KENT COUNTY COUNCIL – PROPOSED RECORD OF DECISION

DECISION TO BE TAKEN BY:	DECISION NO:
Cabinet Member for Adult Social Care and Public Health	24/00049

For publication Yes

Key decision: YES

Title of Decision: Adult Social Care Charging Policy – Higher Level Disability Benefits

Decision: As Cabinet Member for Adult Social Care and Public Health, I propose to:
a) **APPROVE** the changes to the Adult Social Care Charging Policy; and
b) **DELEGATE** authority to the Corporate Director Adult Social Care and Health to revise the Adult Social Care Charging Policy and to take relevant actions, including keeping the policy updated as necessary, to implement the decision.

Reason(s) for decision:
In line with the approved Budget Book, Kent County Council (KCC) is proposing to change its policy for charging for adult social care provided in a person's own home or in the community. This means we are reviewing how much some people may have to pay towards the chargeable services that KCC provides or arranges, which include:

- Care and support provided at home (for example homecare including supported living); and
- Care and support provided in the community (for example daytime support).

This policy does not impact on people who live in and receive care and support in a residential care home.

We are proposing to stop disregarding the higher or enhanced rates of Attendance Allowance (AA), Personal Independent Payment (PIP) and Disability Living Allowance (DLA) when we calculate a person's income (we already take into account the lower, middle or standard rates of these benefits).

This would mean that individuals in receipt of care who receive higher rate of these benefits would have more income taken into account in their financial assessment which would mean that they are likely to pay more for their care and support than they do currently.

We need to look at the amount of income we can generate by people contributing towards the cost of their own care. This is why we are proposing a change to the charging policy.

Financial Implications:
The latest budget monitoring presented to Cabinet on 21 March 2024 shows £30m budget gap for 2023/2024, of which £31.3m relates to the Adult Social Care and Health Directorate before management action and one-off use of reserves are considered. Members have agreed the immediate actions needed to reduce spending in the short term and have set the course for getting the council back to financial sustainability, securing the services that residents in Kent need the most.

Forecast spending growth in the 2024/2025 budget approved by full Council is £209.6m (excluding externally funded). The net change to the budget is £113.9m (matched by funding increases through government grants, council tax, etc), leaving £95.7m savings and reserves to balance the budget.

Of the above, the spending growth in Adult Social Care (including the services for 18-25 year olds) 2024/2025 is £115.8m as stated in the 2024/2025 budget. The net change to the budget is £61.7m (matched by funding increases through government grants, council tax, etc), leaving £54.1m in savings/additional income which needs to be found, of which this proposal is included within.

The calculations informing the MTFP estimated that the proposed policy change could raise a net figure of approximately £3.4m in a full year. This factors in financial planning which covers the risk of increased debt and an increase in individual DRE assessments above the authorities' standard allowance.

The increase in income is assumed as part of the overall savings/income requirement to balance the 2024/2025 budget for the whole council/adult social care. If this proposal is not implemented, then alternative savings/income would need to be achieved in other areas in KCC services.

The latest estimates suggest that the proposed changes could now raise approximately £3.7m in a full year if the policy was implemented, which is £0.3m higher than the original estimate as shown in the table below.

Summary of Charging Change Estimates compared to MTFP	Full Year in 25-26	9 months 24-25
	(£000)	(£000)
Latest Estimated Increased Additional Income	3,703.9	2,777.9
MTFP Assumptions	3,400.0	2,600.0
Impact on MTFP	303.9	227.9

Legal implications:
The Care Act 2014 details the council’s duty when assessing an individuals’ care and support needs as well as the process for conducting financial assessments to work out how much the council will pay towards an individuals’ care.

The council may take most of the welfare benefits individuals receive into account for the purpose of conducting the financial assessment as detailed in Part 4 of the Care and Support (Charging and Assessment of Resources) Regulations 2014 (SI 2014/2572).

The council’s current charging policy provides for a disregard at paragraph 17.3: which details that certain benefits namely Attendance Allowance (AA), Personal Independent Payment (PIP) and Disability Living Allowance (DLA) should be taken into account only up to the lower rate of AA and standard rate of PIP/DLA (Care Component) disregarding whether individuals actually receive the higher rate of these benefits.

The proposal to change the charging policy will mean that the disregard will no longer apply and if higher rates of AA and PIP/DLA are received by individuals they would be taken into account in a financial assessment and would no longer be disregarded. This would mean that individuals in receipt of care who receive higher rate of these benefits would pay more for their care than they currently do. Importantly this doesn’t mean they would be in the same position as those not in receipt of these benefits at a lower rate because other disabled persons can earn money from work (because earnings from employment or self-employment continued to be disregarded). Which means that proportionately more of a severely disabled persons income will be taken into account when calculating the contribution.

The council is able to change its charging policy to take into account the higher rates of AA / DLA / PIP but before making this decision must undertake appropriate consultation and an Equality Impact Assessment (EqIA).

It is the Care Act 2014 Guidance which confirms "Local authorities should consult people with care and support needs when deciding how to exercise this discretion. In doing this, local authorities should consider how to protect a person's income."

The results of the consultation that has been undertaken must be taken into account when making this decision.

The EqIA identifies how the proposed change to the charging policy will affect different groups of people and must also be taken into account. This identifies that the severely disabled will be the most affected.

The outcome of these consultation and EqIA exercises enables the council to consider how the proposed change to the charging policy will affect different groups of individuals; consider alternative proposals to minimise any negative impact and introduce any additional measures to mitigate against any negative impact.

This is important because otherwise the council may find itself in a position of challenge like as occurred in the case of R (SH) v Norfolk County Council and another [2020] EWHC 3436 (Admin), where changes to their charging policy, similar to what is being proposed here, gave rise to an unintended and unforeseen discrimination claim.

In the Norfolk case, the council had "exercised its discretion to charge SH the maximum permissible (disregarding only those elements it is required to disregard by law)" in particular by taking into account her PIP (daily living component), which it did not do before. That, alongside proposing to apply only the statutory minimum income guarantee meant that proportionately more of SH's income was taken into account when calculating her contribution as a severely disabled person, when compared to other disabled users who could earn money from work because earnings from employment or self-employment continued to be disregarded.

The judge found that SH was at a distinct disadvantage being severely disabled and unable to work as against her peers being charged for care services and who are also disabled but able to work. Not having earned income that could be disregarded SH found herself in the position of having proportionately more of her income taken into account than a working disabled person allowed to keep their earnings. The judge considered that this was discriminatory and put her on a less equal footing to other disabled people being charged for care services.

The judge crucially found that there was no evidence that the council had considered this differential impact or the alternative approach of setting a "maximum percentage of disposable income" over and above the minimum income guarantee (as the Care Act 2014 Guidance required the council to consider). The outcome for SH was overlooked and not considered or consciously justified at all. None of the proposed mitigations structurally addressed the discriminatory impact.

The negative impact has to be carefully considered. Where there is the possibility of indirect discrimination careful consideration needs to be given to whether the change can be justified and is proportionate.

The aim seeking to be achieved by the council by implementing this policy is to ensure that the council's books balance given the forecasted position set out above. This is a legitimate aim.

However, the EqIA acknowledges that this impacts on 3,765 of severely disabled people.

The council has to consider therefore if the change is a proportionate means of achieving the aim of reducing the deficit in the adult social care budget.

This involves considering if a less intrusive measure could achieve the same aim – the alternatives that have been considered are set out above and finally whether there are possible ways of reducing that impact, which are also considered above.

To be able to defend this decision the council needs to have consulted properly and undertaken a thorough EqIA which has identified the impact. Recognising this impact the council's position has to balance any possible mitigation against the financial challenge to reduce the forecasted overspend in 24/25.

Equalities implications An initial Equality Impact Assessment (EqIA) was published alongside the consultation document on Let's talk Kent. This has since been updated to reflect the views of consultees and other stakeholders from the consultation. This is a live document and will continue to be reviewed and updated.

Age, disability, sex, race and carer's responsibilities have been identified as having potential for negative impact if we were to implement the proposed change.

We have taken the following information from two sets of data, these are:

- Young people drawing on care and support aged from 18 to 25, who are moving from children's social care into adults' social care.
- Adults aged 18 and over drawing on care and support from adult social care.

In the data for young people, there are 612 active individuals who receive care at home, in the community or have a direct payment that may be affected.

In the data for adults, there are potentially 9,011 individuals who receive care at home and in the community that may be affected now or in the future.

If the proposal is implemented, there is a risk of a person not being able to meet all their financial commitments and getting into debt either to KCC and/or other companies. There is also a risk to a person's limited income meaning that they have no surplus monies for socialising or leisure activities to support their quality of life and wellbeing.

The proposal will have the most negative impact on disabled people, especially severely disabled people and the below is a list summarising the impacts this proposal could have:

- Increased self-neglect and safeguarding as some people may reduce or refuse care and support based on the increased costs.
- Impact on wellbeing due to the increased costs limiting their choices for social or leisure activities.
- Direct payments and the potential for this to no longer be a suitable option due to the increase in their financial assessment limiting the flexibility a direct payment allows.
- Impact on the cost of living due to the increase cost of care alongside the growing inflation on everyday basics such as food and heating.
- Mental health and the impact the proposal and increased costs could have on people's quality of life.

Data Protection Implications:

A full Data Protection Impact Assessment was carried out and signed off by the Information Governance Lead and the Corporate Director Adult Social Care and Health.

Cabinet Committee recommendations and other consultation:
KCC undertook a public consultation from 6 February to 7 April 2024. The consultation was hosted on KCC's Let's talk Kent website, with hard copies and support available for those who could not participate online.

The proposed decision will be discussed at the Adult Social Care Cabinet Committee on 15 May 2024 and the outcome included in the paperwork which the Cabinet Member will be asked to sign.

Any alternatives considered and rejected:

Alternative option considered	Why the option has not been taken forward to consultation
Only apply the proposed change to people new to receiving care and support from KCC's adult social care service from the date the new policy is implemented. This would mean that existing people receiving adult social care services would not have the higher or enhanced rates of disability benefits considered when KCC calculates a person's income	Whilst this would reduce the number of people impacted by the proposed change it would not be fair and equitable for all people who draw on care and support and would not deliver the planned savings/income requirement
Introduce the policy in stages, no more than a £12 increase to anyone's charge per year, for existing people who draw on care and support to give them time to adjust	Whilst this would reduce the impact of the proposed change it does not deliver the planned savings/income requirement as quickly. This would also be quite challenging to administrate both manually and on the case management system.
An increase to the level of Disability Related Expenditure **(DRE)** for everyone from £17.00	This would reduce the income available for adult social care and cause a budget gap and would be applied to all rather than just those who receive the higher and enhanced benefits.
Increase Minimum Income Guarantee (MIG) for basic living expenses such as utility bills and food	This would reduce the income available for adult social care and cause an even larger budget gap.
Automatically review DRE for all individuals who could potentially be impacted (9,276)	This would have an incredibly significant impact on operational resources and would redirect resources away from frontline services.
Offer DRE assessments for all 3,784 individuals directly impacted	This would reduce the funding available for adult social care and have a significant impact on operational resources.
Do nothing	Not really feasible due to the Council's prioritisation of moving to new models of care under the budget recovery strategy "Securing Kent's Future".

Any interest declared when the decision was taken and any dispensation granted by the Proper Officer:

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signed date