

# **Care Act – Draft Regulations and Guidance Charging and Financial Assessment – Early Feedback**

## **1. Introduction**

- 1.1 Overall the draft guidance and detailed regulations are welcomed as an opportunity to simplify the current arrangements. The documents provide some useful examples and are very easy and clear to read. Detailed comments on the questions are set out in the appendix to this note. These summary paragraphs provide a focus on the following key points and areas: -
- **Overall Good Practice** – which would supplement the guidance and regulations;
  - **Treatment of Large Compensation or Insurance Payouts;**
  - **Financial Impact of Changes to Disregards etc.**
  - **Deferred Payments** – which is the main area of change in this part of the draft Care Act Regulations and Guidance – with a particular concern about what replaces HASSASSA; and
  - **Consistent Arrangements for Residential/Nursing Care and Community Care Settings.**
- 1.2 Examples of individual comments made by Local Authorities are shown in italics in a number of these summary paragraphs.

## **2. Overall Good Practice**

- 2.1 Whatever arrangements are put in place they need to be as easy as possible for the individual, the family and all the organisations involved. The National Association of Finance Assessment Officers (NAFAO) has produced good practice guides previously and intends to produce good practice guides that will supplement the regulations and guidance. This good practice will make it easier for systems to be developed and ensure administrative costs are minimised. There are some examples of the scope for this good practice included in later paragraphs.

## **3. Treatment of Large Compensation or Insurance Payouts**

- 3.1 Concern has been expressed about the current wording of the regulations and guidance of the treatment of large compensation or insurance payouts including personal injury payments. Where compensation or insurance payments provide for the cost of their care and support, then the regulations need to be clear that the Local Authority should be able to recover these costs.
- 3.2 The regulations should also be re-drawn in order to ensure that defendants rather than local authorities pay for the care needed because of defendant's negligence.

#### 4. *Financial Impact of Changes to Disregards etc.*

4.1 The regulations include a number of changes to the treatment of income and capital. There is concern at the financial impact of these changes. An assessment needs to be made of the impact on income of these changes – and how this will be funded.

#### 5. *Deferred Payments*

5.1 This is the main area of change in the charging and financial assessment in advance of the funding. We have summarised our comments on the regulations and guidance under the following headings: -

- Scope
- Renting of Property
- Interest Rates
- Security
- Deferred Payment Agreements
- Capacity

##### **Scope**

5.2 **There should be discretionary scope to extend deferred payments to those in community care settings as well as top ups.** There are now an increasing number of people supported in the community with high level needs – such as those in extra care housing. As a number of comments we have received indicate many people are asset rich but cash poor. Some people do not take up the support offered because of this. Having the discretion to offer a deferral of payment could avoid this. Such agreements may last longer than those for people in a care home setting. The arrangements need to take account of this in considering the amount of interest and administrative costs that might accrue over the course of a longer agreement.

*“People who own a property but who have been identified during the assessment process as needing support in more suitable accommodation are usually required to pay full rent and council tax and the full cost of any care that they receive. Often these people are asset rich and cash poor, and if they were able to ask for a deferred payment against the value in their former home this would facilitate them in meeting their financial obligations and assist them in retaining their former property for a longer period”*

## Property Renting

- 5.3 ***This is considered good practice – with a number of councils encouraging people to rent out their properties.*** This opens up more houses in the housing market. Managed well it also offers the scope to improve the condition of the property. The property to be let can be in a poor condition – so mechanisms need to be in place for some cash to be invested in the property to bring it up to a lettable condition. These costs need to be recovered. Some LA's have developed arrangements where they have acted as agents for these arrangements – recovering these costs from the rental stream – before any income passes to the Local Authority or the individual.
- 5.4 To offer any incentive we need to be careful that we have a rationale for this compared to other forms of income. This could be justified if it can clearly be demonstrated that this incentive is needed and saves money compared to existing arrangements. *Perhaps the easiest way of testing this is to give Councils the option to offer incentives and see what examples emerge from this that could form part of good practice guidance. Property renting might not be suitable in some circumstances – so should be an option for people to consider.*

## Interest Rates

- 5.5 The regulations and guidance and good practice guides should be drafted in order to: -
- ***Offer interest rate ceilings*** which protect the individual and the council so ***tying interest rates to either the Bank of England base rate or Public Works Loans Board rates;***
  - ***Provide scope for a higher rate for discretionary elements*** – to recognize the extra risks involved;
  - ***Ensure administrative systems can cope with compound interest rates*** – again to recognise the real costs involved.

*“There should be a different interest rate for the mandatory and discretionary elements. The maximum rate could be linked to the Bank of England base rate plus a fixed percentage.”*

*“Where the local authority has been more generous and used their discretion in providing a deferred payment we believe that the interest rate applied should be higher in recognition that the local authority has used powers to assist rather than being under a duty to assist. An additional 1 or 2% would seem reasonable.*

## Security

- 5.6 There are a number of considerations for security.

### *Loan to Value Ratio*

*“It seems sensible to apply a loan to value ratio charge to ensure that variations in market value are recognised and also to ensure that the minimum capital threshold is protected for the client.”*

### *Any Legal Charge?*

Q 35 -Do you agree that local authorities should be required to accept any legal charge on a property as security for a deferred payment agreement when they are required to enter into one and not just a first charge?

*“No, an LA should only accept a legal charge if it is sure that it will be able to recover the deferred debt.”*

## Security - Loss of HASSASSA

- 5.7 Concern has been expressed about the loss of HASSASSA – both the ability of the local authority to place a charge on the property on which the “loan” is secured and the ability to recover the debt. A significant proportion of people entering residential care only do so / survive for a limited period – over 30% less than a year – over 15% 6 months or less. ***It is important that the process that will replace HASSASSA is simple and quick – and avoids Councils having to take vulnerable adults to court.*** If not there is a significant risk that substantial amounts of income will have no form of security with the resultant loss of this income. We collect almost £2bn in residential/nursing care income. Lengthy processes would put hundreds of millions of this income at risk. We recognise that Beverley Lambert is in detailed discussions with the Department on what replaces HASSASSA.

## Deferred Payment Agreements

- 5.8 Most Councils already use Deferred Payment agreements. It would seem sensible to develop a national template with good guidance from NAFAO – hopefully this would keep the arrangements simple for everyone to understand and ensure costs are as low as possible.

## Capacity

- 5.9 Where a person lacks capacity, the local authority must find out if the person has any of the following, as they will need to be consulted:
- Enduring Power of Attorney (EPA);
  - Lasting Power of Attorney (LPA) for Property and Affairs;
  - Lasting Power of Attorney (LPA) for Health and Welfare;
  - Property and Affairs Deputyship under the Court of Protection; or
  - Any other person dealing with that person's affairs (e.g. someone who has been given appointee-ship by the Department for Work and Pensions (DWP) for the purpose of benefits payments).
- 5.10 Again to keep the arrangements simple and easy to understand and ensure costs are kept as low as possible while offering sufficient safeguards it would seem sensible to: -
- **Have national templates agreements and guidance** - for those circumstances where deferred payment arrangements are involved; and
  - **Simple court processes for this** – to avoid delay and cost for the individual and the local authority.

## Overall Nature of Deferred Payment Arrangements

- 5.11 To minimise the financial consequences of deferred payments it is important to continue to treat these as debts/loans, which is the current accounting practice.

## 6. Consistent framework for Residential/Nursing Care and Community Care Settings

- 6.1 One of the Dilnot recommendations was a consistent approach being adopted for residential / nursing care and community care settings. This has been a continued feature of responses to the Care Bill. This has again featured in the response to this consultation so far. This “*would allow for a more equitable regime both across different types of care and across local authority areas and would mirror the new eligibility regulations.*” The ability to offer deferred payments in both settings would better accommodate the general asset rich and cash poor situations of many people.

## Appendix 1 - Section 3: Charging and Financial Assessment – Questions and Responses

- Q20. Do the regulations and guidance provide a clear modern framework for charging that will enable local authorities to maintain existing flexibilities in how people contribute to the cost of meeting their care needs? Are there any particular areas that are not clear?

*Just replicates existing guidance - opportunity missed to set a national charges assessment framework for non-residential services, as is the case for residential charging. Property disregard applies for relatives aged 60 or over – why aged 60?*

*Charging for carer services is more complicated than necessary due to the requirement to leave carers with basic income levels plus 25%, which means that carers will require financial assessment rather than being able to align charging to income types.*

- Q21. Is there anything from the current rules that has not been re-created that you feel should have been? If so, please list along with a brief explanation of why.

*There is no reference to how the rate of Personal Allowance will be calculated/announced.*

- Q22. Do you agree that we should adjust the operation of the 12-week property disregard to better support those most at risk?

*Yes – but consideration should be given to only applying the 12 weeks disregard to those new in long term care. For those previous self-funders and those whose property has been disregarded and a change occurs they have already been provided with a sufficient period of time to consider how to fund care should property fall to be taken into account.*

- Q23. Would you prefer to see the current approach retained?

*No*

- Q24. Do you agree that this proposal is cost neutral for local authorities? If it is not, please provide evidence.

*The design offers the scope for this subject to reasonable interest costs and admin costs, which recover all the costs involved, and these arrangements minimise the administrative costs involved and provide sufficient security to minimise the risks of losses.*

Q25. Do you think these bonds should be taken account of in the financial assessment? What are the risks and costs to local authorities and individuals?

*Yes as a perverse incentive remains otherwise. Risks will include potential for debt increase, as bonds may not be immediately cashable if they are the main source of capital.*

*The surrender value of any policy of life assurance is a capital asset, which is disregarded under the local authority means-test. However there is no clear legal definition of a policy of life assurance and this has understandably led to confusion, particularly in the context of investment bonds, which carry an element of life cover. This is mentioned in R/IS 7/98 – “The overstretching of the concept of life assurance by the life offices and the financial services industry to cloak almost any type of investment product has been a feature of the financial scene for many years.”*

*The understanding of the policy of life assurance disregard was introduced to prevent people having to cash in life policies designed to protect their families. That early surrender would not only expose the family in the event of the death of the insured, but would also realise a much-reduced value over the proceeds due upon maturity. The endowment policy is the classic example of a life policy with a surrender value. If it was cashed in early then the mortgage that it would invariably support would never be paid off. The family might become worse off ultimately. The state would also need to foot the bill in terms of benefits to pay the continuing mortgage interest. This is held in R/IS 7/98:*

*The cash value of the bond fell to be disregarded as capital under paragraph 15 of Schedule 10 to the Income Support (General) Regulations 1987, as the “surrender value of a policy of life insurance”. It was sufficient that the bond contained provisions for payment on contingencies dependent on human life, even if those provisions were peripheral to the main purpose of the bond:*

*Despite the above it now seems that the well timed and well planned conversion of non-disregarded assets such as cash and shares into a disregarded form such as a non-qualifying life policy/investment bond is a legitimate part of protecting the financial interests and choices of older people so it would make sense if such capital could be included in the means test for care. However, would this not require a change in the Income Support (General) Regulations 1987 on which the charging for care regulations are based?*

Q26. Should pre-paid funeral plans be disregarded and if so should there be a limit to the size of plan that can be disregarded? If so, how much?

*No, there is sufficient allowance within the capital disregard of £14,250 to cover funeral costs, whether pre-paid or not.*

Q27. Does the guidance need to particularly cover these types of accommodation? If so, what would it be helpful to discuss?

*Yes. It would be helpful to discuss the different contractual arrangements in place for these accommodation types and how the charging rules would apply.*

Q28. What are the risks of the expansion of the additional cost provisions so that the person can meet this cost themselves (to both local authorities and the person)? How can any risks be mitigated by regulations and guidance?

*The risks to both are affordability and sustainability so it would be helpful if the guidance laid down minimum requirements before additional cost provisions can apply to residents.*

Q29. What do you think the impact of the increased pension flexibilities might be for social care charging for people and local authorities? How can any risks be mitigated via regulations and guidance?

*Presumably the proposals to introduce greater choice and flexibility available for people to fund later life will potentially mean more income and capital disregards and therefore reduced charges income for LA's. It would be helpful if this or future guidance was clear on the treatment of income and capital relating to any changes to defined contribution pensions.*

Q30. Should the eligibility criteria for deferred payment agreements be extended to include people in extra care housing or supported living arrangements? Do you have evidence of the likely demand for deferred payment agreements from people whose needs are met in these types of accommodation?

*Yes*

Q31. Do you think we should seek to introduce a scheme, which is compliant with Sharia law at a later date?

*Yes - but it is recognised that Sharia is complex and its practice is often reliant on the quality and training of experts. There are different schools of thought, which consequently lead to different rulings.*

Q32. Do you agree that the maximum LTV for deferred payment agreements should fall between 70% and 80%? Do you have any evidence to support a particular amount within that range?

*Yes. However we have no evidence to support a particular amount within the 70 to 80% range.*

Q33. Do you agree that people should be able to keep a proportion of any rental income they earn on a property they have secured a deferred payment agreement on? Are there other ways people could be incentivised to rent out their houses?

*Yes. Other incentives could be to exempt the tenants from Council Tax or apply a discount against the deferred debt.*

Q34. Do you have any views or evidence to suggest how much rental income people should be able to keep to incentivise them to rent their property out?

*No.*

Q35. Do you agree that local authorities should be required to accept any legal charge on a property as security for a deferred payment agreement when they are required to enter into one and not just a first charge?

*No, an LA should only accept a legal charge if it is sure that it will be able to recover the deferred debt.*

Q36. In line with the recommendations of the Independent Commission on Funding of Care and Support, do you agree that the interest rate should be set so that it is reasonable for people, cost neutral to local authorities and as such that it does not create incentives for people to apply for deferred payments when they are not needed?

*Yes*

Q37. Do you agree that there should be a different interest rate for deferred payment agreements made at the local authority's discretion? If so, what should the maximum rate be?

*There should be scope for a different interest rate to be applied but preferable for central government to set both rates, to avoid regional variations. The maximum rate could be linked to the Bank of England base rate plus a fixed percentage.*