

Explanatory Memorandum to the Care and Support (Deferred Payment) (Wales) Regulations 2015 made under Part 5 of the Social Services and Well-being (Wales) Act 2014

This Explanatory Memorandum has been prepared by the Health and Social Services Group and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Care and Support (Deferred Payment) (Wales) Regulations 2015 made under Part 5 of the Social Services and Well-being (Wales) Act 2014 in relation to deferring payment for care and support in a care home. I am satisfied that the benefits outweigh any costs.

Mark Drakeford
Minister for Health and Social Services
27 October 2015

Part 1 – OVERVIEW

1. Description

The Social Services and Well-being (Wales) Act 2014 (“the Act”) brings together local authorities’ duties and functions in relation to improving the well-being of people who need care and support, and carers who need support, into a single Act. The Act provides the statutory framework to deliver the Welsh Government’s commitment to focus on well-being, rights and responsibilities.

The existing financial assessment and charging statutory framework for social care and support is derived from separate pieces of legislation that originally stem from the National Assistance Act 1948, as regards charging for residential accommodation with care, and the Social Care Charges (Wales) Measure 2010, in respect of charging for non-residential, community based care and support. As such the framework is made up of a number of separate pieces of legislation, some of which have existed for a number of years so that they have become fragmented and out of date.

The current statutory framework does, however, provides a good basis for local authorities’ charging for the provision or arrangement of care and support, ensuring that only those who can afford to pay for their care and support are required to do so. We see no merit in moving away from this framework and propose that the framework for local authority financial assessment and charging under the Act is akin to the existing framework. That said, we propose to take the opportunity to revise the statutory framework where we consider it appropriate to do.

The Care and Support (Deferred Payment) (Wales) Regulations 2015 (“the Regulations”) seek to do this by continuing the ability of a person entering residential care, or in residential care, who has a property deemed as eligible capital for the purposes of a financial assessment for a charge for this care, to enter into an agreement to delay its sale where such a sale is required in order to meet a charge imposed. This is where local authorities exercise their discretion under section 59 of the Act to impose a charge for that residential care and the person does not have sufficient income to meet this charge, or capital in addition to their property above the “capital limit” (as set by the Care and Support (Charging) (Wales) Regulations 2015).

Where a person enters into a “deferred payment agreement” the Regulations enable a local authority to meet the full cost of their residential care for any time up to the termination of their stay, while placing a charge on the property as security against this deferment. The cost paid during the period of the person’s stay in residential care is then repaid, or met from the proceeds of the sale of the property, at a later date. In order to make such agreements cost neutral to local authorities the Regulations enable a local authority to apply reasonable administration charges, and a low level of interest, on the accumulating deferment during the duration of the agreement.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

No specific matters have been identified.

3. Legislative background

The powers enabling the making of the Regulations in relation to deferred payment agreements are contained in Part 5 (section 68) of the Act.

These Regulations are subject to the negative procedure. They will come into force on 6 April 2016.

4. Purpose & intended effect of the legislation

The overall purpose of the Regulations is to enable a person, assessed as in need of care and support in a care home, who has a property deemed as eligible capital for the purposes of a financial assessment for a charge for this care, to exercise choice over the sale of this property where that is required to meet this charge. This could be to delay its sale until the end of their stay in residential care, or to defer payment of this charge in order to get their financial affairs in order or to allow sufficient time in order to secure a more advantageous sale price for the property. Provisions under the Regulations provide local authorities with a structure to enable them to put in place and operate deferred payment arrangements to effect this. As such the Regulations impose the following requirements on a local authority:

- regulation 3 stipulates the circumstances in which local authority must enter into a deferred payment arrangement with a person subject to them meeting certain conditions (eg that the person's care and support needs are being met by the provision of residential care and that the person has a property which is being taken into account for the purposes of calculating a charge for this);
- regulation 4 stipulates that a local authority, in entering into a deferred payment agreement, must obtain adequate security for the payment of any amount deferred, including any administration charges or interest amount which is part of this (ie by gaining the consent of the person and any other person with an interest in the property to placing a land charge on this which takes a priority ranking over any other interest on the property);
- regulation 5 makes provision about the amount which can be deferred and how this should be calculated (ie the full amount of the charge for the residential care and any administration charges or interest that is charged, or such lesser amount as the person requests, or the local authority agrees);
- regulation 6 sets out that a local authority is permitted to stop or suspend deferring in any week an amount equal to a person assessed income which exceeds the appropriate minimum guarantee applicable in the adult's case as defined by section 2(3) of the State Pension Credit Act 2002 (ie this is to prevent a situation where a person's income may increase to a point where they could be contributing towards the cost of their residential care);
- regulations 7 and 8 establish the timing for repayment of a deferred amount, being either at the time of the sale or disposal of the person's property, after 90 days following the death of the person, or such shorter period as the person requests;
- regulations 9 and 10 allow local authorities to charge compound interest on the amount deferred and any costs associated with this, and set the level of this, and allow a local authority to charge reasonable administration costs for setting up and operating an agreement, and set the requirements applicable to these (eg interest cannot exceed 0.15% above the weighted average interest on conventional gilts for

the period set by the Office for Budget Responsibility under section 4(3) of the Budget Responsibility and National Audit Act 2011).

5. Consultation

A 12 week public consultation on a draft of these Regulations was held between 8 May and 31 July 2015. In total 61 substantive written responses were received from a wide range of individuals, representative groups, local authority officers and professional organisations. Overall these Regulations were well received with respondents generally supportive of the proposed continuation of local authorities' ability to offer a deferred payment agreement to those people eligible for such agreements. Where responses have resulted in material changes to the Regulations, these have been reflected in the final version of the Regulations being laid.

A summary report of the consultation responses is available on the Welsh Government website at:

<http://gov.wales/consultations/healthsocialcare/part5/?status=closed&lang=en>

PART 2 – REGULATORY IMPACT ASSESSMENT

Options and Benefits

This Regulatory Impact Assessment considers the following options and their benefits:

- “do nothing” and not make any regulations (option 1);
- make regulations but only to implement the same deferred payment agreement arrangements as those that currently exist (option 2); and
- make the Regulations to implement deferred payment agreement arrangements but with appropriate revisions (option 3).

Option 1: Do Nothing

This option involves no regulations in relation to deferred payment agreements being made under the relevant powers under Part 5 of the Act referred to earlier. As a result no requirements are placed on local authorities in this respect.

This would result in local authorities having no ability to enable a person to delay paying for their residential care. Instead where a person had a property which was taken into account for the purposes of a local authority imposing a charge for such care, and they had insufficient other financial means to meet this, they would be required to sell their property immediately upon entering residential care with no choice or flexibility over the timing of this.

Option 2 – make the Regulations to implement the existing deferred payment agreement arrangements

This option would allow local authorities to offer and operate deferred payment agreements to those assessed as in need of residential care and who had a property taken into account for determining a charge for that care. It would maintain, therefore, such a person's ability to delay the sale of a property where required, until a more appropriate time for them.

This option would, however, allow local authorities discretion as to exactly what circumstances to offer such agreements so that not all those who met the eligibility criteria would necessarily be able to receive an agreement. In addition, this option would not provide local authorities with the ability to apply a low level of interest on such agreements so as to make entering into such agreements cost neutral for authorities.

Option 3 – make the Regulations to introduce deferred payment agreements that include appropriate revisions

Like option 2 this option would allow local authorities to offer and operate deferred payment agreements to those assessed as in need of residential care and who had a property taken into account for determining a charge for that care. It would maintain, therefore, such a person's ability to delay the sale of a property where required, until a more appropriate time for them.

However, unlike option 2 it would require local authorities to offer and enter into a deferred payment agreement where a person, whose needs were being met with the provision of residential care, met certain eligibility criteria. Where a person met this eligibility criteria local authorities would not have discretion as to whether to offer the choice of entering into such an agreement. This option would also for the first time provide local authorities with the ability to apply a low level of interest on such agreements, or on charges made for associated administrative costs, so as to make entering into such agreements cost neutral for authorities.

Costs

Option 1 – do nothing

This option requires those entering or in residential care who have a property taken into account for the purposes of imposing a charge for this, to sell this immediately if they have insufficient other financial means to meet this charge. Where as this has no financial implications for local authorities, it does result in those in care having to sell their properties at a time when the property may not secure its best market value with the potential financial loss for the person this brings.

Option 2 – make the Regulations to implement the existing deferred payment agreement arrangements

This option maintains the status quo as regards the provision of deferred payment agreements so that it has no additional cost for local authorities beyond costs currently incurred. It does, however, due to authorities' discretion in the provision of agreements as outlined above result in not all those who might otherwise be eligible for an agreement being able to secure one with the potential financial loss for those individuals resulting from an enforced sale of their property.

Option 3 – make the Regulations to introduce deferred payment agreements that include appropriate revisions

This option continues the ability of a person with property entering or in residential care to enter into a deferred payment agreement should they wish but strengthens the eligibility criteria for these. Take up of agreements has been relatively low to date (around 150 new agreements in total a year) due to behavioural factors outside of the present arrangements (such as families not wishing to accrue a debt against the value of a property or where a property is jointly owned those remaining in the property not

agreeing to a land charge being placed upon it). As a result it is not envisaged that this option would lead greatly to an increase in the number of agreements given these behavioural factors will remain. Where there are new agreements the ability of a local authority to charge both reasonable administration costs for setting up and operating an agreement, as well as for the first time a low level of interest on the amount deferred, will ensure the operation of such agreements is cost neutral to authorities. While the ability to charge these amounts may seem to have a cost implication for those who take up these agreements it must be remembered that the value of any property, which is the subject of an agreement, is likely to increase in value over the period of the agreement so as to nullify any such charges made for having an agreement in place.

Consultation

A 12 week public consultation on a draft of these Regulations was held between 8 May and 31 July 2015. The documents can be found at:

<http://gov.wales/consultations/healthsocialcare/part5/?status=closed&lang=en>

Competition Assessment

Competition Filter Test	
Question	Answer: yes/no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulations do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisations?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

Post implementation review

The Act contains provisions to allow for the Welsh Ministers to monitor functions of it carried out by local authorities and other bodies. Ministers may require these bodies to report on their duties in implementing these Regulations.

The Welsh Government will continue to monitor the impact of the Regulations on areas such as the Welsh language, the UN Convention on the Rights of the Child and Older People and Equality.