

Appendix 1: London Borough of Barking and Dagenham response to the consultation on draft regulations and guidance to implement the cap on care costs and policy proposals for a new appeals system for care and support

#	Question	Response
<b>Funding reforms</b>		
1	Do you agree that the draft regulations and guidance will provide a robust framework that will protect the 1 in 8 of us that will face catastrophic care costs? Please state yes or no along with any rationale.	<p>The cap is a positive move in preventing people facing catastrophic care costs. However, we estimate that very few people are likely to reach the cap, particularly with daily living expenses excluded from the calculation. Furthermore, the proposals do not address the key issue of severe underfunding of social care services.</p> <p>The question focuses on the 1:8 that are affected facing catastrophic costs and which in terms will be the outliers for Barking and Dagenham. It is 7 in 8 who will still be affected by the change and may find the issue of a care cap misleading as it may not lead to them spending significantly less of their expected savings/capital in care costs.</p>
2	Do you agree that independent personal budgets should generally be set according to an average of personal budgets allocated to people with similar levels of need? Please state yes or no along with any rationale.	<p>No. The London Borough of Barking and Dagenham does not agree because people have needs that vary and it may be difficult to calculate an average that would be equitable for those persons with similar levels of needs. There will invariably be differences. There is also the spectre of legal challenge if there is insufficient flexibility in provision, this could put local authorities in a difficult position.</p> <p>Applying averages does not take account of the variances between local authorities' market rates, different approaches to commissioning, and availability of care and support in the market.</p>
3	Is the guidance sufficiently clear as to the principles for calculating independent personal budgets? Please state yes or no along with any rationale.	<p>The guidance is clear as regarding the principles for calculating independent personal budgets. However it only gives limited suggestions as to how practically difficulties are to be dealt with. Please note 11.38-11.41 about appeals and disputes. No matter what steps are taken, even if wholly reasonable, many service users may not be happy with provision especially if it involves finance and the potential loss of funds.</p>
4	Does the draft guidance provide sufficient clarity about the operation of care accounts to ensure	<p>The questions have to be covered in two ways. If the general principle of how the account is operated will ensure consistency in its application the answer is yes as guidance advises what should be included</p>

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	<p>consistency between local authorities and reduce the risk of challenge? Please state yes or no along with any rationale.</p>	<p>within the care account and information that should be made available to an individual. There should be no departure from this without good reason where the person is entitled to receive a care account.</p> <p>However it ignores the variations between local authorities such as the application of their RAS and market rates of the borough; social care and health integration will also shape the services offered to individuals, how they are offered and what will count towards their care cap costs. These regional differences may result in challenges from individuals and family members.</p>
5	<p>Can more be done to ensure that the care account is a useful tool to support people in planning for care costs?</p>	<p>The original discussions assumed that central government was to lead on introducing a consistent care account tool. This does not appear to be mentioned in recent consultation documents provided. This would have provided a structured and consistent framework which all local authorities could work from.</p> <p>If this is to be considered as a future tool for care planning costs there has to be the ability to:</p> <ul style="list-style-type: none"> <li>• consolidate information across the country which enables individuals to understand the market of the borough in which they live;</li> <li>• develop account for the care and support planning process specific to that borough;</li> <li>• be clear about the choices that are available in that area;</li> <li>• consider future inflationary effects of care costs;</li> <li>• allow flexibility for change in circumstances/care support (long-term stay vs community based care);</li> <li>• be easily updated to account for changes in government policy, local decisions and changing demographic needs of individual authorities.</li> </ul>

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6	<p>Do you agree that the preferred option best meets the principles and priorities identified? Please state yes or no along with any rationale.</p>	<p>Yes, the preferred option is simpler to understand and easier to administer.</p> <p>The option meets the principles and priorities identified, but does this include those persons who have received compensation payments for personal injury?</p> <p>The guidance does not make it clear that it only applies to individuals who apply and who are assessed for services under the Care Act 2014 from April 2016 only. This needs to be made explicit to current service users and family members, namely clients with a learning disability and those coming through transition in 2015/16.</p> <p>The equalisation of minimum income does not deal with the following:</p> <ol style="list-style-type: none"> <li data-bbox="756 943 1442 1301">i. Insufficient work has been completed at this time to understand the financial implications of those whose income will be equalised between 2016 and 2019; how is it intended that the local authority picks up any loss in income? The loss of income will be dependent on the demographics of the borough and the proportion of income generated by younger adults with disabilities.</li> <li data-bbox="756 1323 1442 1794">ii. The shift to the minimum income level ignores risk. There are a number of clients due to their vulnerability are flagged through the financial assessment process (e.g. non payment of bills, difficulty obtaining financial info) enables the Council to pick up the issue of financial abuse/ inability to effectively manage their financial affairs. As an individual moves towards the minimum income guarantee, these clients will be lost in the system with no immediate way of indentifying financial risk issues until possibly the abuse has happened.</li> </ol> <p>If there is to be an age cut-off for the cap on care costs then the age of 25 is the best point at which to set that cut-off. By this point the person would have been through transition. Also benefit entitlements change at the age of 25 which adds further logic to this cut-off.</p>

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7	<p>What are your views on how people of working age can be supported further to enable them to save and plan?</p>	<p>The Care Act 2014 implies that it will be dependent on the younger generation to build up their finances to support the future generation however if the younger generation do not take a savings approach, they will still need to be supported. It is not clear there are sufficient incentives to support the younger generation(s) to think about future care needs. In the current climate:</p> <ul style="list-style-type: none"> <li>• The ability for the younger generation is limited; more young adults are renting properties rather than investing in the purchase of homes. Also young people who have completed higher education will do so with a high level of debt due to rises in tuition fees;</li> <li>• The market has removed the retirement age of individuals resulting in fewer young adults going into roles which once would have been made available when individual's retired;</li> <li>• Zero costs for the rest of one's life does not account for those younger adults who do build up savings over their life time i.e. learning disability/mental service users clients. What happens if they meet the £27k capital limit? For example where a young person with learning disabilities inherits wealth or builds up resources and can afford to be charged for care and support they will not because the cap for them is set at zero regardless of their wealth. This is not necessarily fair.</li> <li>• This is also dependent on the structure/ investment in health and younger generations approach to future care and how future needs are met?</li> </ul>
8	<p>Is there evidence to support further consideration of the level and/or approach to daily living costs? Please state yes or no along with any rationale and provide any evidence you may have to support the rationale.</p>	<p>Yes, the current approach simplifies the process and places the responsibility of defining the daily living costs on central government removing the possibility of Councils being challenged. However, the daily living costs will have regional differences and the central government may need to consider a daily living rate for London Boroughs vs. out of London in the same way that demographic and regional differences are considered when allocating funding.</p>

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9	<p>Do you agree that the extension of the existing requirements for third party top-ups to cover first party top-ups will provide both the local authority and the person with the necessary clarity and protection? Please state yes or no along with any rationale.</p>	<p>Yes, it make it easier for family members and individuals who may want to enter a third party top-up; thus removing the need to pursue family members when the default on the agreement with the home.</p> <p>Although the Deferred Payments Agreements will set equity limits it needs to be clear in the guidance so that family members and parties that a Council has the discretion to limit the 'top-up' to an agreed level as would be expected in the current local market for that borough.</p>
10	<p>Do you agree that the guidance is clear on how the extensions to the means test will work and that the draft regulations achieve their intended purpose? Please state yes or no along with any rationale.</p>	<p>The guidance may be clear to local authorities but probably not to individuals who may find the means test extension misleading.</p> <p>Yes there may be the care cap limit of £72k and the increase of the capital limit to £118k for those where the property is taken into account however some individuals depending on their available income, capital and the Council's market rate may still find they meet the full care costs. Individuals may see it more advantageous to ensure their property is disregarded and pay their care costs.</p> <p>Example below assumes a property with an equity limit of £270k and weekly residential care costs of £550:</p> <p>Service user with eligible needs with £60k in savings and net available income of £114 per week after applying the personal expenses allowance whose property has been <b>taken into account</b> will be required to pay:</p> <ul style="list-style-type: none"> <li>a) £114 per week net available income</li> <li>b) £132 per week from their savings (tariff income)</li> <li>c) Local authority would defer £304 per week against the property.</li> <li>d) Amount towards the cap would be £320 per week which the individual would meet their cap after spending <b>£72k</b> towards their care costs.</li> </ul> <p>Service user with eligible needs with £60k in savings and net available income of £114 per week after applying the personal expenses allowance whose property is <b>disregarded</b>:</p> <ul style="list-style-type: none"> <li>a) £114 per week net available income</li> </ul>

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		<p>b) The service user will pay £436 per week from their capital until they fall below £27k.</p> <p>c) Between £17k and £27k will be tariff income.</p> <p>d) Maximum contribution towards the cap will be approx <b>£25k</b></p>
<b>Appeals</b>		
11	<p>Do you think there is a need to introduce a new appeals system to allow people to challenge care and support decisions? Please state yes or no along with any rationale.</p>	<p>Yes, but the delineation between roles and purpose of complaints and appeals must be clearly set out to avoid confusion and extra work. Areas for appeal should only cover clear and defined 'decision' areas.</p> <p>It is not clear where the boundary lies between what is a complaint and what is an appeal. This may confuse a service user who will not know which path to follow. This will likely result in duplication of complaints, or result in appeals which are in fact by nature complaints.</p> <p>Furthermore, people may gravitate towards launching an appeal rather than a complaint as ultimately an appeal, if successful, has the ability to overturn the decision whereas the outcome of a complaint cannot alter the decision. Conversely people may choose a complaint in the belief that it might be the quickest route to the LGO. This lack of clarity between appeals and complaints (both in definition and process) will undermine both systems.</p>
12	<p>Do you think that the appeals reforms are a priority for reforming care and support redress? Please state yes or no along with any rationale.</p>	<p>Appeals reforms are important, though they do not have the highest priority as the new requirements of the Care Act (information/advice; advocacy; good assessment; care planning) will all lead to better outcomes for individuals across the board from the outset and throughout the process.</p> <p>A priority for the appeals reforms should be building on current complaints systems/procedures and building on good practice that exists in handling complaints and resolving disputes. It is essential that complaints and appeals are part of the same pathway of redress and we do not end up with two systems.</p> <p>The model for appeals relating to children's social care is a single process and works well. The Care Act appeals policy proposals appear to result in two separate processes, one for complaints and another for appeals. It does not seem that there has been much regard for existing complaints procedures and</p>

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		<p>how these can be developed to include an appeals mechanism.</p>
13	<p>Do you agree the areas identified should be within the scope of the appeals system? Are there any other areas under Part 1 of the Care Act 2014 that should be included?</p>	<p>No. The scope of the appeals system needs to be reduced and focussed only on key decisions that have an impact on the individual and are definable and have consistent comparisons. Appeals should only be launched against measurable decisions where there are clear criteria or processes that should have been applied/adhered to. For example appealing against the format of the assessment is complaining about a process not an outcome of a decision. Likewise, with care planning a local authority is limited to how it can meet a person's needs because of local service provision; this does not mean that the process and decision-making is in flawed and should therefore be able to be challenged.</p> <p>Because of care cap it is in the interest of self-funders to appeal to start the meter running towards the cap. Tight criteria/scope will therefore be needed.</p>
14	<p>Do you think that charging should be part of the adult social care appeals system? Please state yes or no along with any rationale.</p>	<p>No. The charging policy of any authority will have been tested through public consultation and the democratic decision-making of the Council. As with any policy there will have been ample opportunity for individuals or groups to challenge or make representations.</p> <p>Where an individual believes that the policy on charging (or indeed any other policy) has been wrongly or inappropriately applied this should properly be a matter of complaint.</p> <p>It is not at all clear from the guidance what it is that the individual can appeal about.</p>
15	<p>Do you have suggestions as to the expertise, knowledge and person specification for the role of an Independent Reviewer?</p>	<p>Similar to requirements for individual advocates the Department of Health should be very specific about the role of Independent Reviewers and the expectations people and local authorities should have about the skills, knowledge, and calibre of the independent reviewer. Chapter 7 of the Care and Support Guidance (p7.43 – 7.50) describes the role of an independent advocate. A similar description in the Statutory Guidance for appeals about the role of the Independent Reviewer would be welcome, as a starter.</p> <p>As set out in our response to question 22, any Independent Reviewer will need to have wide and</p>

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		varied experience of case work but also possess senior policy experience and strong local authority credentials to be able to analyse the political, organisational, and practice implications to properly adjudicate appeals.
16	Do you think the local authority or another body should be appointing the Independent Reviewer? If another body, please specify.	The local authority. There is no conflict of interest and local authorities have many years of experience of appointing and funding individuals who also may have the functions of holding the authority to account.
17	Do you think a 3 year gap in the Independent Reviewer's employment from the local authority concerned is sufficient to provide independence, or should this period be longer, or should they never have been previously employed by the local authority concerned?	Two years is sufficient. Three years is not required of Civil Servants.
18	Do you agree that the Independent Reviewer's role should be to review decisions with reference to relevant regulations, guidance, facts and local policy to ensure the local authority's decision was reasonable?	Yes.
19	How do you think we can promote consistency in decision making for care and support appeals?	By focussing on those areas of the Act that have national criteria (e.g eligibility). Please see also response to question 14. Consistency will be achieved by making it clear that appeals have no bearing on policy itself and no locus on application of policy as these are either a matter of public consultation and political decision-making; or if wrongly applied a matter of complaint which provides a clear and accessible route to redress.
20	Do you think the timescales proposed to process appeals are right?	Yes, generally.

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	If not, which timescales would be more appropriate?	
21	Do you feel that the Appeals system, as set out, will aid the early resolution of disputes and thus help avoid costs and delays associated with challenging decisions in the courts? Please state yes or no and any rationale.	<p>No. The difference between complaints and appeals is fundamentally unclear and confusing. The scale of appeals is a mish-mash of decision(s) and professional assessment or local policy (e.g. charging) that has already been subject to formal consultation and public debate. There is no evidence that costs will be saved.</p> <p>Are local authorities expected to decide if a person is complaining or appealing? If local authority officers cannot understand the difference how can we expect the public? To an outsider the system will appear complex and bureaucratic. This presents a challenge for information and advice in simply explaining the appropriate path.</p> <p>There is no evidence of fewer court challenges.</p>
22	In the accompanying Impact Assessment we have set out the costs to administer the Appeals system. We would welcome your comments on this and any evidence that you are able to provide	<p>See previous comments on confusion and lack of clarity.</p> <p>The Independent reviewer will need to have wide, varied and senior experience and be able to deliver to tight deadlines. The costs quoted are unlikely to cover this.</p> <p>The proposals are not clear where appeals fit with Judicial Reviews and whether an appeals system will result in fewer legal proceedings as intended. There is concern that the appeals system becomes another layer of bureaucracy that inevitably leads to a Judicial Review. More detail is needed about how the appeals system fits into the Judicial Review process.</p> <p>There is concern that local authority lawyers will spend a lot of time dealing with appeals and giving legal advice to appeal responses. This will cancel out savings from fewer legal challenges, if indeed that comes to pass. There are relatively few Judicial Review cases but the appeals system has the potential to be considerable.</p>