

# Cabinet

Date: **Tuesday 12 January 2021**

Time: **10:00am**

Venue: **Teams Meeting**

## Supplementary Agenda

**8 Adult Social Services charging policy for non-residential care –  
next steps following Judicial Review**

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Report by the Executive Director of Adult Social Care.

**Please note:** That the time for submitting questions for agenda item 8 only has been extended to 10am on Friday 8 January 2021 due to the late issue of the easy read paper.

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Date Supplementary Agenda published: 7 January 2021



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# Cabinet

Item No: 8

<b>Decision making report title:</b>	<b>Adult Social Services charging policy for non-residential care – next steps following Judicial Review</b>
<b>Date of meeting:</b>	<b>12 January 2021</b>
<b>Responsible Cabinet Member:</b>	<b>Cllr Bill Borrett (Cabinet Member for Adult Social Care, Public Health and Prevention)</b>
<b>Responsible Director:</b>	<b>James Bullion, Executive Director of Adult Social Services</b>
<b>Is this a key decision?</b>	<b>Yes</b>
<b>If this is a key decision, date added to the Forward Plan of Key Decisions.</b>	<b>N/A</b>

## **Introduction from Cabinet Member**

This paper has been brought forward at the earliest possible moment as a result of the judgment of the High Court in respect of Norfolk County Council (the Council) changing its charging policy to reflect the Government's national guidelines. The judgment was that the Council had inadvertently discriminated against a group of people that the Court identified as severely disabled. The judgment described the discrimination as "unintended and unforeseen". It came about as the result of the interaction of a number of different charging and income disregard rules relating to certain individuals. The Council's policy was based on what it believed to be best interpretation of the national guidance. The focus of the Council is to find a way which quickly addresses the Court's findings by firstly apologising and amending the current charging policy for severely disabled people now and, following further due diligence, finalising its approach.

## **Executive Summary**

The Council will amend its charging policy for severely disabled people to put in place an interim amendment to the charging policy for non-residential care which establishes the Minimum Income Guarantee at £165, and ceases to take into account any Enhanced Personal Independent Payment (PIP). This amendment will be backdated to July 2019 and financial adjustments to charging for those affected will be made as soon as practicable. People who have been overcharged will have their accounts adjusted to correct any overpayment. The Council apologises to people affected, and now proposes that a more detailed review of its charging policy is necessary where it relates to disabled and 'severely disabled' people identified through this judgment, including further dialogue with individuals and the community on living costs, and including updating its Equality Impact Assessment. A final report on the charging policy will be brought back to Cabinet in due course, which will finalise the amendment made by this interim decision.

## **Recommendations**

**Cabinet is recommended to consider and agree to:**

- a) make an initial amendment to the charging policy for non-residential care for people of working age, setting a minimum income guarantee of £165 per week, and using discretion to disregard the enhanced daily living allowance element of Personal Independence Payment**

- b) apologise to those affected and implement that amendment as soon as practicable and backdate it to July 2019
- c) initiate further detailed work on the impact of the charging policy as it relates to the group of severely disabled people identified by this judgment, and wider groups

## 1. Background and Purpose

- 1.1. In February 2019, Full Council decided to change its charging policy for non-residential care with effect from April 2019. This followed public consultation and consideration by the Adult Social Care Committee in January 2019.
- 1.2. The outcome of the decision was to introduce a two-year phased reduction in the Minimum Income Guarantee (MIG) rate for working age people, in line with government guidance, and to take into account the enhanced rate of the daily living component of the Personal Independent Payment.
- 1.3. The decision to make changes to the charging policy, for people in receipt of services that are working age, was made in the context of some very challenging demographic and financial pressures for Adult Social Services, not just here in Norfolk but across the country. Previously, the Council had maintained a Minimum Income Guarantee level above the government guidance, and above many other councils. In making the changes at that time, the policy was based on the best interpretation of the government guidance and was in line with policies from many other councils. (**Appendix 2** sets out the current charging policy approaches of our neighbouring county councils and a sample of other councils across the country).
- 1.4. In parallel, the Council has continued to make the case to Government for a sustainable funding solution for Adult Social Care and has levied the Adult Social Care council tax precept for the last four years.
- 1.5. The implementation of the changes was agreed to be phased, and due to the impact of Coronavirus an individual Cabinet member decision was taken in April 2020 to suspend the second phase of the MIG reduction. A further decision made in June 2020 maintained the suspension of the second phase for the foreseeable future.
- 1.6. In September 2020, an individual was given leave to challenge the Council's amendments to its scheme in the High Court on the grounds that the Council's decision to increase her charges in line with the scheme was discriminatory.
- 1.7. In December 2020, the case was heard, and the judge's decision was published, finding against the Council.
- 1.8. In summary, the judgment against the Council ruled that its charging policy discriminated – albeit inadvertently – against 'severely disabled' people contrary to Article 14 of the European Convention on Human Rights.
- 1.9. Mr Justice Griffiths identified a group of severely disabled people who, whilst they have higher benefits, would be very unlikely to be able to work and hence, not have earnings which would be disregarded.
- 1.10. A full copy of the judgment is available at the link below, and **Appendix 1** is a background briefing giving further information:  
<https://www.bailii.org/ew/cases/EWHC/Admin/2020/3436.html>

- 1.11. Given the findings, and the vulnerable nature of those affected, the judge's determination is accepted, and an appropriate amendment to the scheme needs to be made to comply with the judgment.
- 1.12. The Council responded straight away on the day that the judgment was announced, releasing a statement of its intentions and producing the briefing for Members at Appendix 1.

## **2. Proposals**

- 2.1. The Council is responsible for setting its own charging policy and did so whilst adhering to Government guidance on charging. The judge recognised that the changes were not introduced lightly and that additional mitigating measures were put in place. He observed that the discrimination had been unintended.
- 2.2. In remedying the discrimination, Adult Social Services is committed to continuing to support people to be independent and ensuring that those people who want to and can work have good access to opportunities for employment.
- 2.3. It is proposed to make an initial amendment to the charging policy so that it does not take into account any of the enhanced personal independence payment, and to maintain the MIG at the level agreed for the first phase – that is £165 a week - and maintain the suspension of the 2<sup>nd</sup> phase of the MIG for the foreseeable future and in line with the timeline below.
- 2.4. This will address the ruling which found that some very vulnerable people on higher rates of some welfare benefits were disadvantaged when compared with others who were able to access paid work.
- 2.5. Around 3200 people will be affected by the change which will be backdated to July 2019. Individuals will have their care accounts credited with the backdated payments, and this will be notified to them as soon as is practicable.
- 2.6. This will ensure that the finance team can carry out detailed work to review and correct individual charges with due diligence.
- 2.7. Given the complexity of the charging regime, the interdependency of different benefits, and the implications of this judgment, further work is needed to develop a final policy.
- 2.8. In parallel with this initial amendment, it is proposed to undertake more detailed work, looking particularly at the interplay between Employment Support Allowance, Personal Independent Payments and the Minimum Income Guarantee to reach a revised sustainable charging policy. This will benefit from engagement and consultation with people affected.

## **3. Impact of the Proposal**

- 3.1. The temporary amendment will immediately address the unintended disadvantage of the policy and will leave people currently affected by the enhanced PIP with more disposable income. It will not prevent them from earning money in the future.
- 3.2. The more detailed review will test and ensure the robustness of the Council's policy in the longer term, addressing any unintended consequences and ensuring there is a clear, sound rationale for the policy.

## **4. Evidence and Reasons for Decision**

- 4.1. In changing its charging policy in February 2019, the Council was bringing itself into alignment with many other councils. A driver for the change was to support more people into work – which many people said they wanted.
- 4.2. The judgment recognised that the Council had not taken the decision lightly, and that the discrimination had been inadvertent.
- 4.3. This approach to remedying the injustice can be put in to place swiftly, and back payment made as soon as is practicable. The longer-term review allows a more detailed, considered piece of work to be undertaken, with consultation, to ensure that the policy is equitable and sustainable in the longer term.

## **5. Alternative Options**

- 5.1. An alternative option would be to not implement changes straight away, however the Council's view is that this is not a helpful or sustainable position and would be detrimental to those affected.

## **6. Financial Implications**

- 6.1. The annual cost of implementing this temporary amendment will be in the region of £0.6m for the 2021/22 budget. The cost of revising backdated charges for the period July 2019 to March 2021 is estimated to be in the region of £1m.

## **7. Resource Implications**

- 7.1. **Staff:**
- 7.2. The associated work, as proposed here, of identifying and reimbursing can be done within the existing workforce.

## **8. Other Implications**

### **8.1. Legal Implications**

- 8.1.1 The decision not to appeal against this judgment has been made because it is felt to be more important to address the issues that have arisen for individuals.
- 8.1.2 The Council has taken legal advice on the High Court decision and the methods by which the decision might be implemented and compliance with the Courts order “amend and/or withdraw the Charging Policy to remove the discriminatory impact”. It is considered that by this two-stage route, the scheme can be amended, backdated reimbursement under the scheme will remove the discriminatory element and that further work into the future will ensure that the scheme operates fairly for all.

### **8.2. Human Rights implications**

- 8.2.1 The Council was found to have breached article 14 of the European Convention on Human Rights and has made a statement to this affect. By implementing the changes set out above the Council is working to ensure that the scheme does not discriminate against any group.

### **8.3. Equality Impact Assessment (EqIA) (this must be included)**

- 8.3.1 The proposal in this paper is an interim one following the court's decision. It has been developed in accordance with:
- a) The Public Sector Equality Duty to eliminate discrimination; advance equality of opportunity and foster good relations, alongside
  - b) The court judgment, which sets out in detail how the inadvertent and unintentional discrimination occurred, and the impact of this on those affected
- 8.3.2 This interim proposal enables a swift remedy to be made to these impacts.
- 8.3.3 The longer term review proposed in this report relates to a more detailed piece of work to be undertaken, informed by consultation with disabled people, to develop an equitable and sustainable longer term charging policy. As part of this process, an equality impact assessment will be developed for the new policy.
- 8.3.4 The new policy and equality impact assessment will be brought to Cabinet in due course for determination, in line with the timescale set out in this report.

## **9. Risk Implications/Assessment**

- 9.1. There is some risk of challenge to any scheme, however the approach of making initial amendments and then reviewing including in consultation with service users is seen to minimise risk.

## **10. Recommendations**

- 10.1. **Cabinet is recommended to consider and agree that Adult Social Services:**
- a) **make an initial amendment to the charging policy for non-residential care for people of working age, setting a minimum income guarantee of £165 per week, and using discretion to disregard the enhanced daily living allowance element of Personal Independence Payment**
  - b) **apologise to those affected and implement that amendment as soon as practicable and to backdate to July 2019**
  - c) **initiate further detailed work on the charging policy as it relates to the group of severely disabled people identified by this judgment, and wider groups**

## **11. Background Papers**

- 11.1. [Non-residential care charging policy](#)

### **Officer Contact**

If you have any questions about matters contained in this paper, please get in touch with:

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**Content of an email for Councillors from the Cabinet Member for Adult Social Care, Public Health and Prevention, sent December 18th 2020**

Dear Member

You may remember that earlier in the year it was announced that an individual using Adult Social Care had launched a Judicial Review into the Council's decision to implement a new policy on the level of the Minimum Income Guarantee (MIG), and to change the amount of the Personal Independence Payment (PIP) that is included in someone's financial assessment.

Today the High Court has given its verdict. It has agreed with the Petitioner and found that Norfolk County Council "discriminated in an unintended and unforeseen way" and by doing so it breached article 14 and article 1 of the European Convention on Human Rights.

Firstly, I would like to announce that we will not be appealing the Court's decision and we will be contacting all relevant Service Users to reassure them of the outcome and explain how they are affected.

For the avoidance of doubt, any overpayment made by a Service User as a result of the judgment will be refunded in full.

I intend to take a proposal to the next Cabinet Committee meeting to rectify the breach and implement the Court's decision and, most importantly, I would like to apologise to everyone affected on behalf of the Council.

The Council's approach was similar to that of many other Local Authorities across the country so this decision may have far reaching implications.

### **Frequently Asked Questions's**

#### **Why did the Council discriminate against these vulnerable people?**

The Council did not intend to discriminate. Its intention – which the judgment acknowledges – was to amend its charging policy in line with the National Guidance, and to bring it in line with other councils. It considered this carefully and conscientiously, seeking to both phase in and mitigate the impact on vulnerable people and their income. The judge's ruling is that this approach was not enough to solve an unintended and unforeseen discrimination – that some very vulnerable people on higher rates of some welfare benefits will need to pay more. This decision has the potential to affect the national approach.

#### **Will you apologise?**

Of course. We will apologise and work with people who use services to explain the implications and will seek to bring revised arrangements as soon as possible.

#### **Who is affected?**

This judgment affects about 3200 people who receive enhanced Personal Independence Payments out of the total 4320 who are affected by the Minimum Income guarantee.

#### **Do you accept the Council was at fault?**

The Council is responsible for setting its own charging policy, and to interpret the relevant guidance. It has tried to do this accurately, based on consultation and advice. The judgment is clear that the discrimination in the policy was inadvertent, unforeseen and unplanned. It is, however, the Council's responsibility to change its approach in line with the judgment.

### **When are you going to address this?**

The Council will address this as soon as possible, bringing to the next Cabinet Meeting a set of proposals which will seek to remedy the discrimination.

### **What are you going to do to sort it out?**

It is too early to be precise about exactly what is necessary because the Council needs to be sure that any action meets the court's expectations and further meetings are necessary to achieve this.

### **Where can I see the judgment?**

The full judgment will be published on the High Court website here: [Judgments | Courts and Tribunals Judiciary](#)

### **Are you going to appeal?**

No. The Council is, however, concerned about several aspects of the judgment and its implications for the national guidance and for people and councils in a similar position. But the Council has listened to the court and believes it is its responsibility to sort out the issue here in Norfolk.

### **Will you pay back the money people have already paid?**

Yes. The Council will deal with the individual implications for the people involved in this case. Its proposals will outline the detail of how it will be done, the guiding principle is to be fair.

### **Does this judgment affect other Councils?**

Potentially, yes. It has implications for the national charging rules and National Guidance as it comments on them, and finds some aspects, when implemented in the way the Council has, to have an unforeseen discriminatory affect. Therefore the judgment may affect other councils.

### **What is it going to cost?**

The Councils initial assessment is at least £600k per year. It is difficult to be more precise until the Council has been advised that what it proposes meets the judge's requirements.

### **You have come in for a lot of criticism for this policy. Why did it take a court case to make you change your mind?**

The judge recognised that the changes were not introduced lightly and that additional mitigating measures were put in place. He observed that the discrimination had been unintended. A key part of what it was trying to achieve was to give people independence through better opportunities to gain work or work experience. It also felt that it was not doing anything unique, using an approach that was in line with many other



councils. However, the judgment has set out inadvertent discrimination which the Council accepts and wants to put right.

With my best wishes

Bill

BILL BORRETT  
Cabinet Member for Adult Social Care  
Norfolk County Council

## Other Local Authority Charging Details – position as at 1 April 2020

<b>Council</b>	<b>MIG (working age adults)</b>	<b>PIP (enhanced) within financial assessment</b>	<b>Comments</b>
Norfolk	£165	Norfolk includes £9 of the enhanced PIP in its financial assessment. This means that £19.95 is disregarded, i.e. service users charged £19.95 less than those charged at full rate.	
<b>Eastern Region County Councils</b>			
Cambridgeshire	As per government guidelines: £151.45 (25-pension)/£132.45 (18-24)	Full rate included  (This means that the full £28.95 is included within the financial assessment, i.e. including the full amount within the charge.)	
Peterborough	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	Full rate included	
Essex	As per government guidelines: £151.45 (25-pension)/£132.45 (18-24)	Full rate included	
Hertfordshire	As per government guidelines: £151.45 (25-pension)/£132.45 (18-24)	Full rate included	

<b>Council</b>	<b>MIG (working age adults)</b>	<b>PIP (enhanced) within financial assessment</b>	<b>Comments</b>
Suffolk	£151.45	Full rate included	£25 standard DRE
<b>Other Authorities</b>			
Bedford Unitary	Not provided	Full rate included	
Central Beds Unitary	As per government guidelines: £151.45 (25-pension)/£132.45 (18-24)	Full rate included	
Luton	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	Enhanced PIP not included unless night care is part of the care and support plan	
Southend	£131.75 (without enhanced disability premium)	Not provided	
Brighton	£189	Full rate included	Enhanced DRE
Bury	£151.45	Full rate included	
Redcar and Cleveland	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	Full rate included	Enhanced PIP for Night Time Care only
Camden	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	Full rate included	

<b>Council</b>	<b>MIG (working age adults)</b>	<b>PIP (enhanced) within financial assessment</b>	<b>Comments</b>
Reading	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	Full rate included	
Knowsley	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	Full rate included	Enhanced PIP for Night Time Care only
Warrington	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	Full rate to be included	From April 2020
Torbay & South Devon	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	Not provided	
Warwickshire	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)		
Stoke	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	£28.95 disregarded  (Which means they take none of the additional enhanced PIP into account, thereby leaving the full amount with the service user.)	
Sheffield	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	Not provided	

Council	MIG (working age adults)	PIP (enhanced) within financial assessment	Comments
Gloucestershire	As per Government guidelines £151.45 (25-Pension)/£132.45 (18-24)	Full rate included	