DRAFT RESPONSE

KENT COUNTY COUNCIL'S RESPONSE TO PERSONAL CARE AT HOME – A CONSULTATION ON PROPOSALS FOR REGULATIONS AND GUIDANCE

1. Introduction

(1) Kent would like to thank the Department of Health for the opportunity to comment on the proposals presented in the Government consultation, 'Personal Care at Home'.

(2) We welcome the Government's **intention** to provide free personal care at home for those with the highest needs. We strive to provide the best possible care for those in Kent who require our support, and welcome any move that helps to enable people to live healthy and fulfilling lives in their own homes.

(3) We are also pleased that Adult Social Care has come out of the shadows and been accorded the increased importance and higher public profile that it has long deserved. To this end, we eagerly await the Care and Support White Paper, which we hope will place Adult Social Care on more sustainable foundations and ensure that the health and well-being of the people of Kent are safeguarded for as long as possible.

(4) Kent also welcomes the emphasis placed on reablement services as a means to assist people to live as independently as possible. Kent has a strong heritage of pioneering transformation in Adult Social Care, and will continue to build on this through our commitment to promoting independence as part of the *Personalisation* agenda.

(5) One particular concern we must raise is the issue of the **affordability** of the Government's proposals. Having given careful consideration to the details in the consultation document and accompanying impact assessment, we have grave misgivings and have reached the conclusion that the proposals have not been sufficiently assessed and costed.

(6) As these proposals will increase the cost of providing local authority services, a failure to adequately fund this increase would be a breach of the New Burdens Doctrine, the Government's commitment to ensure new burdens falling on local authorities are fully funded. In particular, since the proposals rely on local authorities finding further efficiencies, it is clear that they will not be fully funded. We consider these proposals to fall within reasonable interpretation of the principle which underpins the Doctrine; as the Government has stated:

> *"A new burden is defined as any new policy or initiative which increases the cost of providing local authority services. The new burden need not necessarily arise as a result of a proposed statutory duty. For example,*

guidance to act can result in additional costs falling on local authorities, putting pressure on council tax.

Government as a whole are committed to ensuring new burdens falling on local authorities are fully funded. This commitment is called the New Burdens Doctrine." [1]

(7) We would like to draw the Department's attention to the fact that this is a view echoed by organisations which represent Councils with Adult Social Services Responsibilities (CASSRs) across the country. Most notable among them are the Local Government Association (LGA), the Association of Directors of Adult Social Services (ADASS) and the Society of County Treasurers (SCT).

2. Background

(1) Kent is the largest Council with Adult Social Services Responsibilities in England, and provides Adult Social Care to around 37,000 people in the community and 9,000 in residential and nursing care throughout the year. We also support over 10,000 people in the community through services we fund through the voluntary sector.

(2) Kent's delivery of social care was assessed as three stars by the Commission for Social Care Inspection (CSCI) from the inception of the star rating system until CSCI was replaced the by Care Quality Commission (CQC) and the star rating system was replaced by an assessment that focuses on delivery of outcomes. Throughout this time, Kent has continued to support individuals right down to the Moderate Fair Access to Care Services (FACS) eligibility level.

(3) In the most recent assessment of Kent Adult Social Services (KASS), we were awarded 'Excellent' in three of the seven outcomes:

- Improved Quality of Life
- Making a Positive Contribution
- Economic Well-being

and judged as 'Performing well' in the other four outcomes.

(4) Key areas which Kent was commended for in 2008/9 were:

- A clear focus on promoting the independence of older people and a strong emphasis on enablement and rehabilitation.
- Well-developed joint working arrangements with Health and other partners.
- Increased focus on Self-Directed Support.

[1] http://www.communities.gov.uk/localgovernment/localgovernmentfinance/newburdensdoctrine/

(5) In order to maintain this performance, Kent has had to raise additional funding through local taxation, but has managed to maintain a non-residential charging policy which is in the middle range compared to those operated by many other authorities.

(6) Due to the demographic pressures of an ageing population, the current financial climate and the need to deliver the initiatives set out as part of the *Transformation* agenda, Kent Adult Social Services has been undergoing a seismic shift in the way it delivers care and support to the people of Kent. Kent has had to do this to ensure that it can continue to provide quality services as efficiently as possible.

3. Structure of the response

(1) We have a number of comments on the proposals outlined in the Government consultation. These are set out in the remainder of this document, along with our responses to the consultation questions, in the following sections:

4. Financial implications
5. Boundary and definition issues
6. Implementation
7. Operational and process issues
8. Conclusion
Annex – Responses to individual consultation questions from DH

4. Financial implications

(1) As the Department of Health Impact Assessment (IA) concedes, there is "inherent uncertainty in estimating the costs of offering free personal care in their homes to those with 4 or more ADLs" [2]. The IA is replete with such statements:

> *"the number of people who are defined as FACS Critical at any point in time and the relative distribution of their needs/disability is not something that is routinely collected at the centre*"[3]
>
> "*We know very little about the disability of those younger adults who do not already receive free personal care, so all of the estimated costs of extending free care to this group have been included in the 4+ADL figures. These costs are themselves uncertain…*"[4]
>
> "*Due to the inherent uncertainty in estimating the costs of offering free personal care in their homes to those with 4 or more ADLs, the overall costs reported in this Impact Assessment are estimated over a period of*

[2] Impact Assessment of Personal Care at Home Regulations and Guidance, p 8
[3] p7, *ibid*.
[4,5,6] p8, *ibid*.

just two and a half years. With better information and two and half years of experience, more accurate costs will be able to be produced."[5]

"*Estimating the costs of re-ablement is difficult. We do not know for certain how many people are already receiving re-ablement services. In addition, we do not know exactly what proportion of individuals require no further care following re-ablement or for how long they derive such a benefit*."[6]

(2) Whilst we accept that assumptions are necessary in any financial modelling, we urge the Department not to underestimate that there is a high level of uncertainty about the true cost of the proposals and this poses a serious risk to local authorities' ability to deliver them.

(3) Particularly alarming, is the fact the Department have used 6.54 hours in their modelling of costs[7]. Independent research carried out by the Personal Social Services Research Unit (PSSRU)[8] suggests that the target hours of personal care for an individual needing help with 4 ADLs is 15.6 hours per week, and for an individual needing help with 5 ADLs the figure is 18.7 hours per week. This evidence, combined with our experience in providing care and support in Kent, suggests that 6.54 hours would be woefully inadequate to meet the requirements of those with the highest level of need.

(4) For example, one of our service users is a 50 year old lady with Cerebral Palsy; she is a wheelchair user at all times. She lives with her brother-in-law, who carries out all domestic tasks. She requires seven '*double-handed'* one hour visits per week, twenty *double-handed* half hour visits per week, and 1 hour visit from one member of staff. The Independent Living Fund pay for someone to take her out. It can be seen that, due to the requirement for double-handed care, she requires 35 hours of care per week.

(5) We have carried out our own analysis of what implementing the proposals would cost. It is hard to provide a clear estimate for the likely cost of this policy. There are significant areas of uncertainty, notably:

- The extent to which current self-funders qualify for this financial support
- The extent to which current service users on Critical also need significant help with 4 or more Activities of Daily Living (and the definition of 'significant')
- The extent to which people currently in residential care will seek to discharge themselves to benefit from this policy

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[7] Impact Assessment of Personal Care at Home Regulations and Guidance, p16 (Annex B)
[8] Forder, J and Fernandez, JL, *Analysing the costs and benefits of social care funding arrangements in England: technical report*, Personal Social Services Research Unit, July 2009.

- The extent to which this will influence people's future choices on residential or non-residential care

- The extent to which a reliable distinction can be made between personal and non-personal care.

(6) Other financial risks, which cannot be assessed but which could further increase costs are:

- People believing that they should be eligible for this support, when they are not, refusing to pay for their support, thereby increasing levels of debt

- Individuals who are eligible for this support not seeing the need to apply for Continuing Healthcare status (and indeed PCTs being reluctant to assess for this) thereby increasing the numbers and costs of people supported

- Informal carers stepping back from some or all of the care they currently provide, on the basis that this is now a free service.

(7) The overall funding proposed is only for the second half of the 2010/11 financial year, after that there is no clarity at all. It is evident that the Department has similarly struggled with these uncertainties, and therefore there is concern that its figures cannot adequately reflect the likely true cost of this policy.

(8) In addition, there is also the assumption that, of the estimated £670m national cost, £250m (or 37%) will be found by efficiencies in local authorities. In Kent (as in many other local authorities) the efficiency savings arising from enablement and other preventative services have already been factored in to the Medium Term Plan to pay for the demographic increases in older people numbers. It is also considered that the assumption that local authorities will pay for a part of a new policy is in direct contravention of the Government's own New Burdens Doctrine, which states that new Government requirements should be fully funded.

(9) It is our assessment that there will be increased costs of administration. It is clear that the assessment and review processes will need to become more rigorous, and the recording of judgements will need to be unambiguous. It is highly probable that there will be legal challenges, either from people (or their families) believing that they should qualify; or by Kent Adult Social Services following up debts from people who are refusing payment.

(10) Taking all of these factors together, the current estimate of the costs of this policy for Kent is £9m-22m. This is over and above an assumed level of grant from Government, and includes the unfunded level of efficiencies.

(11) This scale of gap is a function of the level of uncertainty regarding how many people will be eligible for financial support, and for how much. It also represents a fundamental concern that government has seriously under-estimated the level of personal care required by people with 4 or more ADLs.

(12) In addition to this it is estimated that the implementation costs will be between £100-200k, while ongoing administration will cost around £700k. Both of these estimates depend on the complexity of the regulations and guidance, when published, and will therefore be subject to review at the time.

5. Boundary and definition issues

(1) We have serious concerns about how well-defined the boundaries will be regarding an individual's eligibility for free personal care at home, and the problems that will result from this lack of clarity.

(2) Despite the fact the consultation document proposes that the guidance would cover what does and does not fall within the definition of 'personal care'[9], we think this would introduce further complications for charging (and may lead to dispute). This would happen particularly with the implementation of more holistic and flexible personal budgets. It also mitigates against responsiveness to personal need, which may change from day to day, and this is one of the main justifications for providing personal budgets.

(3) At a time when authorities are, quite rightly, moving to give individuals more choice and control over the way in which their care and support needs are met, with 'light touch' monitoring of how they are meeting those needs, it would be very difficult to ensure that they are using the free 'personal' care element of their budget exclusively for items of personal care.

(4) The determination of what is personal care and what is not has already become a fault line in Scotland, where for example, the provision of meals has been challenged in court as to whether it is personal care (i.e. ensuring that the person is fed) or not.The same scenario may arise should the proposals be implemented in England, so we urge the Department to pay careful attention to this to ensure that the final policy makes the distinction abundantly clear.

(5) In borderline cases, an individual's needs might just fall short of the criteria that qualify them for free personal care. This may lead to acrimonious and costly disputes. Our authority, like others across the country, is mindful of the need for resources to be used as effectively as possible, particularly in the light of the current economic climate and the increasing pressures on the social care budget. It can be seen from disputes that already arise as a result of the Ordinary Residence regulations, that legal challenge can be very costly, and can divert resources away from where they are needed most.

(6) Due to the separation that will be required to be made between personal and non-personal care in a personal budget context, we strongly oppose the way that the proposals have been presented to the public. We think the wording needs to be changed in order to manage public expectation; otherwise most individuals will be expecting to receive <u>all</u> of their care free, when clearly this will not be the case since non-personal care will be subject to normal means-testing.

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[9] Personal Care at Home, a consultation on proposals for regulations and guidance, p14

(7) The first two options for allocating the amount to an individual to meet their care needs are based on setting an indicative amount and an indicative range. However, the local authority will still be required to fund personal care needs above that indicative amount. Assuming the indicative amount is assessed on average costs, there is a serious risk of over-compensating service users whose personal care costs are below average. This will add to the financial pressures of the system.

(8) If people believe that they should be eligible for free personal care when they are not, they may refuse to pay their assessed contribution. This would increase further pressures on our budget due to the accruing debt.

(9) There are implications relating to NHS Continuing Health Care (CHC), another potential source of dispute under the current arrangements. Even if an individual may be eligible for CHC, they may have less reason to apply for it because of the possibility (and high public profile) of 'free' personal care. If someone thinks they can have all their needs met free of charge under the proposals, it is questionable that they would bother going through *another* assessment process for arguably the same result. This would put further pressure on the social care budget.

(10) Finally, we are very surprised that the consultation document does not cover scenarios where individuals may recover over the longer term, and so cease to meet the eligibility for free personal care. Withdrawing free personal care from individuals may perversely create *dependency*, since a consequence of regaining independence would be that an individual would then start paying for care that was previously free. As such, this would serve to undermine one of the key objectives of *Putting People First*, namely better management of long term conditions.

6. Implementation

(1) We have begun to analyse the steps that will need to be taken in Kent to implement the Government proposals. Given the particularly short time-frame requirement for making significant changes, coupled with work already being undertaken to transform the way in which we provide care and support for the people of Kent in line with the *Transformation* agenda, we believe the implementation date is unrealistic. This is for a number of reasons, namely:

- It is likely that we would need to conduct a full public consultation on our charging policy, in line with Cabinet Office guidelines. This would mean that we would have to spend a minimum of 12 weeks in consultation, with further time required to analyse the responses and amend our charging policy accordingly.

- We would need to make a number of key changes to our client database system in order to begin to record information on Activities of Daily Living (a new requirement) and splitting the recording of care needs between personal and non-personal. This would involve specification of changes,

development by our software house, testing of the new functionality and training of our staff in its use.

- Staff would need to be trained to carry out more detailed assessments in order to assess an individual's ability to carry out 4 or more ADLs, and would also need to be conversant with the new National Assessment Tool that the Department of Health is proposing to develop. We would also need to consider how we deal with the increased workload of our assessment staff and the further transactional costs that would be entailed.

- Kent would also need to make changes to its charging mechanisms, both at a systems and operational level, to implement the distinction between personal and non-personal elements of a personal budget. Many authorities are already struggling with a similar distinction as a result of the move from 'traditional' care packages to personal budgets and as a result of the Fairer Contributions Guidance, published by the Department last year. These proposals will complicate this situation further.

7. Operational and process issues

(1) There are a number of operational and process issues that will be encountered once any proposals are implemented. Most of these have been covered elsewhere in this document, but are presented below to illustrate the effects these proposals would have on the day-to-day provision of services:

- If people believe they are eligible for free personal care, they may refuse to pay their assessed financial contribution. This would place a further burden on our staff undertaking income collection and debt recovery

- It is difficult to estimate to what extent the proposals will affect those delivering informal care (i.e. unpaid carers), but it is likely that some service users will instead opt for support from the local authority, as it will be free

- Individuals will be less likely to apply for Continuing Healthcare if they believe they are able to get free care and support from the local authority, particularly as Personal Care at Home has been afforded a high public profile

- As well as after a period of intensive support, such as reablement, individuals may also recover in the longer term. Those who cease to meet the eligibility for free personal care will have to start paying a contribution, so there is risk that this would create a perverse incentive to not recover - *dependency*

- The requirement to record an individual's ability to carry out Activities of Daily Living would mean that more information would need to be recorded

- Reporting extra information in statistical returns would place an additional burden on the staff (practitioners and performance) already producing information for the National Indicator Set, the existing statutory returns and information collected for local performance frameworks.

8. Conclusion

(1) We reiterate our concern that this policy as currently drafted is unaffordable, at high risk of generating legal challenge and impossible to implement within the proposed timeframe. We strongly urge Government to consider piloting the proposals to ensure the above risks and issued can be better understood and managed before implementation. We also urge Government to give local authorities a guarantee that all costs of the policy will be funded.

Annex - Responses to individual consultation questions from DH

Do you agree with the substance of the proposal as set out in this document? If not, why not?

(1) Whilst we agree with the *principle* of the proposal, we think that the costings in the IA demonstrate that it will not be adequately funded (see section 4 of this document). We think:

- the expectation placed on local authorities to find further efficiencies to help fund the proposal is optimistic at best

- the implementation date is unrealistic, given the changes needed implement the proposals, particularly while also undergoing *Transformation*.

Are there any potential positive impacts on equalities of this policy? Similarly, are there any potential negative impacts?

(2) We think that this policy is heavily focussed on older people. As such it does not take into account the needs of younger adults in any great depth, and is likely to benefit older people disproportionately in relation to younger adults with care and support needs.

(3) Furthermore, since it will only apply to those who would normally be eligible to pay the full cost of their care, this policy gives benefit to the more affluent with little or no benefit to those with limited means.

(4) As the intention is to provide free *personal* care, this policy will not benefit individuals with other care and support needs, such as social isolation or mental health issues. We think this will have a negative impact upon equality.

An Impact Assessment is available to accompany this consultation document. Do you have any comments on the perceived costs and benefits outlined in the Impact Assessment?

a) Option 1 (do nothing):

Costs

(5) The assertion that, "*Compared to option 2, people will not be protected from future increases in personal care charges by councils as part of their domiciliary care charging policies*.", is disingenuous because only those with the 'highest needs' will be protected from future increases in personal care charges. Indeed, should the proposal be implemented, local authorities may face increased pressure to put up domiciliary care charges in order to help fund free personal care for those who do qualify.

b) Option 2 (the proposal):

Costs

(6) As documented throughout this response, we have serious misgivings about the costs of this option. The IA is riddled with uncertainty (see section 4(1) of this response), and we think the assumption that those with the highest needs would require, on average, 6.54 hours per week is particularly alarming.

Benefits

(7) We wholeheartedly endorse the (non-monetised) benefits of reablement set out in the IA, namely more people living in their own home and improvement in individuals' health and well-being.

Is the level of detail proposed for the regulations appropriate? If not, why not?

(8) We are concerned that, if the regulations are not sufficiently watertight, local authorities could face legal challenge as a result of their interpretation of them. Precedents set as a result of case law judgements may subsequently alter interpretation of the regulations, and this could mean increased costs to CASSRs if they suddenly find they have to fund free personal care for more individuals than previously.

(9) We also have concerns that, since the Department have only attempted to cost these proposals for the first two and a half years after the implementation date, local authorities could become liable for great expense in funding their portion of delivering free personal care. We would therefore ask that the regulations in some way limit local authorities' liability in terms of their contribution to the cost of these proposals.

(10) Kent endorses the proposal that no charge will be raised for intensive support and reablement services. We are of the opinion that not only does providing such a service free promote independence, health and well-being, but it also saves local authorities money in the longer term, since individuals are less likely to present themselves at a point of crisis.

Is the balance right between regulations and guidance? If not, why not?

(11) Please refer to paragraphs 8 – 10 above.

Is there anything that you feel should be in the guidance rather than regulations, or vice versa?

(12) Whilst we believe that it would be helpful to have explanations of what does and does not fall within the definition of personal care in the guidance, it would be more helpful to have water-tight definitions in the regulations, since these will carry more weight in a court of law.

Has anything been omitted from this document that should be included in either the regulations or the guidance?

(13) Since the whole policy hinges on the meaning of 'personal care', we are concerned that the definition needs to be crystal clear in order to prevent costly legal disputes, it would be useful to have:

- Further detail of the definitions of 'physical assistance' and what forms that could take (e.g. would assistive technology that might be able to fulfil tasks instead of a person amount to 'physical assistance'?)

- More detail on what actually constitutes each of the six activities in the draft regulations

- Further examples of what the definition does *not* cover.

- Real-life case studies, which may help illustrate the above.

Which of the 3 options do you feel would be most appropriate for allocating the amount needed for personal care needs to eligible individuals?

[*The options are: Setting an indicative amount (of £x per week); Setting an indicative range (of between £x and £y per week); Leaving councils to determine on an individual basis.*]

(14) We prefer the 3rd option for allocating support to individuals. As we will be required to pay for the full costs of personal care, the other two options, by fixing an amount, presumably based on an average, give rise to the risk that we would over-compensate those who had care needs less than the average. As it would be necessary to estimate the total cost in all cases to ensure that the requirement to meet the full cost is met, there can be little advantage in using a fixed or banded payment.

Do you have any further comments on the allocation of the amount needed for personal care needs to eligible individuals?

(15) Self-funders may currently be receiving services at a cost over and above that which we would normally fund. We would therefore need the ability to cap the level to which we fund provision for those individuals ceasing to fund their own care.

Do you have any comments on the aspects of implementation outlined in the document?

(16) We think that the implementation date is unrealistic. Please see section 6 of this response.

In particular, do you have comments around any level of retrospection?

(17) It is hard to see how a period of retrospection could work if a local authority required reablement as a prerequisite to accessing free personal care. However, where reablement is already a standard offer for local authorities, there are cases where a period of retrospection could apply.

(18) The proposed timeframe for retrospection (3 months), would mean that individuals would have a short timescale in which to apply to have their free personal care backdated. This would mean that the opportunity to do so would be limited, and may also mean that the volume of such applications would be very high within a short space of time, which would add to the cost of implementation.

Do you have any comments on the collection of new data and its relation to existing information?

(19) Reporting extra information in statistical returns would place an additional burden on the staff already producing information for the National Indicator Set, the existing statutory returns and information collected for local performance frameworks.

(20) The implementation of the National Indicator Set was intended to reduce the burden on local authorities and give them more capacity to deliver local performance frameworks (e.g. Comprehensive Area Assessment) in order to support the transformation of social care.

(21) Although acknowledging the need for this information, there are concerns that the development of personalisation, local strategic commissioning and markets to support people's choices would be hindered if resources are diverted to prepare for this.

(22) In particular, this is from:

> A practitioner perspective - with more time spent assisting with intensive information gathering and data input as opposed to supporting users with self directed support
>
> A commissioner perspective - where the real need for streamlined outcome information to support market development and to ensure peoples needs are met will be diluted for a time.
>
> A performance perspective - the resource needed to implement this would be significant and would reduce the capacity of a local authority to evaluate and support the Directorate with personalisation and ensuring the best outcomes for people are delivered.

Which of the 3 options do you prefer for the funding formula for the Free Personal Care Grant?

(23) We prefer the 3rd option for a funding formula, as this is the only option which seeks to take into account the fact that people supporting themselves on benefits will already be receiving all of their social care for free. The first two options, by factoring an adjustment for deprivation, will effectively skew the funding to where it is not needed.

Do you have any specific comments about the 3 funding formula options?

(24) It is clear that the main issue driving the uncertainties about self funders coming for support is the actual number of self funders who may exist in any local authority area. This will be driven by the market in that area, and the extent to which capacity exists, beyond that already purchased by the local authority. We wonder if it would be possible to work with CQC to develop a view of market capacity, against which current local authority usage can be mapped, allowing a more robust assessment to be made of actual self-funders and a view of the numbers who would be eligible for this support.