

# Consultation Response

The Care Act: consultation on draft regulations and guidance to implement the cap on care costs and policy proposals for a new appeals system for care and support

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This Department of Health consultation is about the draft regulations and statutory guidance for the capped cost care funding system, and the associated measures to be introduced in April 2016. These include how Local Authorities will calculate and meter someone's contribution towards their care costs, the ways people will be able to keep track of their progress towards the cap, an increase in the means test capital limits and how the level of the cap will be regularly updated.

## Key points and recommendations

- Age UK welcomes the Government's intention to introduce the cap on care costs. We support the introduction of the cap in principle; however, we are concerned that its benefit and reach are limited by the high level of the cap and some of the administrative arrangements which complicate the working of the policy.
- We are concerned that the high level of the cap means its overall benefit to those currently using or planning ahead for care is very limited. It does not significantly increase the options for planning ahead, given many people will still lose a significant amount of their savings or capital assets, particularly if they need residential care. It offers no additional potential for savings or investment products. Unfortunately, many people will also still need to sell their home to pay for care fees.
- An immediate way to ensure that the cap and metering system benefit more people would be to extend the eligibility criteria so that more people were within the state system, even if they were self funded.
- Metering care costs is likely to prove complex and problematic, given the number of qualifications to the costs.
- Age UK has a number of overarching principles we think could be reflected more strongly throughout this guidance:
  - It should be clear what costs are metered and people should be able to reconcile their actual costs with their metered costs;
  - Metered care costs should be as close as possible to actual care costs;
  - First and third party top ups should not be standard practice where there is no cheaper alternative that meets eligible needs;
  - A care home resident has the continued right to spend their savings or capital as they wish;
  - Everyone, regardless of how their care costs are being funded, should be able to understand how their Personal Budget or Independent Personal Budget was arrived at and should be informed how to challenge it if it is insufficient.
- In our consultation events with many older people were not clear how the cap will work and which costs are included, even after a thorough briefing. To help people to understand what the policy really means for them there should be a much greater emphasis on the effect of the difference between metered and actual care costs for those progressing towards the cap and those receiving Local Authority funding.
- We would like metered care costs to reflect as accurately as possible what self funders actually pay for their care. During our consultation events it became clear that many people are under the impression that the cap will reflect their actual care costs and we think that this is a reasonable assumption for them to make.

- Most of the older people we spoke to thought that the daily living costs charge was too high if set at £12,000 a year. They thought it was fairer if it more closely related to minimum income for pensioners – the rate of the new state pension plus relevant disability benefits. Age UK agrees with this and we strongly recommend that this element of the policy is amended.
- The annual review of the cap by the Secretary of State should be more clearly defined than proposed in this guidance. We agree it is fair that someone's proportionate progress towards the cap is protected if the cap is adjusted. Age UK also thinks that Independent Personal Budgets should be adjusted in the same way, so that a self funder's metered costs continue to accrue at the same rate.
- The guidance should be clarified to ensure that Local Authorities are prevented from allowing a first party top up from someone whose capital is below £27,000.
- Age UK will submit a report from the consultation events we conducted with older people alongside this response.

## **1. Do you agree that the draft regulations and guidance will provide a robust framework that will protect the 1 in 8 of us that will face catastrophic care costs?**

In part. The framework as it stands is robust and will protect a small number of people from catastrophic care costs.

However, parts of the policy framework will result in metered care costs being different (and in all probability less) than the amount people have actually spent on their care. We expect that this will be as a result of a combination of the following factors:

- Care costs for support below the eligibility threshold not being metered;
- Only care costs met after 1 April 2016 will be metered;
- Care costs for self funders being higher than for Local Authority funded people;
- The use of averages for Independent Personal Budgets;
- Top ups for self funders not being metered, either pre or post cap;
- Personal Budgets and Independent Personal Budgets not being automatically adjusted at the same rate that the cap is adjusted;
- Daily living costs not being metered.

Age UK would prefer to see a care funding system which benefits a greater number of people, where catastrophic care costs are still met by the State, but where people also benefit from an increased ability to plan ahead to meet care costs (because their liability for fees is realistic and achievable). We would also like a care funding system which encourages a healthy local care market where all purchasers of care, whether they are Local Authority funded or not, are able to access affordable and good quality provision.

Many older people we spoke to about this consultation assumed that the total costs of their care fees would be metered, that payments for low levels of care would count and that once they reached the cap their fees would be met in full by their Local Authority. They were disappointed, to say the least, when we explained that this was

not the case. From this it is obvious that there will be some significant communications issues to overcome.

## **Other issues connected to introduction of the cap**

### **Different rates depending on source of funding**

There is a historical unfairness in the care market which means that self funders tend to pay more for services. This is partially as a result of them being individual consumers of care, rather than being able to take advantage of bulk purchasing arrangements in Local Authorities. However, there is also an inequity built into the market as a result of Local Authority payments for care being frozen or reduced over recent years, forcing some care providers to make up the difference by charging private payers more.

The metering system is not the way to address these inherent inequalities in the charging system, but it does highlight more clearly that they exist. In Age UK's view using metering to even out the recorded payments for care is unfair. We think that the rate that self funders pay for their care should be recorded as accurately as possible in their care account. This will make progress towards the cap meaningful for them.

### **Top up fees**

Age UK remains concerned that over-reliance on top up fees for domiciliary care and in particular for residential care will increase the discrepancy between the amount actually paid and the metered costs. The extent of their use reflects persistent underfunding. In paragraph 3.15 the consultation document highlights that someone's top up fees are clearly not part of their metered costs.

However it must be made very clear to people by Local Authorities that top ups should not be a standard requirement and it remains illegal under the Care Act to charge them unless someone has chosen specifically to 'upgrade' their care home or purchase additional services. Local Authorities must be reminded throughout the Guidance that where someone's eligible care needs cannot be met at the Local Authority Personal Budget rate a top up must not be charged (or the Independent Personal Budget should be increased to reflect this). Top up fees must not be ingrained further into the charging system as this would perpetuate the inequality experienced by people who pay for their own care.

Paragraph 3.15 also implies that on becoming a Local Authority funded care home resident any top up would automatically continue to be paid by the resident (or their third party). The 2014 guidance on top ups makes it clear that this is not always the case and that the wellbeing of the resident also has to be taken into account. For example, where someone has lived in the same care home for many years their relationships with residents and staff could be critical for their emotional wellbeing and this needs to be factored in.

The guidance should also remind Local Authorities that they must demonstrate there is alternative accommodation available that meets the person's assessed needs. If there is not this could be further grounds for increasing the rate of the Personal Budget to meet the costs of the current care home placement. The recent Orders issued under the Care Act are useful here as in paragraph 26 it states "[Local Authorities] must ensure an individual has a genuine choice when it comes to choice of accommodation. They must also ensure that at least one of the accommodation

options provided by the local authority is within that person's personal budget and they should ensure that there is more than one accommodation option available'. This requirement should be referred to in 3.15 of this guidance.

Age UK will be reinforcing the guidance on top ups in our advice and information provided locally so that people understand they should not be arbitrarily charged a top up.

### **Adjustments to the cap**

It is fair to adjust the level of the cap; however, the guidance should make clear that the cap could go up or down depending on the change to the average level of earnings. Connected to this, whilst the current proposals for adjustments apply to someone's progress towards that cap any adjustment will not impact on their Local Authority Independent Personal Budget or Personal Budget. Unless someone's budget is adjusted at the same rate as the cap their metered care costs will slowly decline (assuming the cap increases) as a proportion of their overall care charges, meaning they progress more slowly over time as the cap level gets further away from their actual costs. This compounds the inaccuracy of the metered costs compared to actual payments for care. Reviews of someone's Independent Personal Budget should be conducted at least annually and certainly if there is a significant change in someone's needs.

### **Terminology**

Age UK thinks that the terminology used for the capped cost system could be clarified in places. For example, after someone has reached the cap the Local Authority will make a small co-payment towards their overall care bill. This is a more accurate way of describing what will happen.

Independent Personal Budget is also a confusing term for a self funder's personal budget. It may be more straightforward simply to call it a Personal Budget as we can see no reason to make a distinction.

## **2. Do you agree that independent personal budgets should generally be set according to an average of personal budgets allocated to people with similar levels of need?**

No. We recommend that an upper average should be used for people's Independent Personal Budget calculation. This reflects the higher costs faced by self funders and will result in their meter being a closer match to their actual costs. Whilst this means that self funders and Local Authority funded people will progress towards the cap at different rates this drawback is outweighed by the benefit of the outcome being more accurate and more meaningful in terms of the cap.

The use of averages will also rely heavily on a self funder accessing a thorough and adequate needs assessment. Without this it will be impossible to distinguish their individual needs from the average or identify a budget for someone with similar needs already funded by the Local Authority. A light-touch screen of needs, which many Local Authorities will use to begin someone's care meter, may not be sufficient. The guidance must be amended to clarify how Local Authorities should use someone's assessment to calculate their average.

The use of averages must not be used to perpetuate the 'usual rate' in all but name. Age UK has seen many problems caused by Local Authorities operating the usual rate system, not least the indiscriminate charging of top up fees in situations where their rate was insufficient. This can be counteracted by Local Authorities using clear assessment and resource allocation systems which show a clear link between the eligible needs and the cost of meeting them. This transparency will also reduce the number of challenges to the calculations.

The consultation document also refers to stakeholders being concerned that the introduction of Independent Personal Budgets will bring more people forward to Local Authorities (paragraph 4.19). We should make clear that we do not share this view: we welcome the new rights that people have to approach their Local Authority.

### **3. Is the guidance sufficiently clear as to the principles for calculating independent personal budgets?**

The principles are clear but they need amendment. We think additional principles should be added to reflect the importance of:

- Sufficiency (of the level of the budget)
- The right to challenge, because it is not made clear that an independent personal budget amount is not a fixed and non-negotiable amount and that with reasonable evidence and argument it can be altered
- The need for annual reviews to ensure that the independent personal budget continues to reflect the cost of meeting the eligible needs.

The principle of equity between people who access care, regardless of how it is paid for, is a positive one. However, as interpreted in this guidance it is likely the principle will be used simply to reduce the rates given to self funders to make them 'equal' with those getting Local Authority support. To that extent it may be better to cite 'fairness' rather than equity as the aim, given the negative effect 'equity' is likely to have on self funder's budgets.

### **4. Does the draft guidance provide sufficient clarity about the operation of care accounts to ensure consistency between local authorities and reduce the risk of challenge?**

Care accounts are more likely to be challenged when people are not clear what is being metered.

Misunderstandings and challenges can be reduced by incorporating the relevant information into the care account statement so that actual costs to the individual can be reconciled against metered costs. As this information should be held by the Local Authority this should not constitute an additional administrative burden. We are pleased to see that hotel costs as well as the care element of the fees will be itemised. Any top up paid should also be recorded. This information would also be useful for Local Authorities so that they have a more accurate understanding of:

- An individual's rate of spend and the likelihood of them becoming Local Authority funded
- The health of the care market in their area and the extent of top up fees paid across their population.

## **5. Can more be done to ensure that the care account is a useful tool to support people in planning for care costs?**

Provision of online access to statements should be a requirement for Local Authorities, rather than just a consideration (paragraph 5.3).

It is reasonable for Local Authorities not to provide statements after someone has reached the cap or where someone is not currently receiving care.

Including a projection about reaching the cap within 18 months is welcome. Projecting further ahead remains a useful additional source of information. This does not need to be a specific date – ranges could be used, for example, ‘At your current rate of spending on care costs, you could expect to reach the cap within five years’. This could be accompanied by a reminder of the advice and information available to help with financial planning.

## **8. Is there evidence to support further consideration of the level and/or approach to daily living costs?**

Yes. Age UK supports the principle of a daily living costs charge as these are costs that would have been incurred if a person was living in their own home. However, as stated in our consultation response to *Caring for Our Future* we believe that there should be a clearer link between the daily living costs charge and the incomes of people over 65. This is because using the median income to arrive at this standard charge means that half of the population will not be able to support the charge using income alone. The charge must be more closely linked to affordability and what is reasonable for this type of cost.

We propose that the capped contribution to daily living costs should be set at the level of the single tier state pension (in 2016) plus the base Attendance Allowance, for which it is likely that someone requiring residential care would be eligible. In 2015-16 this would be around £151.25 plus Attendance Allowance of £55.10. It is reasonable to assume that someone living in their own home would therefore be spending around £205 on their living costs or £10,660 a year. This would be a fairer and more logical living costs charge for someone in residential care than the £12,000 currently proposed.

## **9. Do you agree that the extension of the existing requirements for third party top ups to cover first party top ups will produce both the local authority and the person with the necessary clarity and protection?**

First party top ups are a sensible extension to the existing third party top up rules, because more people will be in the gap between the upper and lower capital thresholds and will therefore be partially Local Authority funded. It will increase choice for these people and is likely to mean that more people can remain in their care home of choice while continuing to pay for additional services. It is also an important recognition that a care home resident has the continued right to spend their savings or capital as they wish, just as all citizens do, provided they are not deliberately depriving themselves of money for the purpose of avoiding care fees.

Although some care home residents find the current inability to pay a first party top up frustrating it does provide them with some protection against the unreasonable or blanket charging of top up fees that we know some Local Authorities practice. Extending the ability to charge must therefore be accompanied by clear guidance to Local Authorities on when they can and cannot charge a top up and equivalent information must be made available to the care home resident (or the third party if this is how the top up will be paid). It must not become standard practice to charge top ups where there is no cheaper alternative that meets the eligible needs.

The guidance must be clear that Local Authorities are not able to charge a first party top up where someone's capital is below the lower capital limit of £27,000.

We are pleased to see that there should be a legal requirement that all tops ups are subject to a written agreement that includes the care provider and the Local Authority. Research by Independent Age confirmed that many Local Authorities admit not being aware of private arrangements when care homes increase fees or request a top up.<sup>1</sup> A written agreement would provide all parties with certainty about the fee liability and will enable Local Authorities to include this information in someone's care account summary. It is also important that Local Authorities are aware of the extent of top ups in their area so that they can fully understand their local market.

## **10. Do you agree that the guidance is clear on how the extensions to the means test will work and that the draft regulations achieve their intended purpose?**

Age UK welcomes the extensions to the means test. They will have an immediate beneficial impact on many people who use care services. We are also pleased to see the safety net for those who reach the upper capital limit and that those who no longer qualify for Attendance Allowance will not be worse off financially.

The level of tariff income charged on capital under £118,000 is still too high. Age UK thinks this should be charged at a rate of £1 for every £500 which would be a much closer reflection of the value in interest of this capital. Adopting this ratio would also align with the tariff income rate used in creating a notional income for pension credit.

Disregarding capital up to £118,000 for people using care services in a rented property would benefit people considering moving from owner-occupier to more suitable rented accommodation and who are currently put off doing so because of the effect this has on their care charges. It could release more people into accommodation such as rented sheltered or extra care housing without affecting their means tested status.

## **Appeals**

### **General comments**

- Age UK welcomes the proposals to introduce a new appeals system for care and support decisions. This will help people feel empowered to challenge their Local Authority where they feel a decision was made without due consideration of all factors or where the decision is disputed.

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<sup>1</sup> *Care home top up fees: research with local authorities*, Independent Age, 2014.



- Many people are deterred from making a complaint or legal challenge because of the perceived complexity or lack of assurance that it will have a beneficial effect. This appeals system must be set up to be as straightforward, fair and clear as possible so that people are encouraged to bring appeals where they are justified. The distinction between the various complaints or appeals mechanisms should also be clarified to the general public, as there are potentially complaints, appeals, Local Government Ombudsman and legal routes that can be followed. Understanding which route is the most appropriate will be essential for the smooth running of effective dispute resolution.
- The principle of communication underpinning the appeals proposals should include communication about the process and its existence as well as good communication between Local Authority and individual once the process has begun. This should also include supporting them to access the services of an advocate where this is appropriate.
- Consideration should be given to the funding available to Local Authorities in subsequent years as a result of introducing the appeals system. In our view the system is likely to highlight unmet or undermet need in the statutory system which will have an impact on the demands made of Local Authorities. The effect of the appeals system on overall levels of demand should be kept under regular review by the Department of Health and Local Authorities themselves.
- The Guidance must make it very clear that third parties with delegated Local Authority duties and powers must meet the same standards in relation to appeals as if they were the Local Authority. This means that contractual arrangements between the Local Authority and third party should be strengthened. In particular we are thinking about the contractual requirement for the third party to provide timely and relevant information. This should be reinforced so that the contract 'requires' rather than 'allows' information to be exchanged (paragraph 16.56 in the draft Guidance).

## **11. Do you think there is a need to introduce a new appeals system to allow people to challenge care and support decisions?**

Yes. In our experience people are often frustrated about what they feel are poorly made or executed decisions by Local Authorities, particularly where this concerns accessing services and eligibility. An appeals system that will give people a means of redress and reconsideration of the decision is very welcome.

This is also timely given the increase in the number of people who will be eligible for a Local Authority assessment of their care needs and finances and those who will be making metered payments for their care costs.

## **12. Do you think that the appeals reforms are a priority for reforming care and support redress?**

Yes, given the additional numbers of people who will be eligible for Local Authority support for care needs or who qualify as a self funder to start their care meter. It is essential to have an appeals system up and running alongside the major reforms in order to tackle the inevitable teething problems and challenges that are faced as people navigate their new entitlements.

**13. Do you agree the areas identified (assessment, eligibility, care planning, direct payments, personal budgets, independent personal budgets and care accounts, deferred payments agreements, transition from children to adult support, independent advocacy support) should be within the scope of the appeals system? Are there any other areas that should be included?**

These areas should definitely be included as these are known to be the most highly contested and subjective areas of the care and support system. It will also be important to emphasise that the wellbeing consideration will be an important factor in all of these categories.

We strongly believe that charging as well as means testing should be included within the appeals system as this is another major area of dispute. Issues like first and third party top ups are contentious and may not be eligible for appeal under the personal budget or independent personal budget categories.

**15. Do you have suggestions as to the expertise, knowledge and personal specification for the role of an Independent Reviewer?**

The Independent Reviewer specification should be much more defined and less subject to the discretion of the Local Authority. Paragraph 15.24 implies the proposed criteria are optional or at least only open to 'consideration'. We strongly argue that experience of the care and support system is essential for this role.

There are additional issues which should be covered by the Guidance:

- An indication of the how the process for selecting and appointing the Independent Reviewer minimises the risk of conflicts of interest and ensures that they are independent. Our suggestion is that they are appointed by an independent panel of local or national experts. If a national panel is appointed (as with Serious Case Reviews in Children's Services) they could be responsible for appointments across all Local Authorities.
- In our view any history of employment within the Local Authority would indicate a possible conflict of interest.

**16. Do you agree that the Independent Reviewer's role should be to review decisions with reference to relevant regulations, guidance, facts and local policy to ensure the local authority's decision was reasonable?**

In our view the bar should be set higher than a 'reasonable' decision by the Local Authority. The Independent Reviewer should also evaluate whether a decision was lawful. The factors that the Reviewer takes into account in their decision, based on the list in paragraph 15.30, imply that local policy holds equal weight against the regulations and guidance. Whilst clearly important, it must be emphasised that complying with the regulations and guidance is, in many circumstances, mandatory. However, we do recognise that in decisions on eligibility it will have been necessary to use personal and subjective judgement and that in these situations the reasonableness of a decision is an important additional factor. Again, we emphasise

that the Independent Reviewer must consider how the Local Authorities has undertaken their Duty to promote wellbeing in each case.

We are also keen to ensure that people can request a meeting in person in order to put forward their case. The onus in paragraph 15.29 should be on the Local Authority to demonstrate there is *no* value in a meeting in person. It is important that people feel they have had a right to a fair hearing. Not everyone will want this and the wishes of the person bringing the appeal must be considered.