

Report to: ADULT HEALTH & WELLBEING SCRUTINY COMMITTEE
CABINET

Date: 28TH JULY 2009
27th AUGUST 2009

Subject: ADULT SERVICES CHARGING POLICY

Report of: EXECUTIVE DIRECTOR, HEALTH & WELLBEING

Contact officer: HEAD OF SERVICE, CONTRACTS & PERFORMANCE
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Purpose / summary: To recommend a change to the charging policy for non-residential services with the effect that individuals receiving Personal Injury awards where part of the award is specifically made to provide for future care needs, pay an increased charge for services.

Alternative options considered and reason for selecting the one recommended: The alternative option is to maintain the existing charging policy which would mean that individuals receiving Personal Injury awards where part of the award is specifically made to provide for future care needs pay the same level of charge as individuals without the benefit of such an award.

Recommendation / decision: That the revisions to the Charging Policy outlined in the report are approved, namely:

1. Where a personal injury award is made which has an element specifically to provide for future care needs the income derived from that part of the award is taken into account in the financial assessment.
2. That the income arising from the Personal Injury award is assessed at 100% rather than being subject to the 58% taper as is the case with other sources of income.

3. That each case is considered on an individual basis depending on the nature of the award for Personal Injury.

The basis on which these factors will be taken into account is set out in body of the report.

Key Decision:

This report involves a key decision within ground 1.

The decision will be made as a result of this report and will be published within **48 hours** and cannot be actioned until **seven working days** have elapsed, i.e. before 7th September 2009.

This item is included in the Forward Plan.

Risks / Implications:

Financial:

The changes recommended will seek to ensure the Council's financial interest is protected where a Personal Injury award is made which specifically includes provision for future care needs.

Staffing:
Policy:

None
This proposal updates the Charging Policy for non-residential services.

Equal Opportunities - Has a Diversity Impact Assessment been conducted?

Under the changes proposed all service users will be assessed equally, taking into account the element of awards specifically related to future care needs.

Wards affected:

All

Property Implications – Does the proposal involve a reduction, addition or change to the Council's asset base or its occupation?

No

If yes, have the property implications been agreed with the Corporate Property Officer?

Does this proposal have significant implications for the Council and the local population?

A diversity impact assessment is not necessary at this stage, however, equality and diversity implications have been considered when producing this report.

Does this proposal involve a new policy or procedure or significant changes to an existing policy or procedure?

A diversity impact assessment is not necessary at this stage, however, equality and diversity implications have been considered when producing this report.

Has the Service Director - Borough Solicitor confirmed that the recommendations within this report are lawful and comply with the Council's Constitution?

Yes

Has the Service Director - Corporate Services confirmed that any expenditure referred to within this report is consistent with the Council's budget?

Yes / No

Are any of the recommendations within this report contrary to the Policy Framework of the Council?

No

* delete which applicable

For Cabinet reports only :

Categorisation of the report:	x
Discussion leading to a decision	
Monitoring	
Sharing for corporate understanding	

	x
Discussion	
Decision	X
Information	

Tracking/Process:

	Consultation	Ward Members	Partners
AH&WB Scrutiny Committee	Overview & Scrutiny	Cabinet	Council
28 th July 2009		27 th August 2009	

There are no Background Papers to this Report within the meaning of Section 100D of the Local Government Act 1972.

Proper Officer Bernard Walker

Date 14th July 2009

1. BACKGROUND

- 1.1 The Department of Adult Services currently financially assess service users on their ability to pay for home care and other non-residential services by taking into account service users earnings, benefits and savings. The process also involves a welfare benefit check for the service users involved/.
- 1.2 Wigan's original charging policy for non-residential services was introduced following the implementation of Community Care legislation in 1993. In 2005 the charging policy was brought in line with the National Fairer Charging policy and further amended in 2006.
- 1.3 This report recommends further changes in situations where individuals have been awarded Personal Injury awards which specifically include provision for future care needs.

2. CHANGES TO CHARGING POLICY FOR NON-RESIDENTIAL SERVICES – LEGAL POSITION

- 2.1 The Local Authority has legal powers to arrange for and provide both residential care and non-residential care services such as home care.
- 2.2 Residential care is provided under National Assistance Act 1948 and the Local Authority has a duty (subject to minor exceptions relating to temporary arrangements) to charge for such accommodation.
- 2.3 The Act requires the charges to be means tested and that is governed by regulations and Guidance. The principal regulations are the National Assistance (Assessment of Resources) Regulations 1992 (as amended). The detailed guidance explaining the regulations is known as CRAG – Charging for Residential Accommodation Guide.
- 2.4 The charging provisions for non-residential care unlike those for residential care are discretionary. The power to charge is contained in section 17 Health and Social Services and Social Security Adjudications Act (HASSASSA) 1983. There is no statutorily defined procedure for assessing non-residential care charges though many authorities, including Wigan, use the guidance issued in 2001 and subsequently amended "Fairer Charging for Care Services" (FC Guidance) as the basis for its policy.
- 2.5 As the question of charging for non-residential care is a discretion to be exercised by the Local Authority, that discretion must be exercised by looking at each case on its merits. The Local Authority cannot have a "blanket policy" which is applied in all cases. The Scheme adopted must be flexible enough to take into account individual circumstances.
- 2.6 Within the FC Guidance certain income is excluded from the charging calculation. In relation to capital the FC Guidance states that as a minimum, Councils should use the upper capital limit as set out in CRAG. The value of the main residence should be left out of account but "other forms of capital may be taken into account as set out in CRAG"

Personal Injury Awards

- 2.7 There has been considerable controversy and case law about those people who receive large personal injury awards. These awards can include a large capital sum awarded for the purpose of purchasing future care. In recent years however many insurers have avoided the liability for the care element of an award by arguing that it will be provided by the Local Authority.
- 2.8 The tide is beginning to turn however and recent case law has tended towards not taking into account local authority provision in assessing damages and so accepting the argument of Claimants that they are entitled if they wish to purchase their care privately.
- 2.9 The case of *Crofton v NHS Litigation Authority(2006)* which was decided in the Court of Appeal in late 2006 clarified the position to some extent in relation to personal injury awards. One of the main issues in the case was whether a Local Authority could have regard to personal injury awards when assessing means.
- 2.10 It decided that in relation to capital held in trust or in the Court of Protection the whole of a personal injury award had to be disregarded. The Court said that the capital rules in CRAG applied to non-residential services.
- 2.11 However it left open the possibility of a Local Authority being able to take into account the income derived from that part of a personal injury award which is made for the purpose of providing for future care.
- 2.12 It is therefore permissible to take into account the income derived from capital held in trust or in the Court of Protection as regards the part of the award which is made for the cost of future care.

Consultation and responses

- 2.13 In the light of the above considerations with a view to considering an amendment to the Charging Policy, a consultation exercise was undertaken with the leading solicitors in the North West who have regular involvement in Court of Protection and Personal Injury award cases.
- 2.14 The consultation sought views on the proposed changes. Three responses were received though the overall conclusion was that the issues raised did not prevent the Council from proceeding with the changes recommended. The main concern was that the Council looked at each case individually and only took into account the income from the part of the award made to meet future care needs. This concern is acknowledged and the financial assessment process will address this in each case.

Appeals and Challenges

- 2.15 Any individual or their representative has the right of appeal or challenge against a Fairer Charging assessment, which is through the Department's formal complaints process, with further redress through the Local Government Ombudsman, if this is deemed appropriate.

3. PROPOSALS

3.1 That the Council's charging for non-residential services is amended to take into account income from Personal Injury awards as follows:

- Where a personal injury award is made with an element to provide for the cost of future care the income derived from that part of the award is taken into account in the financial assessment.
- This income calculation will not be subject to the normal 58% taper which is applied to other income sources, but will be fully assessed at 100%.

3.2 An example based on a hypothetical set of circumstances (see Appendix A) which identifies how the new arrangements will work compared to the current policy. This is based on a scenario where an individual has received an award for future care needs of around £2m. In the example the outcome of the introduction of the change in policy would mean that the service charge would increase from a contribution of £1,158 per week to a maximum contribution of £1,963. Since the cost of care services, at £1,800 per week, is less than the maximum contribution the individual would pay the full cost of care. The Council's contribution would reduce £642 per week to a £nil contribution.

4. ALTERNATIVE OPTIONS CONSIDERED AND REASONS FOR SELECTING THE ONE RECOMMENDED

4.1 The main alternative would be to retain the existing charging policy, which does not treat service users who are not in receipt of Personal Injury awards, with an element to meet the cost of future care needs on an equitable basis.

4.2 The consultation exercise which was undertaken (see section 2) did not identify any reasons for the policy change being deferred.

5. CONCLUSIONS

5.1 The changes to Charging Policy proposed will ensure that the policy is fair and equitable for all service users in receipt of non-residential services. It will ensure that the Council does not incur additional cost for potentially large packages of care when part of a personal injury award is made by the Courts specifically to cover future care needs.

Extract from minute 19 of the Adult Health and Wellbeing Scrutiny Committee held on Tuesday, 28 July 2009.

18 Adult Services charging policy: The Executive Director of Health and Wellbeing, Bernard Walker, recommended to Members a change to the charging policy for non-residential services. Individuals receiving personal injury awards where part of the award, and received future care needs and pay at an increased charge for services.

He informed Members that the changes to the charging policy proposed would ensure that the policy was fair and equitable for all service users in receipt of non residential services. It ensured that the Council does not incur additional cost for potentially large packages of care when part of a personal injury award is made by the courts specifically to cover future care needs.

Members were ensured that re-assessments were done on an annual basis and that a re-assessment would always be provided if people requested.

The Principal Solicitor, Margaret McKenzie informed Members that Adult Services had consulted with local personal injury solicitors and financial advisors on the charging policy.

Resolved: The Committee:-

- (1) thanks the Executive Director for the report; and
- (2) requests the Executive Director to inform this Committee of any cases that are the subject of a legal challenge.

Service User with Personal Injuries Care Award

Current Assessment.

Weekly Income	
Severe Disablement Allowance	£73.10
Income Support (single person)	£84.95
Disability Living Allowance Care	£47.10
Disability Living Allowance Mobility	
Capital Invested from Person Injuries Award = £100,000 per annum	£1923.08
Total Income	£2128.23

Fairer Charge Calculation – 2009 to 2011

Total Income	£2128.23
Less Fairer Charge Allowance	£131.50
Total	£1996.73
X 58% Taper ($£1996.73 \times 58\%$)	£1158.10
Chargeable Income	£1158.10

Figure A

Maximum weekly contribution to Care Services £1158.10

Figure B

Cost of Care £1800.00

Service users weekly charge

Figure A
£1158.10

Service User with Personal Injuries Care Award

Proposed New Assessment - 2009.

Weekly Income	
Severe Disablement Allowance	£73.10
Income Support (single person)	£84.95
Disability Living Allowance Care	£47.10
Disability Living Allowance Mobility	
Benefit Income	£205.15

Fairer Charge Calculation – 2009 to 2011

Total Income from Benefits	£205.15
Less Fairer Charge Allowance	£131.50
Total	£73.65
X 58% Taper ($£73.65 \times 58\%$)	£42.72
Capital Invested from Person Injuries Award = £100,000 per annum	£1923.08
Chargeable Income	£1965.80

Figure A

Maximum weekly contribution to Care Services £1965.80

Figure B

Cost of Care £1800.00

Service users weekly charge

Figure B
£1800.00