
ADULT SOCIAL CARE POLICY DECISION REVIEW

**Responsible Cabinet Member - Councillor Veronica Copeland,
Adult Social Care and Housing Portfolio**

Responsible Director – Murray Rose, Director of People

SUMMARY REPORT

Purpose of the Report

1. To invite members to reconsider the decision made on 22 November in relation to Eligibility Criteria and the Severe Disability Premium in the light of new information.

Summary

2. On 22 November 2011 Cabinet made a decision about the implementation of new policies in relation to the Council's eligibility criteria for those accessing Community Care Services and the Fairer Contributions Policy in relation to the removal of Severe Disability Premium. The new policies began to be implemented from 5 December 2011 following the completion of the Call-in period. The implementation had begun to progress when the authority received a challenge by way of a letter before claim in Judicial Review proceedings. The challenge was based on the public law requirement to consult and the duties arising under the Equality Act 2010 following recent decisions of both the High Court and the Court of Appeal in relation to similar decisions reached by other local authorities.
3. Following receipt of the challenge the Council sought advice from a barrister specialising in adult social care. He reviewed the process that the Council had undertaken in relation to the decision. In particular he considered the way in which individual needs had been considered, and classified in order to implement the policies.
4. In relation to the Severe Disability Premium the Barrister advised the Council that the challenge should be defended and that on the basis of the evidence provided the decision was lawful. There is therefore no proposal within this report to change that decision. There remained a concern over the effect of the Disability Related Expenditure on the potential savings flowing from the change but it was practically impossible to ascertain what the effect will be. In any event, each individual will be assessed as per the charging policy and the numbers likely to be affected are considered to be modest.
5. In relation to Eligibility Criteria the Council had taken the approach of classifying individuals according to their most severe need i.e. critical, substantial, moderate or low.

Those classified as moderate or low were consulted about the proposal to remove their services. The barrister identified that it was necessary to classify each individual need. Some people with some critical or substantial needs also had needs which were moderate or low. These had not been identified and therefore these people had not been consulted on the proposals.

6. Although the Council had not intended the change in policy would affect those with critical and substantial needs the barrister said that the Council had erred by being too generous to that group within the policy. The decision was therefore likely to be held to be unlawful as they were then being treated differently than those with only moderate or low needs. As a consequence the barrister has advised that the Council should not implement the decision. Additional factors were raised by the barrister relating to the possible consequences of an unsuccessful defence of such a challenge
7. It is therefore recommended that Cabinet immediately revoke the decision that it took on 22 November. In the light of the advice from Counsel the Chief Executive, having consulted with the members of Cabinet, took the decision to suspend the implementation of the policy, and ask for an implementation re-instatement plan to consider the impact that had already taken place on individuals. The Council have also responded to the letter before action to indicate the intention to put the matter back before members.
8. Due to the continuing pressures in the budget generally and the high cost of Adult Social Care, it is recommended that the Director of People be asked to commence work to consider whether it is appropriate to change the eligibility criteria to remove the moderate and low bandings. In order to do this it will again be necessary to consult services users. It is therefore recommended that all service users except those in receipt of residential care packages should be consulted. The reason for exempting those in residential care is that it has been possible to confirm that the vast majority of the same will not be affected by the proposed changes. Those that might be have been or will be identified and will be consulted. It is estimated that this work will take approximately six months and that a report be presented to Cabinet in September 2012 to consider the results of the consultation.
9. To carry out this work the Council will need to take on additional agency staff to back fill the staff who will carry out the consultation exercise. There will be an additional cost estimated at £80,000 to enable this to happen. The Council also has a number of contracts which it may be necessary to extend to continue to provide existing service packages the cost of these contract extensions is estimated to be in the region of £60,000 for the six month period. It is proposed to follow a similar consultation process to that used previously as this was identified by the barrister was well done and a robust process.
10. The revocation of the decision will have an impact on the proposed MTFP and these changes will be presented as part of the report to Cabinet on 22nd February 2012. The savings proposed for the financial year 2012-13 will not now be achieved in full. It is not possible to estimate the savings that might be achieved if low and moderate bandings were removed in the future. It is however possible that savings will be greater than previously estimated due to the inclusion of those in the substantial and critical needs who have some low or moderate needs which may no longer be met.

Recommendation

11. It is recommended that :-

- (a) The decision of Cabinet on 22 November 2011 set out in Minute c83 in paragraph (c) ii (1) in relation to eligibility criteria be revoked.
- (b) The packages of those individuals who have been affected by the implementation of the policy, and want to return to the previous package, be immediately re-instated.
- (c) The Director of People be authorised to proceed to consult on a proposal to amend the eligibility criteria with all service users except those in receipt of residential care packages.

Reason

12. The recommendations are supported by the following reasons :-

- (a) To enable the Council to make and implement a robust decision.
- (b) To achieve savings estimated in MTFP in future years.

Murray Rose
Director of People

Background Papers

No Background papers were used in the preparation of this report.

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S17 Crime and Disorder	This report has no implications for crime and disorder.
Health and Well Being	The impacts on Health and Well Being were set out in detail in the report to Cabinet dated 22 nd November 2011 with its accompanying documentation. A detailed Equalities Impact Assessment was prepared and considered within the text of the report. This report will negate those impacts but proposes further consultation of vulnerable individuals.
Carbon Impact	There are no sustainability issues.
Diversity	This report affects the elderly, disabled and those suffering from mental illness more than other groups within our community.
Wards Affected	All wards
Groups Affected	Those in receipt of Community Care Services
Budget and Policy Framework	Changes to the budget resulting from this decision will be part of the consideration of the MTFP report which will be presented to Cabinet on 22 nd February 2012.
Key Decision	This is a key decision.
Urgent Decision	This is an urgent decision.
One Darlington: Perfectly Placed	There are no issues adversely affecting the Community Strategy.
Efficiency	The proposal is intended to achieve an overall efficiency saving.

MAIN REPORT

Information and Analysis

13. In March 2011 the Council set the Medium Term Financial Plan (MTFP) with a budget envelope which took into account the proposal to make savings through a change to the Council's Eligibility Criteria and the Fairer Contributions Policy. These policy changes were proposed within a wider agenda for delivering personalised support promoting independent, choice and wellbeing. The Council also invested additional sums in Intermediate Care and re-ablement services. The MTFP included two proposals namely reducing the eligibility criteria for long term and ongoing social care funding and reducing the level of Sever Disability Premium disregard given in the Financial Assessment under the Fairer Contributions Policy.
14. Following detailed consultation and a thorough Equalities Impact Assessment the decision was made to proceed with the changes at a Cabinet meeting on 22nd November with implementation taking place from 5th December 2011. On 23rd December the Council received a challenge in relation to both proposed savings decisions.
15. The letter before claim received from Public Law Solicitors concerns 5 Claimants currently in receipt of Community Care Services some of whom will be adversely affected by one policy whilst others were affected by both. The basis of their legal argument is that they are of the opinion that the decisions made by Cabinet on 22nd November 2011 in relation to both policies was unlawful because they fail to comply with the public sector equality duty set out in Section 149 Equality Act 2010 and/or were irrational because they were made on the basis of inaccurate, incomplete and misleading information.
16. Advice has been obtained from a Barrister who considered the approach taken by the Council in relation to both policies. In relation to the Council's decision on Severe Disability Premium the barrister has advised that the Council can defend the decision and that it should stand.
17. In relation to Eligibility Criteria the Council's approach was to classify individuals according to their most severe need i.e. critical, substantial, moderate or low. Those classified as moderate or low were consulted about the proposal to remove their services. Counsel identified that it was necessary to classify each individual need. Some people with some critical or substantial needs also had needs which were moderate or low. These had not been identified and therefore these people had not been consulted on the proposals.
18. Although the Council had not intended the change in policy would affect those with critical and substantial needs the Barrister said that the Council had erred by being too generous to that group within the policy. The decision is likely to be held to be unlawful as they were then being treated differently than those with only moderate or low needs. As a consequence the barrister has advised that the Council should not implement the decision.
19. The original decision was made by Cabinet and therefore Cabinet can revoke the decision. The effect will be to stop the implementation of the decision and to re-instate any changes put in place since the implementation of the policy began, where this is desired by the service user. Where the replacement packages are preferred these can remain in place.

20. Of the proposed savings currently in the MTFP £126,000 for the forthcoming financial year 2012/13 relates to Eligibility Criteria rising to £250,000 in subsequent years and £200,000 for the Severe Disability Premium rising to £400,000 in subsequent years. The majority of the savings proposed at the Cabinet meeting on 22nd November 2011 are still intended to be achieved.

Judicial Review

21. The letter before action related to the Severe Disability Premium may result in a claim by way of Judicial Review. The deadline for such a claim to be lodged with the court will ordinarily be 21 February 2012. If so the claim will proceed to an initial hearing for leave to apply for Judicial Review, if leave is denied this can be appealed. If leave is granted the matter will proceed to a substantive hearing which will take between 6-9 months. It is likely that if a claim is made an application for an injunction to prevent the Council from implementing the decision will also be made. If this application is agreed to this may delay the implementation of the decision while the matter is heard.
22. There are a number of remedies in judicial review the most likely in this case being a quashing order which will have the effect of quashing the original decision in relation to Severe Disability Premium. Damages in Judicial Review cases are rare, but the Council will incur costs in defending an action. These are unlikely to be recovered even if the Council is successful given the relative status of the claimants and the Council as a public body. Costs for a judicial review which goes to a full hearing may be significant. In the event that the Council loses the case then additional costs may be claimed against the Council. Advice from the Barrister is that the Council should resist the claim.

Eligibility Criteria Policy Review

23. It is recommended that the decision be revoked because there has been a flaw in the way that the decision was taken. There is however scope to consider whether the budget savings proposal remains appropriate. In order to do this a two stage consultation exercise will need to be conducted. An initial desk top analysis will need to be undertaken on the classification of each individual need of all service users. A consultation exercise will then take place with service users to in relation to the particular impact on them which is likely to occur if the change is made.

Residential Care Service Users

24. All service users who have or who may have low or moderate needs should be consulted. There are a group of service users in receipt of residential care packages. The proposal is to remove the provision of services designed to meet moderate or low needs. Those in receipt of a package of residential care will not have services which form part of a residential care package removed. If they have needs which have been assessed beyond the residential care package these may be removed and therefore these individuals should be consulted. There are a small number of service users who receive transport to day care services on top of a residential care package. These service users will need to be consulted, although they may not have the services removed. However because the vast majority of residential care users do not receive any services beyond the residential care package, and are also some of the

Council's most vulnerable clients, it is recommended that that group, should not be consulted on the proposed change.

25. To ensure that the process is as comprehensive and robust as the previous exercise a timescale of 6 months has been estimated. The analysis of the consultation is proposed to be presented to a meeting of Cabinet in September 2012 to consider whether to change the policy.