

Title of meeting: Cabinet Member for Health, Wellbeing & Social Care

Date of meeting: 07 July 2020

Subject: Adult Social Care Charging Arrangements

Report from: Innes Richens, Chief of Health & Care Portsmouth

Report by: Richard Webb, Finance Manager

Wards affected: All Wards

Key decision: No

Full Council decision: No

1. **Purpose of report**

1.1 The purpose of this report is to respond to the motion adopted by Full Council on the 14th January 2020, which sought the Cabinet Member for Health, Wellbeing and Social Care to investigate the introduction of a day care cap for all Social Care client groups and to advise councillors of the financial cost of this.

2. **Recommendations**

2.1 It is recommended that the Cabinet Member:

a. Consider and approve one of the following options:

1. **Maintain the current charging arrangements within Adult Social Care, in line with Care Act 2014 and the related charging Regulations; or**
Subject to recommendations (b) and (c) below:
2. **Reinstate a financial cap for Day Care, Community Support and Health & Independence Services; or**
3. **Implement a financial cap across all Adult Social Care services.**

b. Confirm the level of the financial cap to be applied from Monday 06 April 2020, should the implementation of a financial cap be approved as set out in recommendation (a2) or (a3) above.

- c. **Agree that should the implementation of a financial cap be approved as set out in recommendation (a2) or (a3) above, it will on a temporary basis, until the publication and implementation of the anticipated government reforms of the financial arrangements for the Adult Social Care sector and how people fund their care and their eligibility for financial support from Local Authorities in the future.**
- d. **Request the Chief of Health & Care Portsmouth to identify and implement alternative income or savings strategies in order to offset any lost income in 2020-21 and future years, and enable Adult Social Care to maintain a balanced budget.**

3. Background

- 3.1. At the Health, Wellbeing & Social Care Portfolio meeting on 25 September 2018, it was agreed to remove the financial cap of £60.00 per week for client contributions for all client groups, for the following services:
 - Day care
 - Community Support
 - Health & Independence
- 3.2. Following the removal of the financial cap, clients contribute up to their maximum assessed charge; based on a financial assessment of their means in accordance with the Care Act 2014 and related Care and Support (Charging & Assessment of Resources) Regulations. This is consistent with the charging principles applied to other chargeable Adult Social Care services such as: Domiciliary, Nursing and Residential Care.
- 3.3. One of the main reasons for removing the financial cap from the above services, was to ensure that clients across Adult Social Care were treated consistently and equitably for charging purposes.
- 3.4. A motion (9c) was presented to Full Council on the 14th January 2020 which stated:

".....The council believes that charging for both day care and residential care has been unfair in its effect. It therefore calls on the Cabinet member for Health, Wellbeing and Social Care to investigate the introduction of a day care cap for all Social Care client groups and to advise councillors of the financial cost of this. This consideration of all Social Care client groups would protect the council from potential legal action under equalities legislation which would be a risk if a change was made for just one client group....."
- 3.5. Subsequently, at Full Council on 11 February 2020, it was suggested that any financial cap could be reinstated at £250 per week in respect of Day Care, Community Support and Health & Independence services.

However, any reinstatement of the financial cap would be conditional upon legal opinion confirming that the implementation of such a cap is not discriminatory in law and that clients with a protected characteristic will not be determined to be treated unfairly.

4. **Legal Power Charge**

- 4.1. The Care Act provides a single legal framework for charging for care and support under sections 14 and 17 of the Act. It enables a local authority to decide whether or not to charge a person when it is arranging to meet a person's care and support needs or a carer's support needs. Where a local authority arranges care and support to meet a person's needs, it may charge the adult, except where the local authority is required to arrange care and support free of charge.
- 4.2. Under the Care Act, Local Authorities have a duty to arrange care and support for those with eligible needs and a power to meet both eligible and non-eligible needs. In all cases, a local authority has the discretion to choose whether or not to charge under section 14 of the Care Act following a person's needs assessment. Where it decides to charge, it must follow the Care and Support (Charging and Assessment of Resources) Regulations and have regard to the Care Act guidance. The detail of how to charge an individual is different depending on whether someone is receiving care in a care home, or their own home, or another setting.
- 4.3. In deciding what it is reasonable to charge, local authorities must ensure that they do not charge more than is permitted under the regulations and guidance.
- 4.4. When choosing to charge, a local authority must not charge more than the cost that it incurs in meeting the assessed needs of the person. It also cannot recover any administration fee relating to arranging that care and support. The only exception is in the case of a person with eligible needs and assets above the upper capital limit (currently £23,250) who have asked the local authority to arrange their care and support on their behalf in a non-care home setting.

5. **Financial Assessment Methodology**

- 5.1 As highlighted above, where the Council decides to charge for services, it must follow the requirements of the Care Act 2014, the Care and Support (Charging and Assessment of Resources) Regulations as well as having regard to the statutory guidance.

- 5.2 The mechanism for charging an individual will also depend on whether someone is receiving care in a care home, or their own home, or another setting.
- 5.3 In applying the principles of the Care Act and the Charging Regulations, the Council will undertake a means tested financial assessment for each individual.
- 5.4 Capital thresholds and Minimum Income Guarantee (MIG) values are set nationally by the Department of Health and are not a local decision. The current upper capital threshold is £23,250. This means that any client with capital¹ above this threshold is considered as having the financial resources available to meet full cost of services. Where a person refuses a financial assessment the Local Authority can assume the client has sufficient financial resource and will be considered full cost. The Council offers a full welfare benefits check for all clients (including full cost clients) to ensure they are accessing all the financial support available to them to help sustain affordability of care.
- 5.5 Where a person has less than the upper capital threshold a full financial assessment is completed. For care other than that in a care home setting, there are a number of sources of income that the Council is required to disregard. These include:²
- a. Direct Payments
 - b. Guaranteed Income Payments made to veterans under the Armed Forces Compensation Scheme
 - c. War Pension Scheme payments made to veterans with the exception of Constant Attendance Allowance payments
 - d. Mobility component of Disability Living Allowance
 - e. Mobility component of Personal Independence Payments
 - f. Money from employment, such as wages.
 - g. Payments received on behalf of a child, such as child tax credit.
 - h. Charitable payments.
- 5.6 The means tested financial assessment will consider the clients eligible income, allowable expenses, (housing costs and disability related expenditure) and a personal allowance or Minimum Income Guarantee, which is set according to an individual's age bracket, living arrangements and disability³. An example means test assessment is shown below.

¹ Annex B of the Care Act Statutory Guidance provides guidance of the treatment of capital

² Annex C of the Care Act Statutory Guidance provides guidance of the treatment of income

³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772969/Social_care_charging_for_care_and_support_-_LAC_2019.pdf

FINANCIAL ASSESSMENT:

Total Income/Benefits	£276.20
Tariff Income from Total Capital	£0.00
Total Disregarded Income	-£23.20
Total Allowances/Expenses	-£32.50
Minimum Income Guarantee (MIG)	-£151.45
Calculated Disposable Income	£69.05

MAXIMUM WEEKLY CHARGE **£69.05**

ACTUAL WEEKLY CHARGE **£69.05**
(Based on current care package cost)

- 5.7 If, after deducting allowable expenses and the Minimum Income Guarantee (MIG) value from the client's total income there is a remaining value, this is considered to be the client's disposable income and would constitute their maximum weekly charge. Clients are charged either their assessed maximum charge or the actual cost of service(s) whichever is the lower amount.
- 5.8 The Council seeks to comply with the Care Act 2014 charging principles and apply these to all clients across all services. Based on the application of these principles, some clients will pay the full cost of services, some will contribute towards the cost of services and some will pay nothing at all; the determining factor being the individual's financial circumstances.
- 5.9 The principles are that the approach to charging for care and support needs should:
- apply the charging rules equally so those with similar needs or services are treated the same and minimise anomalies between different care settings
 - be sustainable for local authorities in the long-term
 - ensure that people are not charged more than it is reasonably practicable for them to pay
 - be comprehensive, to reduce variation in the way people are assessed and charged
 - be clear and transparent, so people know what they will be charged
 - promote wellbeing, social inclusion, and support the vision of personalisation, independence, choice and control
 - support carers to look after their own health and wellbeing and to care effectively and safely
 - be person-focused, reflecting the variety of care and caring journeys and the variety of options available to meet their needs
 - encourage and enable those who wish to stay in or take up employment, education or training or plan for the future costs of meeting their needs to do so

6. Financial & Administrative Impact

- 6.1 As at February 2020, 90% of the Adult Social Care Clients in receipt of Day care, Community Support and Health & Independence services, were either paying nothing (37%) or contributing up to £60.00 per week (53%). Of the remaining 10% of clients, 7% were contributing between £60.01 and £100.00 per week.
- 6.2 The table below provides a breakdown of the clients contributing in excess of £60.00 per week according to the level of their weekly contribution.

Weekly Contribution £	Number of Clients No.
60.01 - 100.00	38
100.01 - 150.00	6
150.01 - 200.00	7
200.01 - 250.00	1
250.01 - 300.00	3
300.01 - 350.00	0
350.01 +	1
	56

- 6.3 The table above shows four clients with financial contributions in excess of £250 per week. From an analysis of the financial assessments for these clients, the reasons their current level of contributions, is due to a combination of the level of services being utilised and all clients having capital in excess of the threshold of £23,250.
- 6.4 The motion approved by Full Council sought to understand the financial impact of reinstating a financial cap. The table below shows the potential cost to Adult Social Care (as a consequence of lost income) if the financial cap were to be reintroduced for the Day Care, Community Support and Health & Independence services.

Level of financial cap £	Estimated reduction in income £
60	146,704
100	85,352
150	48,696
200	29,488
250	17,527
300	11,117

- 6.5 As highlighted within the September 2018 report, the removal of the financial cap sought to align the charging policy across all Adult Social Care services, so that all clients would be financially assessed in line with the Care Act and related charging Regulations, and contribute only up to the their maximum assessed charge. This change was also line with the Care Act charging principle which seeks to ensure that the charging rules

are applied equally so those with similar needs or services are treated the same and minimise anomalies between different care settings

- 6.6 Should the reintroduction of the cap be applied across all Adult Social Care services (including Domiciliary, Nursing and Residential Care) the table below shows the potential cost to Adult Social Care, as a consequence of lost income.

Level of financial cap £	No. of clients affected	Estimated reduction in income £	Estimated reduction in income as % of ASC 2020/21 Cash Limit
60	1,057	6,010,500	13.07%
100	724	4,156,200	9.04%
150	331	2,805,000	6.10%
200	201	2,163,900	4.71%
250	128	1,767,600	3.84%
300	90	1,511,300	3.29%

- 6.7 If the financial cap were to be reintroduced, then Adult Social Care would need to identify and implement alternative income or savings strategies to maintain a balanced budget in order to offset any lost income in 2020-21 and future years. The table above also shows the estimated reduction in income as a percentage of the net budget for 2020-21.

Administrative Impact

- 6.8 Since the previous financial cap was removed, the Adult Social Care case management system and related finance systems have been replaced. As a consequence the new systems are configured to apply the Care Act financial assessment framework. Should the financial cap be reintroduced, the application of the change could not currently be applied automatically within the system and therefore manual intervention would be required.
- 6.9 Any manual intervention would need to be undertaken on each client's record on a weekly basis for billing purposes. The staffing resources required to administer the application of any financial cap will be dependent on the level of the cap and the number of clients affected. For every 100 clients that the cap would apply to, it is currently estimated that an additional 1 FTE of billing support staff would be required to process the weekly adjustments.

7. Community Engagement

- 7.1 Throughout the implementation period an engagement exercise was undertaken, which included information letters being sent to clients and/or their representatives. Additionally, visits were offered to all clients, in order to undertake a review of their current assessment and/or a welfare benefits check to ensure clients are in receipt of all the Welfare Benefits that they may be entitled to; specifically Attendance Allowance and Personal Independence Payment. These benefits are non-means tested and therefore would offer an additional income stream to minimise impact of the charging policy change.
- 7.2 No formal complaints in relation to this policy change were received through the Adult Social Care complaints team.

8. Options for consideration

- 8.1 There are three main options available for consideration, which are assessed in detail below.
- i. Maintain the current charging arrangements
 - ii. Reinststate a financial cap for specific services
 - iii. Reinststate a financial cap all Adult Social Care services

Option 1 - Maintain the current charging arrangements

Under the current charging arrangements, all clients will only pay for Adult Social Care services up to their maximum assessed contribution, in accordance with the Care Act 2014, the Care and Support (Charging and Assessment of Resources) Regulations. This approach to charging is also consistent with the following Care Act charging principles:

- *apply the charging rules equally so those with similar needs or services are treated the same and minimise anomalies between different care settings*
- *be sustainable for local authorities in the long-term*

As shown above, under these arrangements 90% of the clients in receipt of the Day Care, Community Support and Health & Independence services are either paying nothing (37%) or contributing up to £60.00 per week (53%). A further 7% are contributing between £60.01 and £100 per week.

There are 4 clients who are contributing in excess of £250.00 based on a combination of the level of services they are utilising and their individual financial circumstances.

Option 2 - Reinstate a financial cap for specific services

Reinstating a financial cap for Day Care, Community Support and Health & Independence services would:

- Reduce the costs borne by individual users of these services.
- Create an anomaly in the charging rules between the different care settings, as this would be inconsistent with the Care Act charging principles.
- Potentially not be financially sustainable for Adult Social Care in the long-term.
- Require the disapplication of the charging framework specified in the Care Act and the related Charging Regulations for specific individuals.
- Create additional administrative tasks, as each system generated bill would require manual adjustment.

Based on the data above, under the current charging arrangements 97% of the client cohort are either paying nothing or contributing up to £100 per week for the services they are receiving. Therefore any financial cap above this amount would create a charging anomaly for 18 clients or less.

An alternative sub-option that could also be considered here, is to reinstate a financial cap for Day Care, Community Support and Health & Independence Services, for those clients who were in receipt of these services prior to the removal of the financial cap; and continue to be in receipt of these services. New clients would continue to be assessed in accordance with the Care Act 2014, the Care and Support (Charging and Assessment of Resources) Regulations.

It should be noted that any decrease in an individual's charges for these services may not automatically lead to a decrease in their financial contributions. The reason for this is that if the cost of other services that they utilising, together with the cost of the capped services is equal to or greater than their maximum assessed charge, then the client's contributions will remain at the current level.

Option 3 - Reinstate a financial cap all Adult Social Care services

If a financial cap was implemented for all Adult Social Care Services, then it would ensure there was consistency in the charging principles applied across all services and client groups. It was also reduce the costs borne by individual users of these services (where their charges would have been in excess of any proposed financial cap). However the changes would:

- Potentially not be financially sustainable for Adult Social Care in the long-term.
- Require the disapplication of the charging framework specified in the Care Act and the related Charging Regulations for specific individuals.
- Create additional administrative tasks, as each system generated bill would require manual adjustment.

Any level of financial cap across all services would result in significant reductions in income for Adult Social Care. Therefore the service would need to identify and implement alternative income or savings strategies to maintain a balanced budget in order to offset any lost income in 2020-21 and future years. The table at paragraph 6.6 shows estimated loss of income at different levels of financial cap.

- 8.2 Should it be considered appropriate to reintroduce a financial cap on the financial contributions expected from Adult Social Care clients, then a further option for consideration may be to time limit the application of any financial cap.
- 8.3 The Adult Social Care sector has been awaiting the publication by the government of its proposals for the potential reform of the financial arrangements for this sector and how people fund their care and their eligibility for financial support from Local Authorities in the future. These potential reforms could therefore affect the future charging arrangements for Adult Social Care service, including Day Care, Community Support and Health & Independence services.

9. **Reasons for recommendations**

- 9.1 The report provides a response to the motion adopted by Full Council on the 14th January 2020 and seeks to consider the impacts of implementing a financial cap to the charging arrangements for Adult Social Care services. The recommendation requests the Cabinet Member to consider and approve one of the potential options available in response to the motion.
- 9.2 Any reinstatement of the financial cap would be conditional upon legal opinion confirming that the implementation of such a cap is not discriminatory in law and that clients with a protected characteristic will not be determined to be treated unfairly.

10. **Integrated Impact Assessment (IIA)**

- 10.1 A preliminary Integrated Impact Assessment (IIA) has been carried out (Appendix 1). From this it was determined that a full IIA would not be required.
- 10.2 As highlighted within the Legal Comments section below, the reason the original cap of £60 per week was looked at (September 25th 2018) was that it created wide disparity, was inconsistent, inequitable and confusing.
- 10.3 The current position is that all service users are financially assessed in accordance with the Care Act 2014 and related charging regulations. Under this arrangement clients may pay different amounts, but their expected contribution will be based on their individual circumstances.
- 10.4 Should any financial cap be reintroduced then it is likely to increase the level of disparity, inconsistency and inequality; and therefore create charging anomalies across different care settings.
- 10.5 In order to minimise the risk that the introduction of the financial cap will create direct discrimination, any financial cap should be applied equally to services across all client groups. Additionally, the policy should not differentiate on the basis of age or disability.
- 10.6 In terms of indirect discrimination, the reinstatement of the financial cap would have a financial impact and will result in those with higher levels of disposable income and higher levels of need, paying less proportionately towards the cost of their care and support.

11. **Legal Comments**

- 11.1 The power to set charges is found in sections 14 and 17 of the care Act 2014 and the Care and Support (Charging and Assessment of Resources) Regulations 2014. The Local Authority (LA) has a power to charge and currently charges service users up to their maximum assessed charge based upon the individual service users own financial assessment.
- 11.2 There is nothing wrong with the premise that a) a charge can be made and b) it is based upon the statutory regulations.
- 11.3 The fact that individual service users may all pay different amounts is purely based upon their own individual circumstances.
- 11.4 Looking back, the reason the original cap of £60 was looked at (September 25th 2018) was that it created wide disparity was inconsistent, inequitable and confusing. The change meant that moving on post September all those who made a contribution were assessed as

having to pay the maximum amount, this Provision Criteria or Practice (PCP) being applied to the whole group (circa 71 service users at the time).

- 11.5 The current position is that all service users make the assessed contribution.
- 11.6 Claims based upon engaging the Equality Act 2010 could potentially be initiated. The duty here is in the provision of services or indeed in interpreting the process for financial assessment as part of the initial process. The starting point is section 29 of the Equality Act that prohibits service providers and persons exercising public functions from doing anything that constitutes discrimination. This duty applies to most protected characteristics, which for our purposes are confined to age and disability.
- 11.7 What is a service is not defined in the act other than to say that the provision of a service includes the provision of goods or facilities in the exercise of a public function (here we as the LA are engaged in providing the facilities). The question to ask is in providing the service and applying the provision criterion or practice (paying the full assessed contribution) does that amount to a discrimination in the sense that a service user is being treated less favourably than those because of the protected characteristic. On a direct basis there is limited possibility of a claim being raised because:
 - a. We are looking at the same policy for all with the same application process being applied to all.
 - b. We do not differentiate about contribution just saying that the maximum assessed payment will be taken.
 - c. We do not differentiate on the basis of age, or disability.
- 11.8 The existing policy in its current form and application exposes the LA to very limited challenge.
- 11.9 On the issue of indirect discrimination that occurs when the service provider applies a provision, criterion or practice that places service users sharing a protected characteristic at a particular disadvantage that cannot be justified. The current blanket PCP whilst costing more to some than others is such that on the face of it is not placing any user at a particular disadvantage and even if that was the case it could be justified that the PCP is a proportionate means of achieving a legitimate aim. The LA could suggest that the removal of the cap was to redress the unfairness as in the original 2018 decision.
- 11.10 The fact that persons pay more or less is a fact and may seem unfair which of itself is not an illegality.

11.11 The reinstatement of the financial cap would have as the report espouses a financial impact along with a potential argument about the rationality of such a decision as in effect those with higher need would be in receipt of a higher disposable income as their contribution would be less. There is an argument that this is an unreasonable decision and not one any reasonable LA would make.

12. Finance Comments

12.1 Under the current charging arrangements, clients are only expected to contribute up to their maximum assessed charge; based on a financial assessment of their means in accordance with the Care Act 2014 and related Care and Support (Charging & Assessment of Resources) Regulations.

12.2 Any decision to introduce a financial cap to any assessed client charges will result in a reduction in the level of income received by Adult Social Care. The tables within the report provide estimates of the potential lost income at different levels of financial cap, depending on whether they are applied to all Adult Social Care services or limited to Day Care, Community Support and Health & Independence services.

12.3 If a financial cap was to be implemented, Adult Social Care would need to identify and implement alternative income or savings strategies to maintain a balanced budget in order to offset any lost income in 2020-21 and future years.

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Signed by:
Innes Richens, Chief of Health & Care Portsmouth

Appendices:

1 - Integrated Impact Assessment

Background list of documents: Section 100D of the Local Government Act 1972

The following documents disclose facts or matters, which have been relied upon to a material extent by the author in preparing this report:

Title of document	Location
The Care Act	www.legislation.gov.uk
The Care and Support	

(Charging and Assessment of Resources) Regulations	www.legislation.gov.uk
Care & Support Statutory Guidance	https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#charging-and-financial-assessment

The recommendation(s) set out above were approved/ approved as amended/ deferred/ rejected by on

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Signed by: