

# RAPID RESPONSE TO THE HEALTH AND SOCIAL CARE CHANGES ANNOUNCED ON 7 SEPTEMBER 2021

9 September 2021

Fenella Morris QC, Sian Davies and  
Arianna Kelly

This session will be starting shortly

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

# The Cap on Care Costs and Charging: What's in, what's out and how it all adds up

9 September 2021

Arianna Kelly

# The Cap on Care Costs

- White paper/further regulations expected
- Retaining overall cap on care costs framework in the Care Act 2014
- **\*\*Caution\*\*** - Command Paper is still at a high level of generality, and regs/guidance would need to be seen to know how the cap would operate

# Cap on Care Costs

S.14 Care Act: Power to charge for care

S.14 power is limited by the cap on care costs in s.15 Care Act – a local authority may not charge for the care of a person who has exceeded the cap on care costs

-Income as well as capital?

# Cap on Care Costs

S.15: (1) A local authority may not make a charge under section 14 for meeting an adult's needs under section 18 if the total of the costs accrued in meeting the adult's eligible needs after the commencement of this section exceeds the cap on care costs.

-What about s.19 power to provide care? Unclear

# Cap on Care Costs

## Unpacking s.15:

- Costs accrued in meeting eligible needs
  - Eligible needs only – costs in meeting needs not eligible under ss.13/18 Care Act do not count
- Costs accrued in meeting eligible needs after the commencement of this section
  - Not retrospective
- Putative cost of needs met by a carer do not count towards the cap under s.15(3)

# Cap on Care Costs

How do you know the cost of eligible needs?

- Needs assessment (s.9)
- Eligibility determination (s.13)
- Care plan (s.25)
- Personal budget (s.26) or independent personal budget (s.28)
- For independent personal budgets – the relevant cost is *‘what the cost would be to the local authority...of meeting the adult’s eligible needs for care and support’* – not what the person is actually paying

# Cap on Care Costs

Keeping track:

- Care Account (s.29), which must contain all of the person's spending on care. To be maintained for either 99 years from the day on which it was last updated, or until the adult's death
- Annual adjustments of the cap (s.16)
  - In line with average earnings
  - Both the cap and accrued costs are adjusted



# Cap on Care Costs

## Daily living costs

- Must be identified in personal budget or independent personal budget
- Do not count towards the cap
- Remain chargeable after a person has exceeded the cap under s.15(7)
- Primarily an issue for people in residential care
- Regional rate issues
- Suggestion of £230/week in 2015

# Cap on Care Costs

What we know from the Command Paper:

- Cap from October 2023 – no suggestion of retrospective application
- £86,000 (s.16 adjustments annually presumed)
- Cap on care costs towards costs spent on ‘personal care’ rather than ‘eligible needs’
- Income charges to end once cap is met
- Top-ups not included in accrued amount to the cap

# Consultation on Draft Regulations - 2015

*4.15. The personal budget...will reflect the actual cost to the local authority of meeting that person's needs, taking into account their preferences and the support available locally. When a person goes into a care home the cost to the local authority may also be affected by other factors, such as the availability of beds on that particular day or the status of any block contracts which may apply. **This means that two people with similar eligible needs supported by the same local authority will not necessarily have the same personal budget.***

# Consultation on Draft Regulations - 2015

*4.16. We think that to seek to remove this variation in personal budgets would run counter to efforts to promote personalisation and is not necessary to create a level playing field for the purposes of the cap. We do, however, recognise that this variation may pose challenges for the calculation of IPBs in terms of balancing the need for personalisation with the need to minimise administrative burdens and meet the person's wishes.*

***4.19. The fairest approach would be for local authorities to set IPBs by taking the average of the personal budgets the authority had given to people in that area with similar levels or types of needs.***

# Cap on Care Costs

- Dilnot commission
  - Lifetime cap between £25,000-£50,000
  - Increase in upper threshold for capital eligibility
  - Free care for people who turn 18 with care and support needs or develop them before 40
- In February 2013, the government announced that it intended to take forward a cap on care costs at £75,000, with an upper threshold for capital at £123,000, and free care for those who turn 18 with care and support needs

# Means-tested support for care

- The Command Paper sets out that there will be new upper and lower capital limits of, respectively, £100,000 and £20,000.
- The Command Paper confirms that the current rules for when a person's main or only home would be disregarded for the purposes of determining assessable capital would remain in effect.

# Means-tested support for care

- Individuals with more than £100,000 in assessable capital are responsible for paying the full cost of their care.
- Individuals with less than £20,000 in assessable capital are not required to make any contribution from their capital for the cost of their care and support (though would still pay any relevant income charge, unless they have already exceeded the cap on care costs).

# Means-tested support for care

- Individuals with assessable capital between £100,000 and £20,000 would be required to pay a tariff income which appears broadly aligned with the current rules: a person would be required to pay 'not more than' 20% of 'chargeable' capital annually.
- Not clear whether 'chargeable' capital would include the last £20,000 of a person's capital below the lower capital limit.
- Person would continue to be assessed for any relevant charge on income, unless they have already exceeded the cap on care costs.



# Duties to self-funders

*We will also tackle persistent unfairness in the social care system. Under the current system, people who fund their own care often pay more than people who are funded through their Local Authority for equivalent care. For the first time, using legislation included in the 2014 Care Act, we will ensure that self-funders are able to ask their Local Authority to arrange their care for them so that they can find better value care.*

# Income Charges

- Freeze on Personal Expenses Allowance and Minimum Income Guarantee (in place since 2016) are to end:

*‘from April 2022 they will both rise in line with inflation.’*

# Deferred Payment Agreements

- DPAs to remain, but
- DHSC *‘will work with partners to review the existing scheme in order to provide more flexibility for people to defer their care payments.’* Further details on how this may occur are not yet provided.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

[39essex.com](http://39essex.com)

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . MANCHESTER . SINGAPORE . KUALA LUMPUR

