

# **Appendix 4 - Barnet's response to the 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**

March 2015

## **Introduction**

The London Borough of Barnet is pleased to have the opportunity to respond to the Department of Health's consultation on the on draft regulations and guidance to implement the cap on care costs and policy proposals for a new appeals system for care and support.

Barnet is one of the largest London Boroughs with a high proportion of residents aged over 65. Barnet's population is set to increase significantly, with increases in people living with dementia and younger adults with complex disabilities. Barnet is also home to a large number of care providers, with over 100 registered care and nursing homes in the borough.

We welcome the commitment that Part 2 gives to funding reform, protecting people against catastrophic care costs and to an efficient, cost effective and open means of redress. However, we are concerned about the short period of time available to properly develop and test systems and the uncertainty arising from a lack of robust data on self-funders numbers, behaviour and housing and non-housing wealth held.

# FUNDING REFORM

## *Cap on care costs: an overview*

**Question 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? Please state yes or no along with any rationale.**

Response to Q1:

- We do not entirely agree with the statement. We do agree that the draft regulations and guidance will provide a robust framework that will protect people from catastrophic care costs when combined with the extended means test. We are not yet convinced that it will benefit 1 in 8 people.

## *Measuring what counts towards the Cap*

**Question 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? Please state yes or no along with any rationale.**

Response to Q2:

- We do not agree with the statement. We think that a simpler and fairer approach is required.
- Determining the IPB using averages allocated to people with similar levels of need is complex and could lead to confusion and inconsistency in application.
- However it is calculated, the average is constantly changing. This makes it burdensome to calculate and apply and even more complex for people to understand.
- It is not clear how an average IPB allocation equates to need in conjunction with the wellbeing criteria.
- For most people it will be straightforward to identify “similar levels of need”, however, there will be difficulties with those people at the margins.
- The framework applied needs to be clear, transparent and be equitable with people who do not fund their own care.

**Question 3. Is the guidance sufficiently clear as to how independent personal budgets should be calculated? Please state yes or no along with any rationale.**

Response to Q3:

- We do not agree with the statement. Because the calculation of personal budgets has been left to Local Authorities to determine we are concerned that the absence of clear detailed national guidance will lead to a postcode lottery and inconsistencies between Local Authorities. This will be especially apparent in London with so many Local Authorities in close proximity.
- We ask that the Department of Health reviews and improves the guidance.

### ***Care accounts***

**Question 4. Does the draft guidance provide sufficient clarity about the operation of care accounts to ensure a basic level of consistency between local authorities? Please state yes or no along with any rationale.**

Response to Q4:

- We agree with the statement. Apart from our concerns about the calculation of the IPB voiced in response to question 3, the draft guidance is straightforward and clearly expressed on the operation of care accounts.

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

Response to Q5:

- Yes, the freedom that local authorities have to enhance the planning value of care accounts with regard to the local social care market should be emphasised and illustrations provided.

### ***Cap on care costs for working age adults***

**Question 6. Do you agree that the proposed option best meets the principles and priorities identified? Please state yes or no along with any rationale**

Response to Q6:

- We do not agree with the statement. We would suggest that the extended means test used with the cap of £72,000 meets the identified principles and priorities. The identified cut-off points are arbitrary and discriminate against age.

**Question 7. What are your views on how people of working age can be supported further to enable them to save and plan?**

Response to Q7

- We feel that the question should have been more specific and have been explicitly about saving and planning to meet social care needs. The approach would need to be different for people who already have needs and people who do not have needs.

***Daily living costs***

**Question 8. Is there evidence to support further consideration of the level and/or approach to daily living costs? Please state yes or no along with any rationale, and provide any evidence you may have to support the rationale.**

Response to Q8:

- We think that there is evidence to support further consideration.
- The level at which the daily living allowance has been set is a concern. London has some of the highest living costs in the country. A nationally set living allowance fails to take in to account regional differences. This disadvantages London residents because their wealth would be depleted more quickly than if they lived in a region with lower living costs.
- Reports in the media about the cap and care account are leading to some people having an expectation that they will not have to pay anything to meet their needs once they have spent £72,000. The proposed media campaign must be very clear about what expenditure counts towards the cap and what people will have to continue paying (i.e. living costs and care costs in excess of the IPB) after they have reached the cap. The table on page 21 describing what does and does not count towards the cap is useful in illustrating this.

***Top-up payments***

**Question 9. Do you agree that the extension of the existing requirements for third party top-ups to cover first party top-ups will provide both the local authority and the person with the necessary clarity and protection? Please state yes or no along with any rationale**

Response to Q9

- We believe that people should be able to make choices about the way they live and the care they receive. Whilst the extension of the existing requirements provides some protection for Local Authorities, the risk remains that people may need to be moved out of a residential home when they have spent all their resources and where the local authority is not able to maintain them at that level.

## ***Extension to means-tested support***

**Question 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?**

Response to Q10

- The extension of the means test from April 2016 will have immediate and negative impact on our budget. It is critical that the additional costs to local authorities are taken into account in any funding allocations for 2016/17 and beyond.
- The proposal to equalise the amounts that people can retain as income after assessing a contribution for all client groups to the same level as those aged over 60 will have a negative impact on our income.
- The draft guidance out appears to put those who wish to move into smaller homes at a disadvantage. If a person decides to downsize their home it is likely to free up additional resources. This may increase their assets to exceed £27,000 which in turn means that they will not qualify for Local Authority support. In contrast, should they choose to remain living in their bigger home they could potentially qualify for local authority support if they have less than £27,000 in assets excluding their home. This is particularly an issue for London where homes are more expensive than the rest of England.
- The guidance is inconsistent about who the £118,000 upper capital limit applies to. There is uncertainty about whether it applies to those going into residential care who own their own property; to those who are renting on the private rented sector; and to those receiving domiciliary care. If it applies to all these groups then this seems to move away from the original intention or purpose of the upper capital limit which was to protect those who own their own properties.
- The intended purpose should be explicitly stated - is it to avoid asset depletion or is it to enable people to stay in their home?

## ***The appeals system***

**Question 11. Do you think there is a need to introduce a new appeals system to allow people to challenge care and support decisions? Please state yes or no along with any rationale.**

Response to Q11:

- Yes, we agree with the statement and welcome the introduction of an appeals system, however, we are concerned that the proposals set out in the consultation are for a system that is separate from existing Local Authority complaints structures and would have preferred a system which built on what is currently in place similar to the model used for children's social care.
- We feel that the proposed system has independent elements but is not independent in terms of appointing the Independent Reviewer and determining the outcome of second stage appeals. We feel that the draft guidance should acknowledge this.
- We feel that the guidance should be clear on the demarcation between complaints and appeals.

**Question 12. Do you think that the appeals reforms are a priority for reforming care and support redress? Please state yes or no along with any rationale.**

Response to Q12:

- Yes, we regard appeals reform is an urgent matter, however, it will have to compete against other priorities.

## ***Scope of the appeals system***

**Question 13. Do you agree the areas identified should be within the scope of the appeals system? Are there any other areas under part 1 of the Care Act 2014 that should be included?**

Response to Q13:

- We think that the scope of the appeals system should be reduced to focus only on key decisions that impact on an individual. Appeals should only be launched against measurable decisions where there are clear criteria or processes that should have been applied/adhered to. For example, appealing against the format of the assessment is complaining about a process rather than an outcome of a decision. Likewise, with care planning a local authority is limited to how it can meet a person's needs because of local service provision; this does not mean that the process and decision-making is in any way flawed and should therefore be able to be challenged.
- It will be in the interest of self-funders to appeal against the costs which count towards the cap. The criteria and scope for appeals relating to IPBs will therefore need to be tight and unambiguous.

**Question 14. Do you think that charging should be part of the adult social care appeals system? Please state yes or no along with any rationale.**

Response to Q14:

- Any appeal relating to charging should be limited to the application of the appropriate policy e.g. Deferred Payments policy.

### ***Early resolution and independent review of appeals***

**Question 15. Do you have suggestions as to the expertise, knowledge and person specification for the role of an independent reviewer?**

Response to Q15:

- Our initial suggestions as follows:
  - Social care knowledge relevant to the area (e.g. older people, learning disabilities, mental health).
  - A thorough understanding of the Care Act 2014, regulations and statutory guidance.
  - The ability to quickly get a good grasp of the local policies in relation to the area of appeal.
- We are unsure where the expertise will come from to perform the role of an independent reviewer. Training will be crucial to ensuring quality. We think that ensuring a supply of quality independent reviewers to meet demand could be costly and onerous for the Local Authority.

**Question 16. Do you think the local authority or another body should be appointing the independent reviewer? If another body, please specify.**

Response to Q16:

- A national body would appear to be a better way to provide a greater degree of independence, however, creating such a body would be costly.
- We support the independent reviewer role within the appeals system, however, we feel that it would be better if the role was incorporated into a single complaints and appeals system.

**Question 17. Do you think a 3 year gap in the independent reviewer's employment from the local authority concerned is sufficient to provide independence? Should this period be longer? Or should they have never previously been employed by the local authority concerned?**

Response to Q17:

- The pool of independent reviewers is unlikely to be high and all London local authorities will be using the same pool. A requirement for an independent reviewer to not have worked for that local authority is overly restrictive. In London the workforce is very mobile with people having worked for several authorities through their work life. A requirement to not have worked for an authority would therefore be impractical.
- Similarly, a three year gap requirement will also make it more difficult to find independent reviewers in London.

**Question 18. 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 authorities decision was reasonable? Please state yes or no along with any rationale.**

Response to Q18:

- Yes, we agree with the statement.

### ***Consistency of decision making on appeals***

**Question 19. How do you think we can promote consistency in decision making for care and support appeals?**

- We think that this could be undertaken by an independent person / body and that they could use similar cases as a comparison– perhaps setting a national or local baseline
- As suggested in the draft guidance, we think that a pool of reviewers would be beneficial for consistency and decision making.
- We think that perhaps a structured response template that is the same for all Local Authorities would help to ensure that all decisions are transparent and clear to understand.



## ***Timescales of the appeals process***

**Question 20. Do you think the timescales proposed to process appeals are right? If not, which timescales would be more appropriate?**

Response to Q20

- We think that the proposed timescales are acceptable and think it helpful that there is an option to extend for complex cases. However, there will need to be an adequate supply of independent reviewers to ensure that there is not a gap between the Early resolution stage and the Independent review stage. The guidance is not clear on what should happen if an independent reviewer cannot be found immediately.

## ***Funding of appeals***

**Question 21. Do you feel that the appeals system, as set out, will aid the early resolution of disputes, and thus help avoid costs and delays associated with challenging decisions in the courts? Please state yes or no along with any rationale.**

Response to Q21

- Yes, we feel that the appeals system, as set out, will aid the early resolution of disputes, and thus help avoid costs and delays associated with challenging decisions in the courts. Nevertheless, we have no expectation that an appeals process will completely stop challenges in the courts. Moreover, it seems reasonable to expect that, following the implementation of the Care Act, that there might be a 'spike' in the number of decisions challenged in the courts as people and organisations try to establish a body of case law around the Act.
- The proposals are not clear where appeals fit with Judicial Reviews and whether an appeals system will result in fewer legal proceedings as intended. There is concern that the appeals system becomes another layer of bureaucracy that inevitably leads to a Judicial Review. More detail is needed about how the appeals system fits with the Judicial Review process.
- There is concern that local authority lawyers will spend a lot of time dealing with appeals and giving legal advice to appeal responses. This will cancel out savings from fewer legal challenges, if indeed that comes to pass. There are relatively few Judicial Review cases but the appeals system has the potential to be very big.

**Question 22. In the impact assessment we have set out the costs to administer the appeals system. Do you agree with the funding as set out in the appeals impact assessment? Please provide supporting evidence for your answer including details of any further options to manage costs.**

Response to Q22:

- We are unable to answer the question because we are uncertain about the number and types of appeals that the Act will generate at a local authority level. We are not aware of an impact assessment that goes down to this level and would welcome further financial analysis that gives an indication.