

Explanatory Memorandum to the Proposed Social Care Charges (Wales) Measure

This Explanatory Memorandum has been prepared by the Department for Health and Social Services of the Welsh Assembly Government and is laid before the National Assembly for Wales.

Member's Declaration

In my view the provisions of the Proposed Social Care Charges (Wales) Measure, introduced by me on the 29 June 2009, would be within the legislative competence of the National Assembly for Wales.

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Deputy Minister for Social Services
Assembly Member in charge of the Proposed Measure

12 January 2010

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ANNEX 1 – Explanatory Notes

1. Description

1.1 The proposed Social Care Charges (Wales) Measure (“the Measure”) is primarily enabling in scope. It will allow Welsh Ministers to set out, in subordinate legislation and in guidance, the detail of a fairer and more consistent framework for local authorities to adopt when charging individual service users for non-residential social care services.

1.2 This will mean that the wide inconsistencies that currently exist in local authority charging policies will be significantly reduced. It will provide a mechanism for establishing a system that is fair to all client groups, is simple to understand, cost effective to administer and will reduce the charging burden on service users.

1.3 The proposed Measure will enact a free standing provision governing charging for non-residential social services in Wales. It will amend the existing primary legislation governing charging so that in relation to Wales it will apply only to services provided in the form of residential care. In relation to England the existing legislation will remain as currently enacted.

2. Legislative background

2.1 The power to make this Measure is contained in section 93 of the Government of Wales Act 2006 (c.32) (“GOWA 2006”) and the National Assembly for Wales’ competence to legislate on this matter is found in matter 15.1 in Field 15 of Schedule 5 to the Act. Matter 15.1 was originally inserted by the National Assembly for Wales (Legislative Competence) (Social Welfare) Order of 9 July 2008 (SI 2008/1785) (“the 2008 Order”). In relation to direct payments the 2008 Order allowed for provision to be made in an Assembly Measure governing payments in respect of the service user or persons looking after them. However, subsequently, the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 extended the National Assembly’s competence in relation to direct payments. The 2009 Order amended the National Assembly’s competence to extend to payments in respect of service users or any other person for the purposes of securing the social care services needed. Together these two Orders permit the National Assembly for Wales to make provision about the following:

Matter 15.1

“Charges levied by local authorities for social care services provided or secured by them and payments in respect of individuals with needs relating to their well-being so that they, or any other person may secure social care services to meet those needs”.

This matter does not include any of the following:-

- (a) child support;
- (b) tax credits;
- (c) child benefit and guardian’s allowance;
- (d) social security;
- (e) independent living funds;
- (f) motability.

2.2 The term “social care services” was defined in the 2008 Order for the purposes of Field 15 as:-

“any of the following provided in connection with the well-being of any person: non-residential care services; advice, counselling or advocacy services; or any other assistance”.

2.3 The term “well-being” was also defined in the 2008 Order:

“well-being”, in relation to individuals, means well-being so far as relating to any of the following:-

- (a) physical and mental health and emotional well-being;*
- (b) protection from harm and neglect;*
- (c) education, training and recreation;*
- (d) the contribution made by them to society;*
- (e) social and economic well-being;*
- (f) securing their rights.”*

2.4 The National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (SI 2008/3132), which was made on 10 December 2008, subsequently amended the definition of “well-being” so as to remove the reference to ‘physical and mental’ in (a) above. It also amended the definition of “social care services” so as to include residential care services. In order to counteract the widening of this definition SI 2008/3132 also amended matter 15.1 to exclude charges and payments for residential care.

2.5 The primary legislation setting out the statutory provisions governing charging for social care services is:

- Section 17 of the Health and Social Services and Social Security Adjudications Act (1983) (“HASSASSA”) for adult services; and
- Section 29 of the Children Act 1989 for children’s services.

2.6 Under section 17 of HASSASSA local authorities have a discretionary power to recover charges they consider reasonable from adult recipients of certain non-residential social care services. The only proviso to this is that an authority should not require a service user to pay more for services than it appears to the local authority reasonably practical for the service user to pay having regard to his/her finances.

2.7 While the scope of matter 15.1 would allow this Measure to cover charging for children’s services this is not our current intention and no powers are being sought in the Measure in relation to these services.

3. Purpose & intended effect of the legislation

Background

3.1 Home care and other non-residential social care services are provided by local authorities under a variety of legislation. The power to charge for services provided under the legislation is found in section 17 of the Health and Social Services and Social Security Adjudications Act 1983 (HASSASSA). This enables a local authority providing services to recover such charge (if any) as it considers reasonable. However, it also provides that if the service user satisfies the authority that he or she has insufficient means to pay the sum they would otherwise be charged, the authority cannot require the service user to pay more for the service than it appears to them to be “reasonably practical” for the service user to pay having regard to their finances. Section 17 does not require a means test to be applied to every person charged.

3.2 In practice, section 17, gives local authorities a wide discretion as to whether to charge and how to set their charges. Surveys and research have shown that service users, carers and their representatives are concerned that charges are often set too high and that differing amounts can be charged by different councils for similar services. Inconsistency in the levels of local authority charging was highlighted in recent research. For example, this revealed that weekly maximum charges for home care services across Wales ranged from £16.20 in one authority to £200 in another and that 7 authorities had no ceiling on charges.

3.3 The Welsh Ministers can provide statutory guidance to local authorities on the exercise of their charging arrangements using their powers under section 7 of the Local Authorities Social Services Act 1970. They can also provide good practice guidance regarding charging. In 2002, “Fairer Charging” guidance was issued to local authorities in an attempt to address some of the issues concerning the wide variation in charging policies across Wales. Only part of this guidance was issued under section 7 of the 1970 Act and it remains largely good practice. The main element which is statutory across Wales ensures that service users are left with a guaranteed level of income after charging has been applied.

3.4 While section 7 of the 1970 Act enables the Welsh Ministers to issue statutory guidance this power is not unlimited. If the Welsh Ministers were to issue further guidance under section 7 in relation to charging for non-residential social care services they would need to be sure that it was not so prescriptive as to fetter the discretion given to local authorities in section 17 of HASSASSA. The guidance could specify how local authorities should set about exercising their discretion to charge but it could not make it obligatory for local authorities to exercise their discretion in a particular way, for example, by setting maximum charges for certain users or services, or by preventing local authorities from charging certain users or for certain services.

3.5 The Assembly Government's 'One Wales' document therefore set out a commitment to "seek the powers and then bring forward legislation to create a more level playing field in relation to charges for domiciliary care services". Legislative competence in this area was sought so as to provide the National Assembly for Wales with powers to legislate by way of an Assembly Measure in order to address these issues.

Intended Effect of the Measure

Charging framework

3.5 The overall intention of the proposed Measure is to provide for the introduction of a new regime for charging which will ensure that local authorities across Wales adopt a more consistent approach to charging service users for non-residential social care services. The Welsh Assembly Government intends to pursue an incremental approach to the introduction of greater consistency with an initial package of improvements being followed up by further improvements over time.

3.6 The proposed Measure would establish a new legislative framework which will allow for detailed provisions to be set out in regulations and statutory guidance to be made under the Measure. This will provide maximum flexibility and allow for a range of options to be pursued by the current and future Welsh Assembly Governments without the need for a further Measure.

3.7 The proposed Measure will provide Welsh Ministers with the power to make detailed provision in regulations about the following:

- a) the types of services for which charges may or may not be made (e.g. home care, day care centres, transport, meals, laundry, rehabilitation services);
- b) the client groups that may or may not be charged (e.g. those in receipt of certain benefits, carers, those over a certain age threshold);
- c) the financial assessment process (including what may and may not be taken into account and the minimum level of income that service users must be left with after charging);
- d) the maximum charge that may be made for an individual service or for any package of services to an individual;
- e) the exemption from charging of certain prescribed services or categories of service user;
- f) reviews of charging decisions taken by local authorities

3.8 Under the proposed Measure local authorities will continue to be able to set such charges for non-residential social care services as they consider reasonable. However, this general discretion will be made subject to specific limitations to be set out in future subordinate legislation. Local authorities will continue to be able to decide not to charge at all or to charge less than what would be reasonable under the new regime.

Provision of information

3.9 The proposed Measure places an obligation on local authorities to provide information about charges. It requires a local authority to provide existing and prospective service users with information about the services for which charges are made, their standard charges and means testing. This information must be provided free of charge and in a variety of accessible formats. Where a local authority decides to impose a charge the proposed Measure also requires the authority to provide the person to be charged with information about the proposed charge and the procedure for reviewing charges. This information must also be provided free of charge. This will introduce a clear and consistent approach in relation to the information users receive about their charges and the way in which requests to review them will be handled.

Direct payments

3.10 Section 6A of the Measure provides for the making of regulations governing direct payments. It allows for regulations which include provisions about direct payments that corresponding to those provisions made in or under the Measure about charges for those in receipt of direct services. This will enable the Welsh Ministers to ensure parity between those individuals who receive direct payments and those who receive services direct from their local authority.

Territorial Extent

3.11 The Measure applies only in relation to Wales.

Commencement

3.12 Sections 10 and 12 will come into force two months following approval of the Measure by Her Majesty in Council. The remaining provisions will be brought into force on a date specified in an order made by the Welsh Ministers.

4. Consultation

4.1 To aid the development of the proposed Measure, the Deputy Minister for Social Services established a stakeholder Task and Finish Group to advise her on possible options for achieving greater consistency in charging and on the implications of these.

4.2 The terms of reference for the Group were:

To provide advice to the Welsh Assembly Government on the development of a revised framework for charging for non-residential social care that provides fairer and more consistent outcomes for users and their carers to be introduced through an Assembly Measure. In doing so the Group will:

- consider specifications, methodology and findings for a research exercise to provide underpinning evidence and data to assess the impact of the proposed legislation on service users, their carers, providers and on local government;
- consider the options for introducing an Assembly Measure to create a fairer charging framework for non-residential social care. To comment on the merits of each of the options identified in terms of:
 - its benefits to service users;
 - the type of service users who would benefit from it;
 - the method and practicality of its implementation;
 - its acceptability to all stakeholders (i.e. users, providers and commissioners);
- consider the options for enhancing the treatment of disability related income and expenditure and other issues in the Assembly Measure and subsequent statutory guidance to local authorities. To comment on the merits of each of the options and priorities identified in terms of:
 - its benefits to service users;
 - the type of service users who would benefit from it;
 - the method and practicality of its implementation;
 - its acceptability to all stakeholders (ie users, providers and commissioners):
- make a report of its findings.

4.3 The group included representatives of service users, the Coalition on Charging Cymru, the National Partnership Forum for Older People, care service providers, local authorities and the Welsh Local Government Association (WLGA) as well as relevant Assembly Government policy and legal officials. The group also had representation from an official from the

Equality and Human Rights Commission (EHCR) to assess the policy proposals against equality legislation.

4.4 In accordance with the terms of reference and in order to help inform the Group's deliberations research was undertaken by LE Wales; an economic and policy consultancy based in Wales who are part of the Indecon-London Economics Consulting Group. LE Wales produced two reports. The first is a comprehensive "Baseline Assessment Report" of the current overall picture of charging by local authorities for non-residential social care services in Wales. It provides conclusive evidence that wide inconsistencies exist in the services charged for; in the range of charges service users have to pay; in the financial assessment; in the information provided about the charging process; and, in the way appeals about charges set are dealt with.

4.5 The second and "Main Report" which was produced in collaboration with Group members identifies 13 potential policy options and assesses the implications of each. It focuses on introducing changes in relation to four main areas of the charging process:

- financial assessments;
- types of service users who are charged;
- services which are charged for;
- charge levels.

4.6 In considering these options LE Wales, in liaison with the Task & Finish Group, put together a number of different packages of options that could be implemented to achieve more consistency in charging. Each package contained one or more of the 13 options identified. Each package was assessed against an agreed set of "success criteria" and given an overall ranking. This second report also outlines some initial external service user views on the issue of consistency and on charging for non-residential social care.

4.7 The Group met on eight occasions between June and December 2008 and its report along with reports produced by LE Wales reports are available on the Welsh Assembly Government website at:

<http://wales.gov.uk/topics/health/publications/socialcare/reports/charging/?lang=en>

A range of implications for implementation of new legislation were identified by the Group, including potential increased demand for services from individuals who currently did not take these up due to their cost and the need to ensure that service users were not worse off as a result of any changes made. While the Group was not asked to make recommendations to Welsh Ministers on the way forward, the service users and their representatives on the Group commended an approach of setting a single threshold to be liable for charges. This suggested threshold was that a user held more than a specified level of savings, which it was proposed was set at £50,000. If a user

had savings above this amount they would then be liable for a flat rate charge for the services they received of £15 per week.

4.8 The proposed Measure puts in place a framework which will enable Welsh Ministers, if they so wish, to implement any or all of the options and packages identified by the Group and LE Wales over time. It also reflects the comments of the Group about the provision of information and charge review procedures. The options put forward by the group have fed into the development of the proposed Measure and into an initial package of planned improvements.

4.9 The earliest that implementation of changes stemming from approval of the proposed Measure and any subsequent regulations could commence would be April 2011. It is acknowledged that there will be considerable interest in the Welsh Ministers' immediate intentions for reform under the proposed Measure and, for this reason, a statement of policy intentions will be produced to accompany this Explanatory Memorandum setting out the detail of a 'First Steps Package of Improvements'.

5. Power to make subordinate legislation

5.1 The proposed Measure contains enabling powers for Welsh Ministers to implement and set out the detail of revised charging arrangements in regulations, orders and statutory guidance.

5.2 The proposed Measure also provides that an order made under the Measure may, make such provision as the Welsh Ministers consider necessary or expedient for the purposes of the Measure or in consequence of, or to give effect to, any provision of the Measure. Such an order may make amendments to any Act of Parliament, Assembly Measure or subordinate legislation but where an Act of Parliament or an Assembly Measure is amended the order must not be made unless a draft is laid before, and approved by resolution of, the National Assembly (i.e. the order is subject to the affirmative procedure).

5.3 In each of the cases detailed below the rationale for the application of subordinate legislation rests upon the need to avoid inappropriate detail and to allow for flexibility, within the parameters set out in the proposed Measure. Detailed provisions governing charging (such as how certain income and capital should be treated when determining a person's means) will be dealt with in regulations to be made under the Measure. This is consistent with other charging regimes and is considered to be the most appropriate way forward as such provisions will need to be reviewed regularly.

5.4 Given the nature of the proposed subordinate legislation, being concerned primarily with the financial and administrative arrangements governing the operation of the revised charging regime, the legislation, with a few exceptions, will be subject to the **negative procedure**. The main exception is that if the subordinate legislation seeks to amend an Act of Parliament or Assembly Measure it will be subject to the **affirmative procedure**.

Section 2 – Maximum charges

5.5 Section 2(2) gives the Welsh Ministers the power to make regulations controlling and limiting the determination by local authorities of a reasonable charge for a chargeable service. A chargeable service is defined in section 7 as those services falling within subsection 7(2). (The list of services in section 7(2) may be amended by order under section 7(3). Such an order may add a service to, or amend or remove the description of a service included in, section 7(2).)

5.6 The section 2 regulation making power will enable the Welsh Ministers to set a maximum that a local authority may charge for a particular chargeable service or for any combination of chargeable services. This could be used to introduce regulations establishing a maximum unit charge or a maximum

hourly, weekly or monthly charge for a chargeable service or combination of chargeable services.

5.7 This power will also enable maximum charge levels to be reviewed periodically in the future or for additional charge levels to be set without the need for amendment of the Measure itself.

Section 3 – Persons and services in respect of which charges must not be imposed

5.8 Section 3(1) provides for Welsh Ministers to make regulations excluding certain categories of persons or services from charging, for example, because they are in receipt of a particular benefit or because they are of a certain age.

Section 4A – Invitation to request means assessment

5.9 Section 4A(1) places a duty on local authorities to invite a service user or prospective service user to request a means assessment when it offers a chargeable service or as soon as reasonably practicable thereafter. It also places an obligation on a local authority where a person is being provided with a chargeable service to issue an invite in such cases as may be specified in regulations. Section 4A(4) provides for Welsh Ministers to make regulations governing the form and content of such invitations and the manner in which they are to be made.

Section 4B – Duty to carry out a means assessment

5.10 Under section 4B(1) a duty is placed on local authorities to carry out a means assessment of a service user or prospective service user where an assessment is requested and where all the other conditions in section 4C are met. Sections 4B(3) and 4B(4) give the Welsh Ministers regulation making powers to specify how means assessments must be carried out. Sections 4B(2) and 4B(5) dis-apply the duty to carry out a means assessment in such cases as may be specified in regulations made under subsection (2) and in the circumstances set out in subsection (5) unless regulations made under that subsection make provision to the contrary.

Section 4C – Conditions giving rise to the duty to carry out a means assessment

5.11 Sections 4C(1) to (4) set out the conditions which give rise to a local authority's duty to carry out a means assessment. Section 4C(5) provides for the Welsh Ministers to make regulations as to who may make the request for a means assessment or provide the financial information required for that purpose. This would enable Welsh Ministers to make regulations providing for a third party to request the means assessment on behalf of a service user, where appropriate.

Section 4D – Determinations as to ability to pay

5.12 Section 4D(1) places a duty on local authorities to determine, in the light of any means assessment carried out, whether it is reasonably practicable for the service user to pay the standard charge and if not what (if any) charge it would be reasonable practicable for them to pay. Section 4D(4) defines the term “standard charge” as referred to in subsection (1) and section 5 as the amount which a person would be required to pay for a service if no determination under the Measure as to the person’s ability to pay had effect.

5.13 Section 4D(2) requires a local authority to discharge its duty under section 4D(1) in accordance with provision made by the Welsh Ministers in regulations. Section 4D(3) provides that regulations under subsection (2) may include provisions specifying amounts which local authorities must disregard when assessing a service user’s means and amounts below which a service user’s income must not be reduced after payment of a charge.

Section 4E – Effect of determinations as to ability to pay

5.14 Section 4E(1) obliges a local authority which has made a determination under section 4D or 4F to give effect to that determination when imposing a charge. Subject to section 4E(3) such determination shall have effect from such date as the local authority considers reasonable. Section 4E(3) enables the Welsh Ministers to make regulations as to the date from which a local authority’s determination is to have effect.

Section 4F – Replacement by authority of determinations as to ability to pay

5.15 Section 4F(1) enables a local authority to replace a determination with a new determination where specified conditions are met. Section 4F(4)(d) provides Welsh Ministers with the power to make regulations setting out further conditions that would allow for the replacement of a determination.

Section 5 – Provision of information about charges

5.16 Sections 5(1) to 5(3) place a duty on a local authority to provide service users and prospective service users with general information about its charging policy in a range of accessible formats. Section 5(4) requires local authorities to provide certain specified information to those who receive, or may receive, a chargeable service for which a charge will be made. The information to be provided is listed in subsection 5(4) and subsection (e) gives the Welsh Ministers a regulation making power to add to this list. This information must be provided in writing and such other accessible format as the person concerned reasonably requests.

Section 6 – Reviews of charging decisions

5.17 Section 6(1) provides for the Welsh Ministers to make regulations for and in connection with the review of charging decisions taken by local authorities. Subsection 2 sets out examples of the types of provision that may be included in regulations.

Section 6A – Direct payments

5.18 Section 6A provides that the Welsh Ministers may make regulations about direct payments which make provision corresponding to those which are made, or may be made, under sections 1 to 6 of this Measure. This section must be read in conjunction with section 57 of the Health and Social Care Act 2001 and the regulation making powers contained in that section. Section 6A(4) gives examples of the type of provision that may be made under such regulations.

Section 7 – Chargeable services

15.19 Section 7(2) sets out the services to which this Measure applies (these services are referred to as the chargeable services). Section 7(3) enables the Welsh Ministers by order to add a service to, or to amend or remove the description of a service which is for the time being included in, section 7(2). Section 10(7) provides that such an order will be subject to the affirmative procedure.

Section 10 – Orders and Regulations

5.20 This section makes general provision about orders and regulations made under the Measure.

5.21 Subsection (1) provides that where the Welsh Ministers are empowered by the Measure to make orders or regulations, these are to be made by statutory instrument. Subsection (2) provides that such orders or regulations may make different provision for different purposes and may include incidental, supplementary, consequential, transitory or transitional or saving provisions.

5.22 Subsection (3) confers on the Welsh Ministers the power by order to make provision that is necessary or expedient for the purposes of the Measure, or in consequence of, or to give effect to, any provision of the Measure. Subsection (4) provides that such an order may amend, repeal or revoke any provision of an Act of Parliament, an Assembly Measure or subordinate legislation. Where such an order amends an Act of Parliament or an Assembly Measure it will be subject to the affirmative procedure.

5.23 The intention of the new regime is that it should establish a simplified and coherent system for dealing with the financial cost to an individual of securing social care services. The interface between charging and general social care legislation is complex and in order to ensure the new regime is effective it may be necessary to make further provision under this power. This power may also be needed to deal with the consequences of any changes to this general legislation, including changes that may arise from the current Law Commission review of adult social care legislation.

Section 11 – Commencement and interpretation

5.24 Subsections 2 and 3 provide that section 10 and 12 will come into force two months following approval of the Measure by Her Majesty in Council and that the remaining provisions will be brought into force in accordance with provision to be made by the Welsh Ministers by Order.

6. Regulatory Impact Assessment (RIA)

6.1 A Regulatory Impact Assessment has been completed for this Measure and follows at Part 2.

6.2 The earliest that implementation of changes stemming from approval of the proposed Measure and any subsequent regulations could commence would be April 2011.

PART 2 – REGULATORY IMPACT ASSESSMENT

7. Options

7.1 The following options are available:

Option 1: Do nothing

Option 2: Introduce minimal changes relying on existing legislation

Option 3: Introduce an Assembly Measure

Option 1 – Do nothing

7.2 The main statutory provisions governing charging for non-residential social care services allow an element of discretion that has created wide variations in levels of charging across Wales. Despite steps taken by the Welsh Assembly Government there is still widespread inconsistency in the way in which services are charged for, in the service users charged for these services, in the financial assessment process and in the charge levels set for services. There are also inconsistencies in the information provided by local authorities about the charging process and in the way in which appeals about charges are dealt with.

7.3 Doing nothing would maintain a situation in which service users can be charged different amounts by different authorities for the same service or similar service, and would maintain a system that is complex and difficult for service users to understand. Doing nothing is likely to perpetuate these disparities thereby adversely affecting some of our most vulnerable citizens.

Option 2 – Introduce minimum changes relying on existing legislation

7.4 This option relies on the use of current legislative powers in conjunction with the co-operation and partnership of local government in Wales. Section 7 of the Local Authority Social Services Act 1970 gives the Welsh Assembly Government powers to issue general guidance to local authorities on the exercise of their social services functions, including their discretion to charge.

7.5 In 2002, the Welsh Assembly Government issued “Fairer Charging” guidance to local authorities. This was issued in an attempt to address some of the inconsistencies in charging policies. The guidance remains largely good practice apart from five elements which were made statutory by way of guidance issued under section 7 of the 1970 Act. Whilst further guidance could be issued to local authorities, legal advice is that it would be important to ensure that it is not so prescriptive as to fetter the discretion given to local authorities in the relevant primary legislation (section 17 of HASSASSA). Such further guidance could direct local authorities on how they should set about exercising their discretion to charge, but could not oblige authorities to exercise that discretion in a specific way, for example by setting maximum

charges for certain users or services or by preventing them from charging certain users or for certain services.

7.6 Whilst some improvements could therefore be made by relying on the existing statutory framework these could only be minor in nature. Local authorities would still have wide discretion about how charges are calculated and the level of the charge set and this option would not therefore deliver the improvements in consistency and fairness that the Welsh Assembly Government wants to achieve. It would also fall far short of service users and stakeholders expectations in this area.

Option 3 – Introduce an Assembly Measure

7.7 This option would most effectively meet the policy objective of establishing a new regime for charging for non-residential social care services that will ensure much greater consistency across Wales. A Measure would allow the Welsh Assembly Government to prescribe a uniform approach to local authority charging without removing authorities' current discretion as to whether to charge at all or to charge less than would be required.

7.8 The proposal for a Measure to introduce more equitable charging arrangements has been welcomed by service users and key stakeholder organisations. The stakeholder task and finish group made a valuable contribution to the consideration of options for change and the implications of those options.

7.9 The proposed Measure establishes a new legislative framework that will enable the Welsh Assembly Government to pursue an incremental approach to the introduction of much greater consistency with an initial package of improvements being followed up by further improvements over time. Detailed provisions will be set out in regulations and statutory guidance, to be made under the Measure, thereby providing maximum flexibility and allowing for a range of options to be pursued by the current and future Welsh Assembly Governments without the need for a further Measure.

8. Costs & Benefits

Option 1: Do nothing

Benefits:

8.1 There is no benefit to be gained by doing nothing. Local authority arrangements for charging for non-residential social care services are likely to continue to differ, to the detriment of service users, particularly in areas where the costs are greatest.

Costs:

8.2 The total income received by local authorities through charging for non-residential social care services in the 2007-08 financial year amounted to £36-37m, of which some £5m was expended on the administrative costs of services. In addition local authorities received £8.5m to compensate for the loss of income resulting from the introduction of further changes to the statutory guidance. These required certain elements of service users' income to be 'disregarded' from the charge assessment (see paragraph 8.7).

8.3 If the current charging arrangements are maintained, local authority costs and the proportionate cost to the Welsh Assembly Government may only be affected by inflation or a significant increase in demand for services. However, where currently local authority maximum charge rates vary widely we are already seeing indications of the lowest rates being raised so that the service charge would be higher despite the statutory requirements currently in place. Whilst this would increase local authorities' income without additional cost to the Welsh Assembly Government, it would intensify the cost pressures on service users. This adverse effect would be avoided by proposals under the Measure to regulate to ensure that local authorities adopt a specified maximum weekly charge.

8.4 In terms of cost to individual service users, those individuals who forego services which they need but cannot afford will be disadvantaged in comparison to those in other local authority areas where the service costs are more affordable. In such cases, the likelihood is that the individual's health will deteriorate to the extent that they need hospitalisation, which increases the cost burden on the NHS. The current system is complex and difficult to administer and this places an increased administrative burden on local authorities.

Option 2: Introduce minimum changes relying on existing legislation

Benefits:

8.5 Structures are already in place and procedures are well established so that any further changes that could be made to the existing statutory guidance

could be implemented more quickly than regulations under the proposed Measure.

8.6 There would be some, limited, improvements for a small number of service users.

Costs:

8.7 There would be implementation and administrative costs to local authorities associated with the introduction of any further changes by way of statutory guidance. Changes could also result in a reduction in the amount of charges collected and therefore a loss of income for local authorities. There would be an expectation that the Welsh Assembly Government would compensate local authorities for these additional costs which would need to be contained within the Welsh Assembly Government's Health and Social Services budget. An example of changes previously made and the costs associated with them is given below by way of illustration:

Using the powers in section 7 of the Local Authority Social Services Act 1970, the Welsh Assembly Government issued statutory guidance to local authorities that from 9 April 2007 they should:

- ensure that service users' net incomes are not reduced after charging below the "basic" level of Income Support, or below the appropriate guarantee credit level, plus a "buffer" of no less than 35% of this (raised from a previous buffer of 25%); and
- ensure that all service users have a flat rate Disability Related Expenditure disregard of 10% of their equivalent "basic" level of Income Support or appropriate guarantee credit level.

As a result of these changes local authorities in Wales were paid approximately £8.5m in lieu of income foregone in 2007-08 and £9.5m in 2008-09. In addition, they were given approximately £570,000 over the two years for one off IT costs and ongoing administrative and publicity costs. This money was distributed by way of a specific grant scheme. It is intended that changes will be funded via the Local Government Revenue Support Grant from 2010-11 onwards.

Option 3: Introduce an Assembly Measure

Benefits:

8.8 This option allows the policy intention to be fully met and signals the Welsh Assembly Government's commitment to improving the lives of some of its most vulnerable citizens.

8.9 The proposed Measure will provide the Welsh Ministers with the power to introduce a revised charging framework which will lead to much greater

consistency in local authorities' arrangements for charging for non residential social services care. The benefits of this option include:

- a system that is fairer for service users and which removes the current inconsistencies;
- greater clarity about the charge levels for services and how a service users contribution has been calculated;
- a system that is simpler to understand;
- a more cost-effective system with reduced administrative costs;
- a simple straight forward review process which will allow disagreements to be resolved informally at an early stage

8.10 The cost savings to service users generally will have a positive impact on their well being with increased income to provide for a better quality of life.

Costs:

Provision of information about charges

8.11 The proposed Measure will place an obligation on local authorities to provide information about the services for which charges are made, their standard charges and means testing. This information must be provided free of charge and in a variety of accessible formats. Where an authority decides to impose a charge, the proposed Measure will also require the authority to provide the person to be charged with information about the proposed charge, how it has been calculated and how they may request a review of the proposed charge and the procedure for doing this.

8.12 The Fairer Charging Guidance issued to local authorities by the Welsh Assembly Government in 2002 includes the following statement:

Information about charges

Clear information about charges and how they are assessed should be readily available for users and carers. This information should be made available at the time a person's needs for care are assessed.

Once a person's care needs have been assessed and a decision has been made about the care to be provided, an assessment of ability to pay charges should be carried out promptly, and written information about any charges assessed as payable, and how they have been calculated, should be communicated promptly. This should normally be done before sending a first bill. Charges should not be made for any period before an assessment of charges has been communicated to the user, although exceptionally this may be unavoidable where the user has not co-operated with the assessment. A first bill for a charge for a lengthy past period can cause needless anxiety. Any increase in charges should also be notified and no increased charge made for a period before the notification.

Information for charge payers should make clear that they may either seek a review of their assessed charge, or they may make a formal complaint if they are dissatisfied with any aspect of the assessment. Councils will need to consider how best to make the facility for a review accessible to users and how to ensure independence and consistency in decisions.

8.13 In accordance with the guidance, the baseline assessment of local authority charging schemes carried out by LE Wales to assist the work of the stakeholder task and finish group demonstrates that, as a matter of good practice, local authorities in Wales do already make information available about the level of charges set and about the charge assessment process. Where they decide to impose a charge, they also notify service users of their charges or proposed charges and how these have been calculated and how they can have the charge reviewed.

8.14 The purpose of including these requirements in the proposed Measure, therefore, is to reinforce and consolidate the good practice that already exists amongst local authorities in this respect and to provide a common framework which will ensure a clear and consistent approach. The overall cost across Wales to local authorities of administering their charging arrangements is £5m p.a. but within this figure there is no break down of specific expenditure items available. However, the cost of providing information on charging alone would represent only a very small proportion of this overall cost. Given that the purpose of the proposed Measure is to ensure that the information on charging already provided is in future provided in a consistent format, it is not anticipated that there will be any additional costs to local authorities in meeting these requirements in the proposed legislation. Consequently, the provisions of the proposed Measure do not give rise to any additional administrative, compliance or other costs.

Framework provisions

8.15 Apart from the requirement to provide information set out above, the remaining elements of any revised charging arrangements will be set out in regulations and guidance to be made under the proposed Measure. Any implementation costs for local authorities such as loss of income and administrative and IT costs associated with the changes will be assessed accordingly as part of the Regulatory Impact Assessment for that legislation.

9. Competition Assessment

9.1 The impact of any new arrangements will have no detrimental effect on competition for business, charities, local government and/or the voluntary sector.

10. Post implementation review

10.1 Monitoring and review arrangements will be set out in the detail of regulations to be made under the proposed Measure.

Annex 1

Explanatory Notes

Introduction

1. These Explanatory Notes relate to the proposed Social Care Charges (Wales) Measure as introduced in to the National Assembly for Wales on 29 June 2009.

2. The Welsh Assembly Government's Department for Health and Social Services has prepared them in order to assist the reader of the proposed Measure and to help inform debate on it. They do not form part of the draft Measure and have not been endorsed by the National Assembly for Wales.

3. The Explanatory Notes should be read in conjunction with the proposed Measure. They are not, and are not meant to be, a comprehensive description of the Measure. So where a section or part of a section does not seem to require any explanation or comment, none is given.

4. The Measure makes provision about charging by local authorities for non residential social care services. The Assembly's competence to legislate on this matter is found in matter 15.1 in Field 15 of Schedule 5 to the Government of Wales Act 2006 (c.32) ("GOWA 2006"). Matter 15.1 was originally inserted by the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008 of 9 July 2008 and permits the Assembly to make provision about:

"Charges levied by local authorities for social care services provided or secured by them and payments in respect of individuals with needs relating to their well-being so that they, or persons looking after them, may secure social care services to meet those needs".

Section 1 – Charging for care services: the general rule

Sections 1(1) and 1(2) provide that a local authority in Wales providing a chargeable service may charge for that service such amount as it considers reasonable (for a description of the chargeable services to which the Measure relates see the notes on section 7). Section 1(3) provides that this power shall be subject, however, to a number of legislative provisions referred to in subsection (3) which are:

- the provisions of section 2 on maximum charges;
- the provisions of section 3 about persons and services in respect of which charges must not be imposed;
- the provisions of section 4E(1) (effect of determinations as to ability to pay); and

- any regulations made by the Welsh Ministers under section 16 of the Community Care (Delayed Discharges etc) Act 2003 (free provision of services in Wales).

Subsections (4) and (5) provide a power for a local authority to recover a charge for services to which this Measure applies and to recover such charge as a civil debt in court proceedings.

Section 2 – Maximum charges

Subsection (1) requires local authorities to act in accordance with regulations made by Welsh Ministers under subsection (2) when considering what is a reasonable charge for a chargeable service.

Subsection (3) gives the Welsh Ministers the power to make regulations controlling or limiting what will be a reasonable charge. Subsection (3) gives examples of the type of provision that may be included in regulations made under this section. This includes provision setting out the maximum that a local authority may charge for a particular chargeable service or for any combination of chargeable services and provision establishing a maximum hourly or weekly charge.

Section 3 – Persons and services in respect of which charges must not be imposed

This section would enable the Welsh Ministers to make regulations excluding certain persons or chargeable services from charging. Subsections 2(a) and 2(b) give examples of how categories of excluded persons may be defined; this includes by reference to their age or the receipt of certain payments, facilities or services. Subsection 2(c) provides that categories of chargeable services may be excluded by reference to the period of time for which they are provided.

Section 4A – Invitation to request means assessment

Section 4A(1) places a duty on local authorities to invite a service user or prospective service user to request a means assessment when it offers a chargeable service or as soon as reasonably practicable thereafter. It also places an obligation on a local authority where a person is being provided with a chargeable service to issue an invite in such cases as may be specified in regulations.

Subsection (2) provides that where an invitation is required to be given, a local authority may not impose or alter a charge unless certain requirements are met. These are that the invitation has been given and that where it has been responded to in accordance with provisions to be set out in regulations, the authority has carried out a means assessment and made a determination as to ability to pay.

This section also gives the Welsh Ministers the power to set out in regulations the form and content of invitations and the manner in which they are to be made.

Section 4B – Duty to carry out a means assessment

Subsection (1) imposes a duty on local authorities to carry out an assessment of a service user or prospective service user's means where the conditions set out in section 4C are met. Subsections (2) and (5) dis-apply this duty in such cases as may be specified in regulations made under subsection (2) and in the circumstances set out in subsection (5) unless regulations made under that subsection make provision to the contrary.

Subsections (3) and (4) enable the Welsh Ministers to make regulations as to how means assessments must be carried out.

Section 4C – Conditions giving rise to the duty to carry out a means assessment

This new section sets out the conditions which give rise to the local authorities' duty to carry out a means assessment, as referred to at section 4B(1). It also enables the Welsh Ministers to make provision in regulations as to who may make the request for a means assessment or provide any necessary financial information on behalf of a service user or prospective service user.

Section 4D – Determinations as to ability to pay

Subsection (1) requires a local authority to determine, in the light of the means assessment, where one is carried out, whether it is reasonably practicable for the service user to pay the standard charge and if not what (if anything) it would be reasonably practicable for them to pay.

Subsection (2) requires the local authority to discharge its duties under subsection (1) in accordance with provision made in regulations by the Welsh Ministers.

Subsection (4) defines the term 'standard charge', as referred to in subsection (1) and in section 5.

Section 4E – Effect of determinations as to ability to pay

Subsection (1) requires local authorities to give effect to any determination made as to a service user or a prospective service user's ability to pay for a chargeable service.

Subsections (2) and (3) make provision as to the date from which determinations shall have effect.

Subsections (4) and (5) are concerned with the date from which replacement determinations shall have effect.

Section 4F – Replacement by authority of determinations as to ability to pay

Subsection (1) provides for a local authority to replace a determination with a new determination subject to the conditions set out in subsection (4) having been met. Subsection (4) (d) gives the Welsh Ministers power to make regulations prescribing other such conditions.

Subsection (2) provides that where a local authority is obliged to issue an invitation to request a means assessment it may not replace an existing determination until such invitation has been issued and responded to and the new assessment has been carried out.

Subsection (3) ensures that the new determination may only differ from the determination it replaces to the extent considered appropriate having regard to the matters in subsection (4).

Section 5 – Provision of information about charges

This section requires local authorities to provide information to those who receive, or may receive, a chargeable service and to those whom they decide to charge.

Subsections (1) and (2) require local authorities to make arrangements to bring the following information to the attention of persons who receive, or may receive, a chargeable service:

- information about which services are charged for and which are not;
- information about the “standard charge” (as defined in section 4D(4)) for different services; and
- information about means testing.

Subsections (3) provide that this general information must be provided in a range of accessible formats and free of charge.

Subsections (4) and (5) deal with the information that local authorities must provide to persons on whom they decide to impose a charge. This information must be provided in writing and in any other accessible format the person reasonably requests, free of charge, and within 21 days of the date on which the decision to impose or alter a charge was made.

Section 6 – Reviews of charging decisions

This section gives the Welsh Ministers the power to make regulations concerning the arrangements that local authorities must make for reviewing charging decisions. Subsection (2) gives examples of the type of provision

that may be included in regulations made under this section. This includes provision concerning an individual's right to request a review, the process an individual must follow to exercise that right and the procedures an authority must follow in conducting the review. Provision may also be made as to who may request a review on behalf of an individual to whom a statement of charges must be provided under section 5(4).

Section 6A – Direct payments

This section applies where a local authority makes direct payments to an individual under section 57 of the Health and Social Care Act 2001. The section must be read in conjunction with section 57 of the 2001 Act and the regulation making powers contained in that section.

Subsections (2) and (3) give Welsh Ministers the power to make regulations about direct payments which make provision corresponding to those which are made, or may be made, under sections 1-6 of this Measure. Subsection (4) gives examples of the type of provision which may be made under such regulations whilst subsection (5) defines certain terms used in the section.

Section 7 – Care services to which this Measure applies

This section sets out the services to which this Measure applies and these services are defined as the chargeable services. These chargeable services are those services provided under the enactments specified in subsection 7(2). These will include welfare services to elderly and vulnerable persons such as home care, day care centres, laundry, transport and meals. Residential care services were excluded from the scope of the enabling Legislative Competence Order and hence have been excluded from this Measure

Subject to the restraints of matter 15.1 in Field 15 of Schedule 5 to GOWA 2006, section 7(3) enables the Welsh Ministers by order to add a service to, or to amend or remove the description of a service which is for the time being included in, section 7(2). Section 10(7) provides that such an order will be subject to the affirmative procedure.

Section 8 – Amendments to the Health and Social Services and Social Security Adjudications Act 1983

This section amends the legislation under which local authorities in England and Wales currently charge for non residential care services. It provides that, except in relation to services provided under section 2 of the Carers and Disabled Children Act 2000 in the form of residential care, section 17 of the Health and Social Services and Social Security Adjudications Act 1983 shall apply only to an authority in England. For local authorities in Wales, section 17 will continue to apply only in relation to services provided under section 2 of the Carers and Disabled Children Act 2000 in the form of residential care. In the case of non residential services the charging regime will be governed by this Measure and regulations to be made under the Measure.

Section 9 – Amendment to the Local Authority Social Services Act 1970

This section amends the Local Authority Social Services Act 1970. The 1970 Act makes provision concerning the exercise of social services functions, including a requirement that Welsh local authorities in exercising their social services functions comply with guidance and directions issued by the Welsh Ministers. For the purposes of the 1970 Act social services functions are those functions under enactments specified in Schedule 1 to the Act. Section 9 adds specified sections of this Measure to that list of enactments in Schedule 1 and makes charging for local authority welfare services a social services function for the purposes of the 1970 Act.

Section 9A – Amendment to the Health and Social Care Act 2001

This section amends the Health and Social Care Act 2001 by the insertion of a new section 57(7B) to alert readers to the existence of the Social Care Charges (Wales) Measure and the additional provision contained within it in respect of direct payments in Wales.

Section 10 – Orders and Regulations

This section contains general provision about subordinate legislation (orders and regulations) made under the Measure.

Subsection (1) provides that where the Welsh Ministers are empowered by the Measure to make orders or regulations, these are to be made by statutory instrument. This means that the provisions of the Statutory Instruments Act 1946 are applied to such orders and regulations, including requirements about publication. Subsection (2) provides that orders or regulations made under the Measure may make different provision for different purposes and may include incidental, supplementary, consequential, transitory or transitional or saving provisions.

Subsection (3) confers on the Welsh Ministers the power by order to make provisions that are necessary or expedient for the purposes of the Measure, or in consequence of, or to give effect to, any provision of the Measure. Subsection (4) provides that such an order may amend, repeal or revoke any provision of an Act of Parliament, an Assembly Measure or subordinate legislation. Subsections (5) to (7) set out the Assembly procedure to which a statutory instrument made under the Measure will be subject. Orders that amend Acts or Measures will need to be approved by resolution of the National Assembly for Wales, as will any order made under section 7(3).

Section 11 – Commencement and interpretation

Subsection (1) defines the term “local authority” for the purposes of the Measure.

Subsections (2) and (3) provide that section 10 and 12 will come into force two months following approval of the Measure by Her Majesty in Council and

that the remaining provisions will be brought into force in accordance with provision to be made by the Welsh Ministers by order. Subsection (4) provides that an order under subsection (3) may provide for provisions of the Measure to come into force on different days for different purposes.