

**Report to the Deputy Leader of the County Council and the Cabinet Member
for Adult and Community Services**

**Report submitted by: Executive Director of Adult Services, Health and
Wellbeing**

Date: 14 January and 15 January 2015

Part I

Electoral Divisions affected:
All

Implementing the Care Act - Approval of a new Deferred Payment Policy

(Appendices 'A' and 'B' refer)

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Executive Summary

The Care Act 2014, sections 34-36 establish a requirement for a Deferred Payment Scheme which all relevant local authorities must have ready for implementation from 1 April 2015.

The establishment of the Deferred Payment Scheme will mean that people should not be forced to sell their home in their lifetime to pay for their residential and/or nursing care. By entering into a Deferred Payment Agreement (DPA), a person can 'defer' or delay paying the costs of their care and support until a later date. Deferring payment can help people to delay the need to sell their home, and provides peace of mind during a time that can be challenging or even a crisis point in their life as they make the transition into residential or nursing home care.

The care and support costs are deferred and not 'written off'. These costs of provision of care and support will have to be repaid by the individual, or by a third party on their behalf, at a later date.

Local authorities are required to follow new national guidance on the eligibility criteria for a deferred payment. There has however been some discretion allowed on how the scheme will be implemented locally. Local schemes for deferred payments have been in operation for some time, but the Care Act 2014 now establishes the requirement for a universal deferred payment scheme and the expectation that all local authorities have a local policy for Deferred Payments.

This report seeks approval for a new Deferred Payments Policy for Lancashire, which complies with legal requirements and uses local discretion where appropriate

This is deemed to be a Key Decision and the provisions of Standing Order No 25 have been complied with.

Recommendation

The Cabinet Member for Adult and Community Services and the Deputy Leader of the County Council are recommended to approve the new Deferred Payment Policy (as set out at Appendix 'A') in order to ensure that the County Council complies with the requirements of the Care Act 2014 with effect from 1 April 2015.

Background and Advice

The Care Act 2014 consolidates many pieces of social care legislation into a single statute and represents the most significant change to adult social care in over 60 years. It represents a fundamental change in adult social care law, redefining the relationship between the state, local authorities and citizens, particularly in relation to paying for care. The Act also converts many existing local authority adult social care policies and good practice into duties. It will be implemented in a phased approach with the care and support reforms to be implemented from 1 April 2015 followed by financial reforms from 1 April 2016.

Sections 34-36 of the Care Act establish a requirement for a Deferred Payment Scheme which all local authorities must have in place from April 2015. The establishment of the Deferred Payment Scheme will mean that people should not be forced to sell their home in their lifetime to pay for their residential and/or nursing care. By entering into a Deferred Payment Agreement (DPA), a person can 'defer' or delay paying the costs of their care and support until a later date. Deferring payment can help people to delay the need to sell their home, and provides peace of mind during a time that can be challenging or even a crisis point in their life as they make the transition into residential or nursing home care.

It should be stressed from the outset that the payment for care and support is deferred and not 'written off' - the costs of provision of care and support will have to be repaid by the individual, or by a third party on their behalf, at a later date.

Local schemes for deferred payments have been in operation for some time but the Care Act 2014 now establishes a 'universal' deferred payment scheme which means that it must be offered by a local authority to anyone ordinary resident within its areas who satisfies the eligibility criteria.

Local authorities are required to follow new national guidance on the eligibility criteria for a deferred payment. There has however been some discretion allowed on how the scheme will be implemented locally.

Deferred Payment Policy Framework

The draft Deferred Payment policy, attached at Appendix 'A', sets out how the Deferred Payment Scheme would be operated by Lancashire County Council. This should be read in conjunction with the Care Act 2014 Regulations and Statutory Guidance.

Subject to approval, the proposed policy will come into effect from 1 April 2015. Any new Deferred Payment Agreements signed from this date will be considered under the terms of this policy.

The decision to approve an application for a deferred payment will be authorised by the Head of Exchequer Services or other Head of Service nominated by the Director of Governance, Finance and Public Services.

As at 31 March 2014, the Council had approximately 507 'deferred payment' arrangements in operation. The total value of these deferred payments accrued as at 31 March 2014 was approximately £10.7 million. There will be no change to the terms of existing agreements as a result of the implementation of this policy. Existing agreements will be reviewed periodically to assess whether a transfer to the new policy would be appropriate.

Local Policy Options

The Care Act regulations allow the council the discretion to:

- a) Charge the client administration fees and interest;
- b) Set a rate of interest to be charged;
- c) Determine the rate of the administration fees as long as it does not exceed the cost that the Council has incurred in arranging the deferred payment;
- d) Include 'top up' fees in the deferred payment;
- e) Set an amount of rental income a person can retain if they decide to rent out their property;
- f) To extend deferred payments to those residents in supported living accommodation and independent living schemes;
- g) Accept other forms of security other than property, such as a third party guarantor, a solicitors undertaking letter, assets abroad and valuable objects;
- h) Use loan agreements in line with the Consumer Credit Act 1974 and Financial Services and Markets Act 2000.

The Council's policy assumes that discretion is only applied for points (a), (b), (c), (d) and (e) above.

The interest, administration fees and the amount that can be retained from rental income will be published annually in the Adult Social Care Fees and Charges Schedule. The decision could be made not to charge administration fees and interest; however this would then result in additional costs to the Council which is considered not to be sustainable.

The Council could exclude any top up fees from a deferred payment however this could result in non-compliance with The Care and Support and Aftercare (Choice of Accommodation) Regulations 2014. It is not expected that this will expose the Council to any additional financial risk as the top up amount is included in the overall equity limit set by the Council when the deferred payment is agreed.

Further consideration will be given to using the discretion available under (f) and (g) when the first year of operation of the scheme is reviewed. Deferred payments could be offered to those residents in supported living accommodation. Other forms of security could be accepted rather than the client's property. These aspects will be reviewed at a later date once the overall impact of the mandatory requirements of the scheme have been assessed.

In respect of point (h) above, loan agreements could be offered in line with the Consumer Credit Act 1974 and Financial Services and Markets Act 2000. However this would involve releasing money to clients to pass onto their care home provider rather than the local authority paying the care home direct. This does not appear to present an efficient way to support individuals to pay for their care.

Public Information and Advice

If the Deferred Payments policy is approved it will form the basis for producing public information which is written in plain English, and is made available in a variety of formats and at appropriate locations.

National template documents have been commissioned by the Department of Health (DH) to assist councils with this task, but these will have to be tailored to local requirements for Lancashire. The work on this will be incorporated in the Information and Advice Strategy which will be the subject of a future report to the Cabinet Member.

Mental Capacity

The decision to seek and agree a Deferred Payment may involve assessing and considering carefully the decision making capacity of the individual concerned. The draft policy includes reference to the possible routes for making judgements in this type of circumstances and making such arrangements as other legislation allows.

The Equality Analysis set out at Appendix 'B' also addresses some of the issues for individuals who may lack capacity, and so have 'protected characteristics' as described in the Equalities Act 2010.

Council staff will themselves have an important role to play in these situations and will need to be aware of the new Deferred Payments policy and the concerns that may arise when mental capacity is an issue.

Workforce

Effective implementation of this policy will require training the relevant staff.

It will also be necessary to ensure that due account is taken of the additional volumes of work. This could mean establishing additional posts or redesign of processes to achieve productivity improvements.

Consultations

The Department of Health conducted an engagement exercise over autumn 2011 with care users and members of the care and support sector on reform of social care. This included some discussion of the proposals for universal deferred payment agreements.

The exercise found there was support for deferred payments; and a workshop on social care funding reform involving representatives from local authorities and disabilities groups noted *that "Universal deferred payments would give people additional choices and flexibility in meeting their care costs and there was strong support for them."*

Local authorities are required to follow new national guidance on the eligibility criteria for a deferred payment. There has however been some discretion allowed on how the scheme will be implemented locally with the expectation that the council has a local policy for Deferred Payments.

A number of events have been held where residential and nursing care providers in Lancashire were asked to provide insight into what clients may value from the new policy, and how clients may respond to the policy. Similarly, consultations have also been held with the Financial Assessment team, who support clients under the current deferred payment scheme. The views of both these groups have been taken into account in the final draft of the policy.

A briefing for County Councillors in November 2014 included a presentation on the Deferred Payment requirements.

Implications:

This item has the following implications, as indicated:

Financial

There will be additional costs associated with the Deferred Payments Scheme, both in terms of administration and interest costs. These costs will be recovered from the client so that the scheme is cost neutral to the Council.

It is not possible to model the cash flow implications of the Deferred Payments Scheme with any degree of certainty as there are a large number of currently unknown factors. These include the number of people who will be eligible for a deferred payment, the level of take up, the average value of payments, the timing of when people take up the offer, and the duration of the agreement up to the point when the property is eventually sold.

The Council is expecting to receive funding through a Department for Communities and Local Government revenue grant, currently estimated at £2.157m in 2015/16. It

is not known whether any of this funding will continue to be received beyond that year to fund on-going costs. The extent to which grant funding may not be sufficient to cover the additional costs will need to be taken into account in the Council's updated Medium Term Financial Strategy. The costs will be kept under review especially during the first year of the new scheme.

Legal

Failure to agree a new Deferred Payments policy would mean the Council would not be compliant with the Care Act in this area.

The application of the Consumer Credit Act in the instance of Deferred Payment Agreements is very complex.

There are two issues that give rise to legal uncertainty as to how the provisions of the Act will be recorded and reflected in agreement form. First, it is not clear at this stage whether permission is needed to enter into the DPAs. Second, there is also a lack of clarity as to whether any provisions of the Consumer Credit Act have to be met in terms of forms of agreement/pre contract information etc.

The current widely held legal view is that Lancashire County Council doesn't need permission from the Financial Conduct Authority to enter into DPAs. However, we are not confident that the agreements will be exempt from the requirements of the Consumer Credit Act which legislation lays down standards including the provision of pre contract information, and strictly controls the format of agreements.

Notwithstanding the application of the regime laid down by the Consumer Credit Act, the County Council would always strive to ensure that its contractual arrangements with service users meet high standards of fairness and thus where possible we would investigate whether it is feasible to adopt some of the best practice enshrined in the Consumer Credit Act and regulations

The Deferred Payments Policy may need to be amended once further guidance is issued by the Local Government Association on this matter.

Human Resources

Additional posts may need to be established in some areas of the Council's workforce to respond to the additional demands arising from this new policy. There will also be Learning and Development activity needed to support the changes.

A separate report will be drafted for the Leader to consider early in 2015, which will bring together all the additional workforce requirements arising from the Care Act, including those relating to the Deferred Payments Policy.

Equality Issues

A completed Equality Analysis is set out at Appendix 'B'.

Existing agreements will be reviewed periodically to assess whether a transfer to the new policy would be appropriate.

For new potential applicants for a DPA, there are benefits arising from the new policy. Explicitly setting out the requirements for responding to applicants who may lack capacity should ensure that their interests are better protected.

However it is unlikely that the new policy would wish to be used by those of Islamic faith, since Sharia law does not allow the charging of interest which is a key element of the Deferred Payments Scheme. The new policy will be reviewed in the light of local experience and advice from government.

List of Background Papers

Paper	Date	Contact/Directorate/Tel
Preparing for Implementation of the Care Act in Lancashire: http://council.lancashire.gov.uk/ieDecisionDetails.aspx?ID=5722	September 2014	Tony Pounder, Adult Services, Health and Wellbeing Directorate, (01772) 536287
Department of Health Care Act Impact Assessment	October 2014	Khadija Saeed, Adult Services, Health and Wellbeing Directorate, (01772) 536195

Reason for inclusion in Part II, if appropriate

N/A