

## **Cabinet – 18 March 2015**

### **Residential and Nursing Home Transitional Contracts and Financial Arrangements for Preferred Accommodation**

**Portfolio:** Councillor Diane Coughlan

**Related portfolios:** None

**Service:** Adult Social Care and Inclusion

**Wards:** All

**Key decision:** Yes

**Forward plan:** Yes

#### **1. Summary**

- 1.1 In June 2013 Cabinet approved a procurement exercise for accommodation-based services comprising residential and nursing care home placements. Preparation for this procurement has continued including consultation with the provider market around quality of provision and setting fee levels. The implications of the Care Act, which are in two phases – the first of which from April 2015 is covered in this report.
- 1.2 To ensure the continuing contractual compliance with contractual and Standing Orders requirements of Residential and Nursing care providers, on February 2015 the Interim Executive Director of Adult Social Care authorised an urgent action waiver to award transitional, spot purchase call off contracts to all 2009-2013 contracted residential and nursing care providers to cover the period from when the current transitional contracts expire until the procurement exercise has been completed and the new framework put in place.
- 1.3 The Care Act 2014 replaces all existing adult social care law and consolidates a system that has grown very complex over the last 60 years into one single statute with supporting regulations, statutory and practice guidance. Usual Cost, Preferred Accommodation, Top Up and Deferred Payments are all regulated as part of the consolidated provisions within the Act. These topics were originally covered by two local policies in the borough of Walsall. In view of the enactment of the Care Act 2014 it is proposed in future these two policies will be merged and known as “Financial Arrangements for Preferred Accommodation”.
- 1.4 The recommendations are the result of extensive Department of Health guidance around the Care Act 2014. The delays to the procurement process have been due to ensuring that the new framework contract will be compliant with Care Act guidance related to care homes for 2015/16, and a further report to Cabinet on subsequent regulations and statutory guidance for the Care Act after April 2016 will be produced by December 2015.

## **2. Recommendations**

Following consideration of the confidential information in the private session of the agenda, the Cabinet will be recommended to:

- 2.1 approve the extension of transitional, spot purchase, and call off contracts to all 2009-13 contracted providers to cover the period from when the current transitional contracts expire until the procurement exercise has been completed and the new framework put in place as set out in paragraphs 3.1 and 3.4;
- 2.2 approve the updated revisions to the previous policies for usual costs, preferred accommodation, top up payments, and deferred payments to be known as "Financial Arrangements for Preferred Accommodation" and changes as outlined in para 3.9.

## **3. Report detail**

### **Contract extension to Residential and Nursing Care Providers**

- 3.1 The previous framework agreement for providers of residential and nursing care placements was established by Walsall Council and NHS Walsall for a 3 year period, with a facility to extend the contract for up to a further year, subject to consultation and mutual agreement which is the maximum period for this type of contracting arrangement. The framework therefore expired on 31 March 2013. To maintain continuity of contractual terms with the providers, transitional contracts were put in place. An urgent action was authorised in August 2014 and renewed in March 2015 to;
  1. Waive/suspend the requirement to follow Contract Rules 8, 11, 16 and 17 on the basis that;
    - a) Immediate action is required to safeguard the Council's assets or interests.
  2. Award transitional, spot purchase call off contracts to all 2009-13 contracted providers to cover the period up to 31 March 2015 (in the first and to 31 July 2015 in the second).
- 3.2 The Council currently has 212 contracts (40 in borough and 172 out of borough) which supports 828 (589 in borough, 239 out of borough) service users. The current interim contractual arrangements are due to expire on 31 March 2015 and, following legal advice and to allow a timely and transparent tendering process to be developed and completed, the Executive Director for Social Care authorised urgent action to issue new interim contracts to cover the period up until the new framework is in place or 31 March 2016, whichever is the sooner.
- 3.3 This contract was tendered in 3 phases for client groups' older people (Phase 1), mental health, (Phase 2) and specialist services which include learning disabilities (LD), physical and sensory disabilities (P&SD) and other complex care (Phase 3). Phase 2 and 3 contracts were never awarded due to the

changing nature of these services and so these services are therefore operating under old contract terms and conditions.

- 3.4 Work has continued since to conduct a consultation exercise to update the service specification and contract terms and conditions in preparation for going to tender for care homes entry onto the new framework contract. In order to provide the Council with some flexibility with regard to the timing of the implementation of the new procurement exercise (albeit that this needs to be completed as soon as possible) and from what date the new resulting contracts will take effect, contracts will be awarded for periods of up to 3 months at a time from 1 April 2015 and up to 31 March 2016 or the date of the commencement of the new framework, whichever is the earlier.
- 3.5 Awarding new transitional contracts to all pre 2004 – 2009 contracted providers allows a timely alignment of approach to the introduction of new contractual terms and conditions by 1 April, 2016 for all Residential and Nursing Care Contracts. 1 April, 2016 is the latest date for implementation and our intention is to have in place at the earliest opportunity.
- 3.6 The award of transitional contracts will allow for a framework agreement that is to be used simultaneously by the Clinical Commissioning Group (CCG) for those placements that are funded by the NHS.
- 3.7 Demand for care home placements for older people has been contained in recent years in Walsall to low levels compared both nationally and regionally, but is growing in response to needs from older people as outlined in the Joint Strategic Needs Assessments.

#### **Financial Arrangements for the new Preferred Accommodation Policy**

- 3.8 The Usual Cost, Preferred Accommodation and Top Up Policy was agreed by Cabinet on 13 January 2010.
- 3.9 The current Deferred Payments Scheme inclusive of the option to apply any expenses was approved by Social Service Committee on 29 October 2001. This arrangement was removed in 2011 and should be restored as a result of the confirmation in the Care Act for Councils to be able to levy a charge against those with assets for their care when it comes in to effect from April 2015. The main features of the new policy will be to protect the interests of the Council as well as to implement the new powers of the Care Act as follows:
  - to widen the offer of deferred payment agreements to include self-funders;
  - that the Council sets an upper LIMIT on the amount which can be deferred by each service user to 80% of the equity which is owned by them within the total asset value. This is to protect the Council's interests in the light of fluctuating market values of residential property;
  - that the Council accept part mortgaged property as security for a deferred payments as well as other forms of security where a first charge cannot be secured against the primary property. Examples of these forms of security could be a third party guarantor, a solicitors' undertaking letter, valuable

objects and agreements to pay from the proceeds of a life assurance policy

- reinstate an administrative charge of £200 per service user to cover the cost of land registry searches and other legal expenses;
- for people who have property and refuse to enter into a deferred payment agreement then they will be advised to seek their own arrangements in paying care home fees;
- that the current interest rate used is changed to make it Care Act 2014 compliant. This would mean changing the rate from the bank base rate plus 4% to the maximum interest allowable under the Care Act 2014;
- Regular valuations/condition assessments of property will be undertaken to ensure that the equity available within the property is sufficient to cover the deferred amount;
- authorised and delegated signatories will be reviewed and updated for deferred payment documentation;
- legal Services will assess the feasibility of using the standardised Department of Health legal agreements to replace existing DPA documentation;
- as part of the new procedures the Council will establish a detailed review and appeals procedure for decisions made under this revised policy.

3.10 With effect from April 2015 it is proposed to combine the two current policies to become a single policy entitled “Financial Arrangements for Preferred Accommodation Policy” (see **Appendix 1**) and in collaboration with corporate colleagues both procedural and contractual documentation is to be developed. Combining the policies provides the opportunity to streamline the implementation of a policy which is consistent with relevant legislation, statutory guidance and standardised legal documentation which is due to be issued by the Department of Health.

3.11 The new Financial Arrangements for Preferred Accommodation Policy will be reviewed annually at a minimum to ensure compliance with evolving legislation, and to evaluation impact on budgets and residents’ outcomes.

#### **4. Council priorities**

4.1 Awarding transitional contracts to residential and nursing care providers contributes to the Council’s priority for supporting vulnerable people’s health and well-being that can no longer live independently in their own homes and require as much continuity of care as possible.

4.2 Implementation of a Financial Arrangements for Preferred Accommodation Policy will contribute to the Council’s priority for supporting people to remain as independent as possible within the new provisions of the Care Act.

## **5. Risk management**

- 5.1 There is a risk that care home owners may not agree to sign up to the new framework contract. This would mean having to continue with historical the legacy of contract arrangements for some placements. To counter this, the aim is to incentivise care home owners to sign up to the new contract as set out in Part 2 of this paper.

## **6. Financial implications**

- 6.1 The cost of service provision and implementation of the Preferred Accommodation policy referred to in this report will be met from existing Adult Social Care & Inclusion resources. There are potential demand risks to social care budgets, outlined above.
- 6.2 The current level of budget associated with residential and nursing care contracts is £25.9m; however there are currently savings proposed relating to the reduction of care package costs (both non residential and residential) for 2015/16 totalling £2.284m and for 2016/17 totalling a further £2.821m. There is a duty to ensure the fee rates that the council pays are reasonable and affordable. The extension of the current contract will allow further time to work with finance and procurement colleagues to ensure that a newly tendered framework for care home services not only meets the assumed level of need going forward, but that fees paid to providers are set at a sustainable level, and are in line with the funding that is available to procure these services over the medium term. It is anticipated that there will a range of responses to the tender that may in some instances pose a risk of longer term increases in fees.

## **7. Legal implications**

- 7.1 Consultation with care home providers continues so as to reduce a risk of challenge of not having being consulted about new contractual terms and conditions and whether the proposed fee levels are realistic in terms of the actual costs of provision.
- 7.2 The Council needs to ensure the delivery of care and support services in compliance with equality legislation and that the procurement process is in compliance with the Council's Contract Rules 2010 and procurement legislation to mitigate the risk of challenge.
- 7.3 Compliance with the Care Act 2014 will require a complete review of legal documentation in relation to deferred payments taking into account relevant legislation, statutory guidance and the standardised legal documentation due to be issued by the Department of Health.

## **8. Property implications**

- 8.1 There are no direct property implications for the Council.

## 9. Health and wellbeing implications

- 9.1 Sustaining a range of housing options will contribute to maintaining the health and well-being of vulnerable people who need Residential or Nursing Care or who require support to remain independent in the community.

## 10. Staffing implications

- 10.1 There are no direct Council staffing implications for the award of transitional contracts to Residential and Nursing Care providers. There will be additional staffing requirements to cater for deferred payments, which are covered in the additional Government Community Care grant for Care Act implementation in 2015/16.

## 11. Equality implications

- 11.1 The Council's standard goods and services contracts incorporate standard clauses which refer to the Equalities Act
- 11.2 An Equality Impact Assessment will be completed as part of the project management approach to the re-procurement exercise and application of the Financial Arrangements for Preferred Accommodation Policy.

## 12. Consultation

- 12.1 All providers of residential and nursing care services will be given the opportunity to participate in workshops regarding the procurement approach to be taken, along with new terms and conditions and proposed fees rates during this transitional period.
- 12.2. The Government is currently consulting upon the wider changes for care home fee and other subsidies under the Care Act due for implementation from April 2016. Once the statutory guidance and requirements are clarified later this year following this consultation, there will be a need to consult with advocates, users and carers as well as care home providers on the new arrangements from April 2016 (such as Care Accounts, new thresholds for eligibility, and new regulations).

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9 March 2015



**Financial Arrangements  
For  
Preferred Accommodation  
policy**



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Version Control	Date
Policy reviewed	February 2015
Policy agreed by Cabinet	March 2015
Date of next review	March 2016



## **1.0 Introduction**

- 1.1 Walsall Council policy in relation to Preferred Accommodation (including guidance on preferred accommodation, top ups and deferred payments is based on the CARE ACT 2014).
- 1.2 The Financial arrangements for preferred accommodation policy is reviewed annually as a minimum to ensure compliance with evolving legislation.

## **2.0 Guidance and Regulations**

- 2.1 The Council's position is determined by the CARE ACT 2014. This replaces all existing adult social care law. It consolidates a system that has grown very complex over the last 60 years into one single statute with supporting regulations, statutory and practice guidance. Guidance around Usual Cost, Preferred Accommodation, Top Ups and Deferred Payments has all become part of the Act.
- 2.2 The guidance replaces the previous guidance which accompanied the Directions and is intended to ensure that when Councils with social services responsibilities make placements in care homes or care homes providing nursing care, that, within reason, individuals are able to exercise genuine choice over where they live.
- 2.3 The Regulations give individuals the right to enter into more expensive accommodation than they would otherwise have been offered in certain circumstances. The guidance sets out what individuals should be able to expect from the council that is responsible for funding their care, subject to the individual's means, when arranging a care home place for them.
- 2.4 The guidance describes the minimum of choice that councils should offer individuals and states that councils should make all reasonable efforts to maximize choice as far as possible within available resources even when not required to act in a certain way by the Directions or the Regulations.
- 2.5 Whilst the detail of the guidance applies to registered care homes, the principles apply to adults placed in unregistered settings also.

## **3.0 Summary of Key Policy Points**

- 3.1 A number of the key points in relation to Service Users choice, preferred accommodation, usual cost and Top ups and deferred payments are summarised as follows;
  - 3.1.1 Individuals will not be refused their preferred accommodation without a full explanation being provided in writing including the reasons for doing so.
  - 3.1.2 The council's usual costs of providing residential accommodation to specific client groups are as set out in Appendix A Table 1. The usual cost includes a contribution from the Service User which is means tested and based on a benefits assessment.
  - 3.1.3 Instead of paying a contribution to the Council, the Resident / Service User is to pay the same amount direct to the Provider. The Council will pay the difference between the usual cost and Service User's contribution. However, it should be noted that even where there is such an agreement for the resident to make payments direct to the accommodation Provider the Council will not be liable for any shortfall.



3.1.4 Walsall Councils own usual costs will apply when making placements in another council's area unless the other Council's usual price is less and a contract is already in existence between that Council and Service Provider.

3.1.5 Only when an individual has expressed a preference for more expensive accommodation than the Council would usually expect to pay (see Appendix A), will a third party or the resident be asked for a top up. This is in accordance with the Care Act 2014 which states that:

The only time when a resident (or a third party on behalf of the resident) can top up is when;

- a) a resident explicitly chooses to enter accommodation other than that which the Council offers him or her and
- b) that preferred accommodation is more expensive than the Council would usually expect to pay.

3.1.6 Under the Care Act 2014 residents are entitled to a deferred 'payments scheme, which enables a person who is, or will be entering accommodation (inclusive of Residential care, Supported Living and Extra care), and who would otherwise be liable to pay for it, whether in whole or part, to enter into a deferred payment agreement whereby

- The resident grants a legal charge on an asset in favor of the Local Authority in respect of any asset in which he or she has a beneficial interest (whether legal or equitable), for the purpose of securing the payment to the Local Authority of the total amount payable to them;
- There is an 'exempt period', beginning with the time when the agreement takes effect and ending either;
  - 56 days after the date of the resident's death, or with any earlier date which the resident has specified in a notice (during the specified timescale) given by him or her to the Local Authority;
- During the exempt period, the resident will not be required to make payment to the Local Authority of any relevant contributions falling within the exempt period; but the total amount of the relevant fees that the Local Authority has been paying shall become payable to the Local Authority on the day after the date on which the exempt period ends.

3.1.7 Residents that are subject to the 12 week property disregard or have agreed a deferred payments agreement with the council may make top-ups from specified resources on their own behalf. These are the only situations where the resident may top up. The most common arrangement is that a third party is providing the top-up. A third party in this case might be a relative, a friend, or any other source. This is in accordance with the Care Act Guidance which states that:

The most common arrangement is that a third party is providing the top up, however a resident may make their own top up payments where either;



- a) the resident is subject to the 12 weeks property disregard, during which the resident can top up his or her own fees or
- b) the resident has entered into a deferred payment scheme with the Local Authority in which case the resident can top up his or her own fees.

- 3.1.8 In order to safeguard both residents and councils from entering into top-up arrangements that are likely to fail, the resident or the third party must reasonably be expected to be able to continue to make top-up payments for the duration of the arrangements.
- 3.1.9 In the event that the resident or the third party is unable to continue to make top-up payments the Council will arrange for the Resident to be moved to available accommodation that meets their assessed needs but is provided at the usual cost.
- 3.1.10 Where a top up is to be paid it shall be paid direct to the Provider.
- 3.1.11 The Council has contingency arrangements in place, that address the likelihood that an individual's preferred accommodation will not always be readily available. The Council, upon request of the Service User in relation to their preferred accommodation, will where necessary operate a waiting list and the Service User shall be kept informed of progress.
- 3.1.12 The Council will never encourage or otherwise imply that care home providers can or should seek further contributions from individuals in order to meet assessed needs.
- 3.1.13 There are also a number of situations where the Council may need to pay for higher costs incurred over and above the usual prices indicated in Table 1 for providing residential care. Examples may include specialist care for specific user groups with high levels of need.

The guidance and regulations which are summarised in the following Sections 4 – 7 describe the minimum of choice that councils should offer individuals and states that councils should make all reasonable efforts to maximise choice as far as possible. Walsall Council is maximising real choice for Service Users through the use of framework contracts and the operation of Placement Lists.

#### **4.0 Top Ups**

The Care Act 2014 states that:

If an individual requests it, the council must also arrange for care in accommodation more expensive than it would usually fund provided a third party or, in certain circumstances, the resident, is willing and able to pay the difference between the cost the council would usually expect to pay and the actual cost of the accommodation (to 'top up'). These are the only circumstances where either a third party or the resident may be asked to top up.

Top-up payments should be distinguished from charges made for extra items not covered by the home's basic fees, which are permitted.

There should be a general presumption in favor of individuals being able to exercise reasonable choice over the service they receive....Where, for any reason, a council decides not to arrange a place for someone in their preferred accommodation it must have a clear and reasonable justification for that decision which relates to the criteria of the Directions and is not in breach of the Regulations.



Individuals should not be refused their preferred accommodation without a full explanation from councils, in writing, of their reasons for doing so.

The location of the preferred accommodation need not be limited by the boundaries of the funding council. Councils are obliged to cater for placements ... in any permitted care home within England or Wales...Funding councils may refer to their own usual costs when making placements in another council's area. However, because costs vary from area to area, if in order to meet a resident's assessed need it is necessary to place an individual in another area at a higher rate than the funding council's usual costs, the placing council should meet the additional cost itself.

The Directions state that a council must arrange for care in an individual's preferred accommodation subject to four considerations which are detailed within the CARE ACT 2014 as follows:

(a) Suitability of accommodation

Suitability will depend on the council's assessment of individual need. Each case must be considered on its merits.

(b) Cost

One of the conditions associated with the provision of preferred accommodation is that such accommodation should not require the council to pay more than they would usually expect to pay, having regard to assessed needs (the 'usual cost'). This cost should be set by councils at the start of a financial or other planning period, or in response to significant changes in the cost of providing care, to be sufficient to meet the assessed care needs of supported residents in residential accommodation. A council should set more than one usual cost where the cost of providing residential accommodation to specific groups is different. In setting and reviewing their usual costs, councils should have due regard to the actual costs of providing care and other local factors. Councils should also have due regard to Best Value requirements under the Local Government Act 1999.

Individual residents should not be asked to pay more towards their accommodation because of market inadequacies or commissioning failures.

Where an individual has not expressed a preference for more expensive accommodation, but there are not, for whatever reason, sufficient places available at a given time at the council's usual costs to meet the assessed care needs of supported residents, the council should make a placement in more expensive accommodation. In these circumstances, neither the resident nor a third party should be asked to contribute more than the resident would normally be expected to contribute and councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees. Only when an individual has expressed a preference for more expensive accommodation than a council would usually expect to pay, can a third party or the resident be asked for a top up.

Councils should not set arbitrary ceilings on the amount they expect to pay for an individual's residential care. Residents and third parties should not routinely be required to make up the difference between what the council will pay and the actual fees of a home. Councils have a statutory duty to provide residents with the level of service they could expect if the possibility of resident and third party contributions did not exist.



Costs can vary according to the type of care provided. For example, the cost a council might usually expect to pay for short-term care might be different from its usual cost for long-term care. There are also a number of situations where there may be higher costs incurred in providing residential care, be it long or short-term. Examples include specialist care for specific user groups with high levels of need or where necessary to prepare special diets and provide additional facilities for medical or cultural reasons. Councils should be prepared to meet these higher costs in order to ensure an individual's needs are appropriately met.

#### (c) Availability

Generally, good commissioning by councils should ensure there is sufficient capacity so individuals should not have to wait for their assessed (that is, eligible) needs to be met. However, waiting is occasionally inevitable, particularly when individuals have expressed a preference towards a particular care home where there are no current vacancies. In view of the Care Act 2014 guidance, councils should have contingency arrangements in place, that address the likelihood that an individual's preferred accommodation will not always be readily available. These arrangements should meet the needs of the individual and sustain or improve their level of independence. For some, the appropriate interim arrangement could be an enhanced care package at home.

Councils should give individuals an indication of the likely duration of the interim arrangement. Councils should place the individual on the waiting list of the preferred accommodation and aim to move them into that accommodation as soon as possible. Information about how the waiting list is handled should be clear and the individual should be kept informed of progress. If the duration of the interim arrangement exceeds a reasonable time period e.g. 12 weeks, the individual should be reassessed to ensure that the interim and preferred accommodation, are still able to meet the individual's assessed needs.

Councils should ensure that while waiting in temporary residential accommodation, if an individual has to contribute towards their care costs it is in accordance with the Care Act 2014. Individuals who are waiting in these circumstances should not be asked to pay more than their assessed financial contribution to meet the costs of these residential care services which have been arranged by the council to temporarily meet their assessed needs and councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees. Only when an individual has expressed a preference for more expensive accommodation than a council would usually expect to pay, can a third party or the resident be asked for a top up.

Councils should take all reasonable steps to gain an individual's agreement to an interim care home or care package.... Where patients have been assessed as no longer requiring NHS continuing inpatient care, they do not have the right to occupy indefinitely an NHS bed. If an individual continues to unreasonably refuse the interim care home or care package, the council is entitled to consider that it has fulfilled its statutory duty to assess and offer services, and may then inform the individual, in writing, they will need to make their own arrangements.

This position also applies to the unreasonable refusal of a permanent care home, not just the interim care home or care package. If at a later date further contact is made with social services regarding the individual, the council should re-open the care planning process, if it is satisfied that the individual's needs remain such to justify the provision of services



and there is no longer reason to think that the individual will persist in refusing such services unreasonably.

(d) Terms and conditions

In order to ensure that they are able to exercise proper control over the use of their funds, councils need to be able to impose certain contractual conditions, for example, in relation to payment regimes, review, access, monitoring, audit, record keeping, information sharing, insurance, sub-contracting, etc.

The contractual conditions required of preferred accommodation should be broadly the same as those councils would impose on any other similar operation. Stricter conditions should never be used as a way of avoiding or deterring a placement. As with suitability, account should be taken of the nature and location of the accommodation. There may be occasions where it would be unreasonable for a council not to adapt its standard conditions and others where it would be unreasonable to expect it to do so. For example, councils should take into account the fact that care homes in other areas, or those that take residents from many areas, may have geared themselves to the normal requirements of other councils.

Councils should be flexible in such circumstances and avoid adding to the administrative burden of care homes.

## 5.0 More expensive accommodation

The Care Act 2014 guidance applies only where a resident explicitly chooses to enter accommodation other than that which the council offers them, and where that preferred accommodation is more expensive than the council would usually expect to pay. In certain circumstances, councils can make placements in more expensive accommodation than they would usually expect to pay for, provided a resident or a third party is able and willing to make up the difference (to 'top up'). Residents that are subject to the 12 week property disregard or have agreed a deferred payments agreement with the council may make top-ups from specified resources on their own behalf. These are the only situations where the resident may top up. The most common arrangement is that a third party is providing the top-up. A third party in this case might be a relative, a friend, or any other source.

(a) Responsibility for costs of accommodation

When making arrangements for residential care for an individual under the Care Act 2014, a council is responsible for the full cost of that accommodation. Therefore, where a council places someone in more expensive accommodation, it must contract to pay the accommodation's fees in full. The resident's or the third party's contribution will be treated as part of the resident's income for charging purposes and the council will be able to recover it in that way. However, under a deferred payments agreement, where the resident is topping up against the value of their home, their top-up contribution is added to their deferred contribution.

Councils will be aware that under the Care Act 2014, it is open to them to agree with both the resident and the person in charge of their accommodation that, instead of paying a contribution to the council, the resident may pay the same amount direct to the accommodation, with the council paying the difference. In such a case, the third party would also pay the accommodation direct on behalf of the resident. However, it should be noted that even where there is such an agreement for the resident to make payments direct to the accommodation, the council continues to be



liable to pay the full costs of the accommodation should either the resident or relative fail to pay the required amount .

(b) The amount of the resident or third party top-up

The amount of resident or third party top-up payments should be the difference between the actual fee for the accommodation and the amount that otherwise the council would usually have expected to pay for someone with the individual's assessed needs.

(c) Price increases

Arrangements between the council, resident and third party will need to be reviewed from time to time to take account of changes to accommodation fees.

There will also be changes to the council's usual cost, however, fees and usual costs may not change at the same rate, and residents and third parties should be told that there cannot be a guarantee that any increases in the accommodation's fees will automatically be shared evenly between the council and/or the resident or third party, should the particular accommodation's fees rise more quickly than the costs the council would usually expect to pay for similar individuals. A council may find it useful to agree with the resident (or third party) that the resident's (or third party's) contribution will be reviewed on a regular basis on the understanding that clear explanations for proposed increases are given.

(d) Responsibilities of residents and third parties

Councils should make clear to residents and third parties, in writing, the basis on which arrangements are to be made when they seek to exercise their right to more expensive preferred accommodation. It should be clear from the outset to the resident, third party and person providing the accommodation that:

- failure to keep up top-up payments may result in the resident having to move to other accommodation unless, after an assessment of need, it is shown that assessed needs can only be met in the current accommodation. In these circumstances, councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees. Where a resident's top-ups are being made against the value of property subject to a deferred payments agreement, a council will have assured itself from the outset that top-up payments are viable and recoverable when the home is sold;
- an increase in the resident's income will not necessarily lessen the need for a top-up contribution, since the resident's own income will be subject to means testing by the council in the normal way;
- a rise in the accommodation's fees will not automatically be shared equally between council, resident (if making a top-up), and third party.

(e) Suitability and Conditions

The criteria of suitability and willingness to provide on the basis of normal conditions should be applied in the same way as for other preferred accommodation. An



exception to this is that it would be reasonable to expect providers entering this kind of arrangement to agree to do so on the basis that the council has the right, subject to notice, to terminate the contract should the resident's or third party's top-up payments cease to be adequate.

(f) Liable relatives

Under the Care Act 2014 relatives who are making maintenance contributions cannot act as third parties for the care of the relative to whose care they are already contributing. This limitation does not apply to top-up arrangements agreed prior to 1 October 2001 with liable relatives.

Neither does the limitation apply to liable relatives who are not making contributions.

For individuals already in residential care

The Care Act 2014 guidance considers Individuals already placed by a council in residential accommodation, and those already in residential accommodation as self-funders but who, because of diminishing resources, are on the verge of needing council support, have the same rights under these Directions as those who have yet to be placed by the council. Any such individual who wishes to move to different or more expensive accommodation may seek to do so on the same basis as anyone about to enter residential care for the first time. Should a self-funder who is resident in a care home that is more expensive than a council would usually expect to pay later become the responsibility of the council due to diminishing funds, this may result in the resident having to move to other accommodation, unless, after an assessment of need, it is shown that assessed needs can only be met in the current accommodation. In these circumstances, neither the resident nor a third party should be asked for a top-up payment and councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees.

Individuals who are unable to make their own choices

The Care Act 2014 guidance identifies that there will be cases in which prospective residents lack capacity to express a preference for themselves. It would be reasonable to expect councils to act on the preferences expressed by their advocate, carer or legal guardian in the same way that they would on the resident's own wishes, unless that would in the council's opinion be against the best interests of the resident.

## 6.0 Effect on contracting

The Care Act 2014 guidance identifies that any block contract or other form of contract that a council may have with a provider should not serve to limit choice. An individual should not be limited to care homes that hold such contracts with the funding council, or care homes that are run by councils. It would not be reasonable for a council to use as a test for the suitability of accommodation, its presence or absence from a previously compiled list of preferred suppliers.

The Directions and Regulations do not, however, prevent an authority having a list of preferred providers with which it will contract where a potential resident expresses



*no preference for particular accommodation, nor from recommending such providers to prospective residents.*

## **7.0 Information**

The Care Act 2014 guidance considers that individuals, and/or those who represent them, need information on the options open to them if they are to be able to exercise genuine choice. They should be given fair and balanced information with which to make the best choice of accommodation for them.

Councils should explain to individuals their rights under the Directions and the Regulations. Councils should also consider providing material in a range of forms including written leaflets in local community languages, Braille, on audio tape and in accessible language e.g. easy words, short sentences, large print and pictures (for those with learning disabilities). Councils should supply copies of the Directions and this guidance if requested in appropriate forms. They should work with local Primary Care Trusts (PCTs) and local hospitals to provide clear information to hospital patients as early as possible in their stay about what the council will be able to provide should they require short or long-term residential care at the end of their hospital stay. Individuals should be told explicitly that:

- they are free to choose any accommodation that is likely to meet their needs subject to the constraints set out in the Directions and the Regulations.
- they may allow the council to make a placement decision on their behalf; and
- they may choose from a preferred list (if the authority operates such a system).

Councils should ensure that individuals are informed that they have a choice of accommodation irrespective of whether they express a preference for particular accommodation. Individuals should also be told what will happen if the preferred accommodation is not available... Wherever possible, the individual should be encouraged to have a relative, carer or advocate present during the conversation. A written record of the conversation should be kept, in particular, recording any decisions taken or preferences expressed by the individual. This record should be shared with the individual.

## **8.0 Deferred Payments**

### **8. Requirement for consistent Deferred Payments scheme under the Act**

8.1. Under Sections 34-36 of the Care Act 2014, all Councils from April 2015 will have a deferred payment scheme which includes:

- National eligibility criteria on entitlement
- Allowing Councils to charge interest and administrative fees to offset the costs of the scheme



- Retaining some local discretion, for example the amounts that can be deferred

## **8.2 Walsall Council's deferred payments scheme (from April 2015)**

Walsall Council's deferred payments scheme will be consistent with relevant legislation and statutory guidance. The principles underpinning the scheme are:

- To ensure that those who have been assessed as needing care may not need to sell their property to pay for care
- That those who can afford to pay a contribution towards care should do so
- To ensure that residents are fully informed about deferred payments and eligibility
- That the scheme sustainable and affordable

## **8.3 Widening scope of the scheme**

Walsall's scheme currently covers residential and nursing care services. It is proposed to extend the scheme for other care services, for example supported living and Extra Care Housing.

## **8.4 The 12 week property disregard**

Where a person has been assessed as having eligible needs for residential or nursing care and owns assets, the capital value of the assets are disregarded for the first 12 weeks.

After 12 weeks, unless there is statutory disregard of the asset, for example, the asset is occupied by a spouse, partner, or close relative who is incapacitated the property is taken into account as a capital resource. During this 12 week period the Council will provide advice and information about deferred payments. Advice and information will include, as appropriate, referring the person or their carer for independent financial advice. Advice and information about deferred payments will be available in a variety of mediums, for example: leaflets; the Council's website.

## **8.5 How much can be deferred**

The Council will defer actual residential or nursing care costs; the amount will be determined in accordance with the Care Act 2014 guidance, this would normally include the actual cost of residential or nursing care less any financially assessed contribution.

The Care Act 2014 guidance recommends setting a maximum amount that people can defer as a loan against the property they own. This is called loan to value (LTV) ratio. The guidance recommends that the total amount that can be deferred should not exceed 70 to 80% of the value of the property.

Where the deferred amount reaches a level where it is likely to exceed the upper limit, the Council has discretion on a case by case basis to exceed this amount. This discretion can be exercised in cases, where for example refusal of a deferred payment



will cause severe hardship, because for example the person does not have sufficient other assets or income to pay for care costs without selling their property.

### 8.6 Eligibility for a deferred payment

Walsall Council must offer a deferred payment where the person receiving care (residential or nursing) meets the eligibility criteria and is able to provide adequate security for the deferred payment. Under the Care Act a deferred payments will be offered to anyone who meets the following eligibility criteria, from April 2015:

- Where the person has eligible care needs which should be met through residential or nursing care.
- Has capital of less than £23,250 (in 2015/16, increasing to £118,000 2016/17). Capital includes savings and other non-housing assets, excluding the value of the person's main home.
- Where the main home is taken into account as part of the financial assessment (those people not entitled to an automatic property disregard as explained above)

To qualify for a deferred payment the person living in residential or nursing care must have the mental capacity to enter into a Agreement. Where the person lacks mental capacity then the person entering into the Deferred Payment Agreement must be legally appointed to manage their finances, for example Deputyship or Lasting Power of Attorney.

Where the person is eligible for a deferred payment the local authority may exercise discretion to refuse a deferred payment where for example the Council is unable to secure a charge on the asset the asset is uninsurable or where someone wants to defer more than they can provide adequate security (see also section 8 –

There may also be circumstances when the Council decides not to continue with a Deferred Payment Agreement, for example:

- The person has reached the upper limit e.g. 70% to 80% of asset value
- Where the qualifying person living in residential or nursing care becomes entitled to an automatic disregard of the property; for example, through a change of circumstances of the person living in the property e.g. a spouse or dependant relative moving into the property.

### 8.7 Assessment of Applications

All applicants for a deferred payment must complete Walsall Council's designated application form. In addition to the LTV ratio (upper limit), the Council will have regard to the following when deciding this:

- The likely duration of the deferred payment



- Equity available in the property
- Contributions which may be made from a person's savings
- The period of time a person would be able to defer weekly care costs

All applicants for a deferred payment must complete the application form in full and disclose full information about their circumstances and finances, as set out in the application form.

### **8.8. Obtaining Security**

The Council is required to have adequate security in place when deciding whether a person is entitled to a deferred payment. The onus is on the person applying for a deferred payment, that they or their representative provides evidence that they are able to give the Council adequate security. Where the person owns property this security will usually be in the form of a legal charge on the property. In cases of jointly owned properties the Council will require all of the owners' agreement to the charge being registered against the property.

The Council has discretion to accept other forms of security on a case by case basis, for example from a third party guarantor. This discretion will not be offered universally and will only be exercised by the Council on a case by case basis. The Council will need to be satisfied that there is adequate security to protect the interests of the Council and that the debt is secure.

### **8.9 Administration fees and interest charges**

The Care Act allows the Council to charge an administrative fee for arranging the deferred payment. The costs can include:

- The costs of registering a charge with the Land Registry, including any Land Registry searches
- Costs of valuing and any re-valuation of the property
- Staffing, management and legal costs

It is recommended that dependent on the outcome of the Charging for non residential care services consultation the one off admin charge previously approved on 29 October 2001 by Social Services Committee of £200 is reinstated to cover the cost of land registry searches and other legal expenses.

The Care Act also allows the Council to charge interest on the deferred payment amount. The current interest rate applied by the Council (Base rate +4%) is not compliant with the Care Act. It is recommended that from the 1 April the interest rate is changed to the Care Act recommended rate ( 15 yr GILT rate reviewed 1 January and 1 June each year /1 and 1/7 – currently 2.5%)

All charges and fees will be clearly set out within the Deferred Payment Agreement. Fees and charges will be set at a level to ensure that they only cover the actual cost of



providing a deferred payment. A schedule of deferred payment fees and charges will be publicly available. This will enable the person applying for a deferred payment full transparency on the costs of the scheme and to enable the person or their carer to plan for the costs of care.

#### **8.10. Asset valuation**

Under the deferred payment scheme the Council will arrange for a valuation of the asset against which payments will be deferred. The person applying for the deferred payment will also be entitled to request an independent valuation of the asset ; this would be separate to the Council's own valuation.

The valuation and condition of the property must be periodically reviewed during the lifetime of the Deferred Payment Agreement to ensure that the deferred payment is sustainable as does not exceed the maximum borrowing level.

#### **8.11. Deferred Payment Agreement**

When applying for a deferred payment all successful applicants will be required to enter into a Deferred Payment Agreement (DPA) with the Council. The Council can enter into an Agreement with residents, who are asset owners or their representative who holds a Power of Attorney or a Deputy appointed by the Court of Protection.

The Deferred Payment Agreement will set out the following terms:

- Interest rates and how interest will be worked out against the deferred payment
- How the agreement can be terminated
- Circumstances on which the Council can refuse to pay any more care fees
- Details of the property charge or any other form of security
- Information on the effects of taking out a Deferred Payment Agreement
- Restrictions on what the deferred amount can be spent on
- How problems should be resolved if either party feels the terms of the agreement have been broken

8.12 A standard legal agreement will be issued to Local Authorities in January 2015 and Walsall may wish to use this agreement.

#### **8.13 Conditions of entering into a Deferred Payment Agreement**

The Deferred Payment Agreement can only take effect upon the applicant's or duly appointed representative signing the Deferred Payment Agreement. A certified copy of the appointment of a Power of Attorney or order from the Court of Protection appointing a Deputy will be accepted as evidence of authorisation to sign on behalf of the applicant.



The person entering into the DPA will also be required to abide by a number of conditions:

- That the property is maintained in reasonable standard of repair and condition.
- All outgoings associated with the property (e.g. Council tax, service charges, ground rent, insurance) are paid.
- That the person receiving care and/or their representative acknowledges that they have sought independent financial advice before agreeing to the Deferred Payment agreement.
- That any net rental income derived from letting the property during the period of the scheme will be assessed
- Where the property is jointly owned, the co-owners as well as the applicant must agree to the Deferred Payment agreement
- That the Council is notified of any change in circumstances which would affect the value of property or the sustainability of the deferred payment.

#### **8.14. Financial Assessment of contributions**

Applicants entitled to a deferred payment will be assessed to make a financial contribution towards the costs of care from their assessable income and capital (for example, savings and investments) whilst ensuring they maintain their Minimum Income Guarantee. The assessed contribution will follow Care Act Guidance.

#### **8.15 Annual reviews and Deferred Payment statements**

The Deferred Payment Agreement must be reviewed periodically to assess the value of the property and ensure that there is adequate security to cover the costs of the Deferred payment agreement

In addition to reviewing the deferred payment an annual statement will be sent to the person entitled to the deferred payment and/or their representative. The annual statement will set out: the amount of fees deferred; interest and administrative charges to date; total amount due and equity available in the property. The statement will record the amounts deferred and progress towards the deferred payment upper limit of 80% of the asset value. It is envisaged that these statements will be sent from MOSAIC, the new client information system within Social Care.

#### **8.16. Terminating the Deferred Payment Agreement**

The Deferred Payment Agreement can be terminated::

- Voluntarily by the person receiving care or someone acting on their behalf paying the full amount that is due
- When the asset (or other form of security) is sold
- When the person receiving care dies.



Where the agreement is voluntarily terminated, the Council will require written notice of termination. On termination of the Deferred payment agreement the full amount due (care charges, interest accrued, administrative and legal fees) will be paid to the Council.

If the person decides to sell the asset they must notify the Council. They will be required to pay the Council from the proceeds of the sale of the asset.

The deferred payment will automatically come to an end on a person's death. The debt can either be paid from a person's estate or by a third party, for example a family member. If the agreement is terminated through a person's death the total amount due becomes payable within 90 days after the person dies.

### **8.17 Reassessments following repayment to the Council and Refusing an application**

If a Deferred Payment Agreement is terminated, because for example the deferred payment is repaid, the Council shall undertake a reassessment of the person's social care needs and finances.

### **8.18 Refusing a Deferred payment**

The Council can refuse a request for deferred payment. In such circumstances the decision should be notified in writing to the applicant and/or their personal representative. The decision should set out the grounds for refusal and provide for appeal rights. Reasons for refusing a deferred payment can include:

- There is insufficient equity in the property to fund the deferred payment
- The applicant or their representative has failed to provide all of the relevant information to process the application
- The Council is unable to place a legal charge on the property which would secure the deferred payment

### **8.19. Review and Appeals procedure**

The decision on the outcome of the application for a deferred payment can be reviewed. The grounds for review could include:

- The decision to refuse the application failed to take into account any new information which would have led to a revision of the decision.
- There are eligible care costs which the Council have failed to take into account

It is recommended that as part of the new procedures the Council establishes a detailed review and appeals procedure

### **8.20. Information and advice**

The Council will provide advice and information about deferred payments through a variety of channels; for example, the internet, the open objects web portal and leaflets. Information and advice will be provided at all stages during the care and financial



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assessment process. This information and advice also includes independent financial advice which all Local Authorities are required to provide under the Care Act

**Current Usual Costs and Bed Analysis**

<b>Summary of Usual Costs</b>			
<b>No.</b>	<b>Type of Provision</b>	<b>Category</b>	<b>2014/15 £ / Week</b>
1	Residential	Older People	£365.10
2	Residential	Older People Elderly Dementia (EMI)	£383.53
3	Nursing	Older People	£484.39
4	Nursing	Older People Elderly Dementia (EMI)	£484.39
5	Continuing Health Care (1)	Older People	£616.49
6	Continuing Health Care (2)	Older People Elderly Dementia (EMI)	£616.49
7	End of Life Care (1)	Older People	£616.49
8	End of Life Care (2)	Older People Elderly Dementia (EMI)	£616.49
9	Residential	People Under 65 with Mental Health Problems	£383.54
10	Residential	People who Misuse Drugs and Alcohol	N/A
11	Residential – Learning Disability, Physical Disability or Sensory Impairment	Larger Home – Standard Complexity	£365.10
12	Residential – Learning Disability, Physical Disability or Sensory Impairment	Higher Complexity	£365.10 - £768.09
13	Residential – Learning Disability, Physical Disability or Sensory Impairment	Highest Complexity	£768.09 - £1,689.81
14	Nursing	People Under 65 with Mental Health Problems	£484.94
15	Nursing – Learning Disability, Physical Disability or Sensory Impairment	Larger Home – Standard Complexity	£484.94
16	Nursing – Learning Disability, Physical Disability or Sensory Impairment	Higher Complexity	£484.94 - £769.49
17	Nursing – Learning Disability, Physical Disability or Sensory Impairment	Highest Complexity	£769.49 - £1,702.36