



CABINET

Date: 11 January 2022

Adult social care ombudsman report

Report of the Executive Director of Adult Social Care and Children's Services

Cabinet Member: Councillor Wendy Pattison, Adult Wellbeing

Purpose of report

To report on a finding of maladministration by the Local Government and Adult Social Care Ombudsman (LGSCO), and to recommend consequent changes to the process for determining appeals against decisions about “disability related expenditure” under the Council’s charging policy for non-residential adult social care services.

Recommendations

Cabinet is recommended:

- 1. To note the contents of the LGSCO’s report on a complaint about the council reproduced in Appendix 1**
- 2. To note that officers have already acted on two of the three recommendations in the report: “Mr X” has been sent a letter of apology, and paid £200 to acknowledge the time and trouble which he has incurred**
- 3. To endorse the revised approach to appeals against decisions on “disability related expenditure” set out in section 5 of this report, and to note that officers will then follow this process when making a new decision as to whether to accept Mr X’s holiday-related costs as disability related expenditure for charging purposes**

Link to Corporate Plan

This report is relevant to the “Living” priority in the Corporate Plan.

Key issues

1. National regulations set out minimum requirements for financial assessments to determine how much people can afford to pay towards the cost of non-residential services. If a local authority treats any of the three main non-means tested disability benefits as income available to pay charges, it must also carry out an assessment of how much other “disability related expenditure” the person has, and subtract that amount when deciding how much of the person’s disability benefit income is available to pay social care charges.
2. The council reviewed its charging policy for non-residential services for adults in 2018/19, and adopted a new charging policy at its budget meeting in February 2019. Under that policy standard assumptions are made about how much “disability related expenditure” service users will automatically be assumed to have, without the need to provide detailed financial information. People who believe that their actual disability related expenditure is higher than this figure can ask for a more detailed assessment. There is a list of types of expenditure which are always taken into account, but officers also consider whether other specific items of expenditure are “necessary” in the circumstances of individual service users.
3. Mr X asked the Council to take into account as disability related expenditure the cost of travel and accommodation for the care workers who he planned to take with him to support him during his annual holidays, which are usually outside the UK. Officers’ initial decision was that these costs were not “necessary” expenditure in the sense intended in the statutory guidance. Mr X complained about this decision, and it was reviewed, but the initial decision was upheld, and he then complained to the ombudsman.
4. Initial drafts of the LGSCO’s report on the decision appeared to interpret the legislation and statutory guidance in a way which would imply that costs of the kind which Mr X wished to claim should always be treated as disability related expenditure. Officers were concerned about the wider implications of this interpretation for Northumberland and other local authorities, and sought QC’s advice. After considering this advice, the LGSCO revised its report. The final version criticises the Council only on a narrower technical point about whether officers applied the correct test when they made the decision. The LGSCO believes that the council relied more than it should have done on a social work assessment of Mr X’s “eligible needs” under the Care Act, and ought to have made a separate decision about whether the holiday-related spending was necessary. The ombudsman did not express a view about whether in Mr X’s case there were or were not specific individual reasons why it was necessary.
5. Officers’ advice is that the LGSCO’s advice, in its final form, should be accepted, and that a more formal framework should be introduced for considering appeals against decisions on disability-related expenditure, to ensure that they are made in a manner consistent with the LGSCO’s advice about what is legally required. This appeals process would then be used to make a decision about Mr X’s charges. The Cabinet is not being asked to make a decision about his individual case.

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BACKGROUND

1. Disability-related expenditure

- 1.1 There are currently three main non-means tested disability benefits paid by the Department for Work and Pensions – Attendance Allowance, Personal Independence Payments (PIP) and Disability Living Allowance (DLA). Broadly, Attendance Allowance is payable to older people, and PIP to working age adults; DLA has now largely been replaced by PIP, but continues to be paid to older people who qualified for it when they were younger.
- 1.2 There are some differences between the criteria for these three benefits, and there has always been some ambiguity about their objectives, but in broad terms, all three include an element which is at least in part based on the person's need for care and support from others. It has therefore been widely accepted that it is reasonable to take these benefits into account when deciding what someone can reasonably be expected to pay towards the cost of care and support services arranged by a local authority, and regulations under the Care Act permit this (though local authorities continue not to be permitted to take into account the elements of PIP and DLA which are linked to mobility rather than care needs).
- 1.3 Since it does not appear that these disability benefits are intended *only* to pay for the costs of care and support, the Care Act regulations repeat the requirement in previous statutory guidance that if a local authority takes income from these benefits into account as income available to pay charges it must also assess what other disability-related expenditure (DRE) the person has which should be subtracted from that income. The regulations say that DRE includes “payment for any community alarm system, costs of any privately arranged care services required including respite care, and the costs of any specialist items needed to meet the adult’s disability.”
- 1.4 Statutory guidance says what should be deducted from the income taken into account is “necessary disability-related expenditure to meet any needs which are not being met by the local authority”. The guidance includes a list of examples of expenditure which would count as DRE. The LGSCO report includes some of the items on that list; the full list is reproduced in Appendix 2 to this report.
- 1.5 The Council’s charging policy adopted in February 2019 provides that the people on the highest rate of any of the three disability benefits it will be assumed without asking for detailed evidence that they have disability-related expenditure of £35 per week, to avoid the need for every service user to produce evidence of spending. Individual DRE assessments are offered if people believe that their relevant expenditure is more than this. The number of service users who have asked for a detailed assessment of DRE has so far been very small.

2. Mr X’s complaint

- 2.1 Mr X’s complaint began as a consequence of the increase in his charges resulting from the adoption of the Council’s new charging policy in February 2019. He asked for an

assessment of his disability-related expenditure, and submitted a list of costs which he suggested should be included. This included a number of items which were not included in the list in the statutory guidance. After extended discussions with Mr X, and advice first from his usual key worker and then from a social worker asked specifically to advise about his needs in the context of the financial assessment, some of these items were accepted and some were not. The issue on which it proved impossible to reach agreement was the cost of travel and accommodation for his care workers to accompany him on holiday.

- 2.2 Mr X complained to the LGSCO about the Council's refusal to accept this cost, and also told the ombudsman that in his view an allowance should be made for the costs which he had incurred in producing the information needed to substantiate his DRE claim. The ombudsman's final decision does not directly address that second element of his complaint, though it includes a recommendation that he should be compensated for his time and trouble in pursuing his complaint.
- 2.3 Officers' final decision about the matter had been expressed in a letter to Mr X which concluded as follows:

I am sorry but our position has not changed and we remain of the view that the additional costs you incur when going on holiday do not qualify as disregarded DRE under the Council's charging policy. This is because the Council's policy says that "on all issues where this policy is silent, the minimum requirements set out in the national legislation and guidance will be taken to apply", and the statutory guidance says only that local authorities should "allow the person to keep enough benefit to pay for necessary disability-related expenditure to meet any needs which are not being met by the local authority". While we would like to be in a position where we could ensure that everyone with care and support needs was able to pay for the support needed to go on the holidays of their choice, and indeed able to participate in any leisure activities which they wish, the Council adopted its current charging policy after considering carefully the balance to be struck between the impact of charges on the financial position of disabled people and its other priorities, within the limited funding available, and it would not be fair to diverge from this policy in individual cases.

3. Correspondence with the LGSCO

- 3.1 The ombudsman sent the council in March 2021 a draft decision which found the Council at fault, with an explanation which included the statements below about the Council's obligations under the statutory guidance:

We make no comment on how the Guidance should be interpreted where there appears to be confusion. However, the central thread running through the Guidance is that Council's should not be tied to one approach. The fundamental principle that guides the approach to decision-making should be a person's well-being.

[...] the Guidance is clear that while a person's care plan is a good "starting point" when considering if something is a DRE or not, councils must be flexible. The Guidance also says that any reasonable additional costs directly related to a person's disability should be included. Mr X cannot manage without a carer. That means that when he goes on holiday, he requires a carer. This is a direct consequence of his disability. A carer cannot go on holiday with Mr X without cost. The Council may consider there are

reasons why these costs are not necessitated by Mr X's disability, but it is not enough to say it is not DRE because holidays are not listed in the Care Act as an eligible outcome. This position does not address Mr X's wellbeing in its decision making.

- 3.2 Officers were concerned by these passages, which appeared to be setting out a general principle which would have very broad implications. It appeared to mean that extra costs of going on holiday which were made necessary by a person's disability should automatically be treated as DRE – but the same logic would have applied in a much wider range of circumstances. Disabled people may have more limited options than non-disabled people in many areas of daily life, and while some of these limitations may be unavoidable consequences of their situation, others could at least be mitigated if the person had more income. Charges for care and support services inevitably have an impact on disabled people's well-being, and it is difficult to envisage any circumstances in which a disabled person with limited financial resources would not be able to improve their lives in some way if they had the option of keeping more of their income and spending it on reducing the impact of restrictions arising from their disability.
- 3.3 Even if the LGSCO's initial advice had been interpreted as applying only to holidays, officers would have been concerned about the fairness of allowing holiday-related costs while not allowing, for instance, the costs of private arrangements that service users might make to enable them to enjoy a wider range of local activities, or the cost of using a more expensive home care service than the council is able to fund because it can offer greater flexibility about timings.
- 3.4 There is a legitimate view, which might perhaps be quite widely shared, that it would be a good thing if service users were allowed to retain the whole of their disability benefits and use them as they wish to increase their independence – and this would arguably be fairer and less intrusive than a system of requiring people to produce evidence of "necessary disability-related expenditure". However the existing funding scheme for adult social care assumes that a substantial part of this income will in fact be available to pay charges and will contribute to maintaining the financial viability of services. In Northumberland, the effect of disregarding all income from disability benefits in the charging assessment would be a loss of income of around £4 million. Realistically, it would be difficult in current circumstances for a local authority to decide on a general policy of disregarding income from these benefits because of its financial impact. Currently there does not appear to be any intention to change the treatment of these benefits nationally as part of the Government's plans for reform of adult social care funding.
- 3.5 After further correspondence, the LGSCO sent a revised draft decision, which removed much of the text quoted above from its first draft, but still said that:

The Guidance also says that any reasonable additional costs directly related to a person's disability should be included. Mr X cannot manage without a carer. That means that when he goes on holiday, he requires a carer. This is a direct consequence of his disability.
- 3.6 Since this still raised the same fundamental legal issue, officers sought QC's advice about its correctness, and supplied that advice to the LGSCO. After considering the QC's advice, the LGSCO accepted that the statement above was "problematic", and removed it, as well as making further changes.

4. The Ombudsman's final recommendations

- 4.1 During the correspondence about this case with the LGSCO, officers set out what had been their understanding of the legal framework, which was that the regulations and guidance about disability-related expenditure were not intended to create additional duties for a local authority to fund care and support services, beyond those which it would have a duty to arrange if asked to because they meet the eligibility criteria set out in another set of regulations under the Care Act. Officers' interpretation was that the DRE provisions were intended to address two issues, neither of which they believed applied to the disputed costs:
- a) additional necessary costs of daily living which a disabled person has, such as extra heating costs and other items on the list in the statutory guidance
 - b) situations in which a person was arranging privately care and support services which they would have been entitled to ask the local authority to arrange, because they were required to meet needs that met the Care Act eligibility criteria – in which case the reasonable costs of these services should be allowed as DRE
- 4.2 In its final version, the LGSCO's final report in effect says that it is unacceptable for the local authority to limit the scope of DRE to those two situations. There could be other situations in which a person has "necessary disability-related expenditure". The report does not give specific examples of those situations, though it does say that it would be wrong to assume that costs associated with going on holiday would *always* be ruled out as DRE. In correspondence informing officers about the changes it intended to make following consideration of the QC's advice, the LGSCO said that it would be acceptable for the council to say that, as a matter of policy "we do not ordinarily consider holiday expenses as DRE", so long as it went on to say "but tell us more about your circumstances and we will consider it."
- 4.3 Officers' recommendation is that this final version of the LGSCO's advice should be accepted, and that a revised approach should be adopted to decision-making about disputes over DRE, both in Mr X's case and in any future cases.

5. The proposed approach

- 5.1 Section 6 of this report discusses the wider issues raised by this complaint, but whatever view the Cabinet takes about those issues, there is an immediate need to confirm a revised process for making decisions about disability-related expenditure under the current policy.
- 5.2 In line with the current policy, the only areas of disability related expenditure which are routinely taken into account when assessing whether a service user has DRE above the level that is automatically allowed under the policy will continue to be those which are explicitly listed in the statutory guidance, with the assessment of what is a reasonable cost continuing to be based on recommendations from the National Association of Financial Assessment Officers. As now, however, any further items identified by individual service users will be considered by financial assessment officers, who will continue to be authorised to approve the inclusion of any expenditure which they are convinced is reasonably necessary, either because it is required to meet outcomes identified in the person's care and support plan or because the person is incurring unavoidable extra costs in day-to-day life as a consequence of their disability or health

condition. Where they are uncertain, financial assessment officers will seek advice from the community team responsible for the person's care and support plan.

- 5.3 If there are some costs identified by the service user which it is not possible to reach agreement about in this way, the service user will be invited to appeal against the decision not to allow them. The proposed process is as follows:
- a) The service user will be invited to confirm in a written statement why they believe that the expenditure is necessary. They will be offered support in preparing this statement if they request that, to ensure that it is as full as possible an explanation of the reasons why the expenditure is important for them. A pro forma will be prepared for these statements. A draft of the main proposed contents of this pro forma is attached as appendix 3.
 - b) The pro-forma will explain that if the expenditure is necessary *in order to do something else that they intend to do (such as take a holiday)*, they should also explain why they believe that it is *necessary* for them to do that other thing.
 - c) The decision on the appeal will be taken by a senior officer nominated by the Executive Director, and if the appeal is rejected, as a whole or in part, will include a written explanation of why the rejected items of expenditure have been assessed as not being *necessary*, which addresses each of the points made in the service user's statement.

6. Wider issues

- 6.1 While the LGSCO ultimately withdrew its remarks suggesting that the fundamental principle that should guide decisions about charges should be the person's well-being, this case is a reminder that charges for social care can have a significant impact on the lives of disabled people. The council considered when adopting its current charging policy a detailed report including comments from disabled people about these impacts, and decided with regret that increases in income from charges were necessary in the context of the council's overall financial position. It remains possible at any time for the council to review its charging policy, though this case does not require the Council to do so.
- 6.2 A High Court case in December 2020, in which Norfolk County Council's charging policy was found to be unlawful, was a further reminder that the impact of social care charges remains a matter of concern, though officers have seen convincing legal advice suggesting that that case was wrongly decided, and remain confident about the soundness of the process by which the council adopted its charging policy in February 2019. The outcome of a further judicial review challenge to a local authority charging policy elsewhere in the country is anticipated shortly, and officers will consider whether that raises issues that need to be considered by the Cabinet. The Norfolk case was not directly concerned with issues about disability-related expenditure.
- 6.3 Details of the Government's proposals for the reform of adult social care funding were published in November 2021. These appeared to make it clear that it is not currently the Government's intention to make changes to the rules for the assessment of charges based on the income of the person who does not have significant savings or assets, beyond ending a freeze on the "minimum income guarantee" which defines the minimum amounts which service users must be left with after paying charges. The aspect of the

current plans is a change from the proposals made by the Government in 2015, at the time when preparations were previously being made for implementation of the Care Act “cap” on charges. Those proposals would ultimately have ended charges for future service users such as Mr X who have had care and support needs since childhood¹. Public debate about the current proposals has so far focused on a separate decision about how credits towards the proposed cap should be calculated.

IMPLICATIONS ARISING OUT OF THE REPORT

Policy	The LGSCO’s final advice is about the process for making decisions rather than about policy.
Finance and value for money	While the proposed change to the Council’s process for making decisions may in some cases lead to reductions in the charges which service users are asked to pay, the overall financial impact is not expected to be material.
Legal	While drafts of the LGSCO’s report raised significant legal issues, on which the Council obtained a QC’s opinion, the final version raises no issues which cannot be met by introducing a more rigorous format for considering appeals against decisions on disability related expenditure.
Procurement	No issues identified
Human Resources	No issues identified
Property	No issues identified
Equalities (Impact Assessment attached) Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> N/A <input type="checkbox"/>	The proposed changes to the procedure for considering appeals against decisions on disability related expenditure will provide further assurance that the impacts of these decisions on disabled people are fully considered.
Risk Assessment	No significant risks identified
Crime & Disorder	No issues identified
Customer Considerations	Mr X has received an apology and a payment of £200 in recognition of his time and trouble, as recommended by the ombudsman.

¹ As published for consultation, the proposals would not have benefited Mr X himself, since they would have applied only to people who had been under 25 at the date when the legislation was implemented. This might have changed if the implementation had gone ahead – the proposals were withdrawn before revised proposals were published after the consultation process.

Carbon reduction	No implications identified
Health and wellbeing	Social care charges are likely to have some detrimental impacts on service users' well-being. However the council's view when it last considered its charging policy in February 2019 was that these charges are a regrettable necessity.
Wards	All

BACKGROUND PAPERS

There are no background documents for this report within the meaning of the Local Government (Access to Information) Act 1985, because correspondence about this issue includes identifying personal information about Mr X.

Report sign off.

Authors must ensure that officers and members have agreed the content of the report.

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Monitoring Officer/Legal	
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Appendix 1: LGSCO report

(Separate document)

Appendix 2: statutory guidance on DRE

39) Where disability-related benefits are taken into account, the local authority should make an assessment and allow the person to keep enough benefit to pay for necessary disability-related expenditure to meet any needs which are not being met by the local authority.

40) In assessing disability-related expenditure, local authorities should include the following. However, it should also be noted that this list is not intended to be exhaustive and any reasonable additional costs directly related to a person's disability should be included:

- (a) payment for any community alarm system
- (b) costs of any privately arranged care services required, including respite care
- (c) costs of any specialist items needed to meet the person's disability needs, for example:
 - (i) Day or night care which is not being arranged by the local authority
 - (ii) specialist washing powders or laundry
 - (iii) additional costs of special dietary needs due to illness or disability (the person may be asked for permission to approach their GP in cases of doubt)
 - (iv) special clothing or footwear, for example, where this needs to be specially made; or additional wear and tear to clothing and footwear caused by disability
 - (v) additional costs of bedding, for example, because of incontinence
 - (vi) any heating costs, or metered costs of water, above the average levels for the area and housing type
 - (vii) occasioned by age, medical condition or disability
 - (viii) reasonable costs of basic garden maintenance, cleaning, or domestic help, if necessitated by the individual's disability and not met by social services
 - (ix) purchase, maintenance, and repair of disability-related equipment, including equipment or transport needed to enter or remain in work; this may include IT costs, where necessitated by the disability; reasonable hire costs of equipment may be included, if due to waiting for supply of equipment from the local council
 - (x) personal assistance costs, including any household or other necessary costs arising for the person
 - (xi) internet access for example for blind and partially sighted people
 - (xii) other transport costs necessitated by illness or disability, including costs of transport to day centres, over and above the mobility component of DLA or PIP, if in payment and available for these costs. In some cases, it may be reasonable for a council not to take account of claimed transport costs – if, for example, a suitable,

cheaper form of transport, for example, council-provided transport to day centres is available, but has not been used

(xiii) in other cases, it may be reasonable for a council not to allow for items where a reasonable alternative is available at lesser cost. For example, a council might adopt a policy not to allow for the private purchase cost of continence pads, where these are available from the NHS

41) The care plan may be a good starting point for considering what is necessary disability-related expenditure. However, flexibility is needed. What is disability-related expenditure should not be limited to what is necessary for care and support. For example, above average heating costs should be considered.

Appendix 3: Draft pro-forma for appeals against DRE decisions

This is a draft of the main proposed questions in the pro forma referred to in paragraph 5.3 of the report. Some further explanation and administrative details would need to be added to the final version (including an explanation that the subtraction from charges for DRE cannot be higher than the level of the person's disability benefits). Service users would be offered support with completing this pro forma.

- 1. What items of spending are you appealing about?**

- 2. What is your current or planned spending on each of these items?**

- 3. For each of these items of spending, what would happen if you did not spend money on it, or if you spent less than the amounts in your answer to question 2?**

- 4. If it might not be obvious, please explain why your answers to question 3 mean that these items are necessary. (For instance if your disability or illness means that you need to pay for these items to be able to do something particular that matters to you, explain why doing that thing is necessary for your physical or mental health, or for some other reason.)**

- 5. The senior officer who considers your appeal will also look at our current assessment of your needs and your care and support plan, to help them understand your situation. If you disagree with anything in those, please explain below. If there is a disagreement, we may need to review your assessment and your plan before considering your appeal (but we will not only consider items of spending that are mentioned in those documents).**