those in place for existing direct payments when they set IPBs, although of course when there is an IPB, there will be no direct payment as such because the person is paying for their care privately. The CASS Guidance contains extensive information about how direct payments should be administered, including in cases where the person lacks capacity.
- 6.2 The impact of direct payments on those who are publicly funded could have a dramatic effect on how individuals engage with the care market but if, as seems likely, the Fair Cost of Care calculations will still result in care fees being set at less than actual cost, then it is difficult to see how individuals will improve their position by agreeing to an inadequate direct payment, any more than agreeing to an inadequate IPB.

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