

Treatment of property in the means test for permanent care home provision

About this factsheet

This factsheet explains how property is dealt with in the local authority means test for the provision of care home accommodation. It covers a part of the overall residential charging rules and should be read in conjunction with Age UK's other factsheets on care home charging, for example Factsheet 10, *Paying for permanent residential care*.

The information in this factsheet is correct for the period April 2015 – March 2016 but rules and figures sometimes change during the year.

This factsheet describes the situation in England. There are differences in the rules for funding care in a care home in Northern Ireland, Scotland and Wales. Readers in these nations should contact their respective national offices for information specific to where they live – see section 15 for details.

For details of how to order other factsheets and information materials mentioned in this factsheet go to section 15.

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1 Recent developments

The **Care Act 2014** came into force on 1st April 2015 along with a range of new supporting regulations and a single set of new statutory guidance, which, taken together, describe how the Act should be applied in practice. The aim of the change is to simplify and modernise the system, which had become too complex and to introduce a new charging system.

The most significant new regulations in relation to this factsheet are the *Care and Support (Charging and Assessment of Resources) Regulations 2014*, which will be called **the charging regulations** in this text and the *Care and Support (Deferred Payments) Regulations 2014*. The other main source for this factsheet is the *Care and Support Statutory Guidance 2014*, which will be referred to as **the statutory guidance** in the text and includes sections on charging. These documents support sections 14-17 of the *Care Act 2014*, which covers charging for services and sections 34-36 on deferred payments agreements; also sections 69-70 on debt recovery and deprivation of assets.

The previous system of adult social care of laws, regulations and guidance, developed over a period of 65 years, has generally been superseded and is now **no longer applicable**; except in a few cases, for example the complaints regulations. An example of the general revocation is the statutory guidance entitled the *Charging for residential accommodation guide*, known as CRAG. This is the guidance on which this factsheet was previously mainly based. It will now be based on the documents mentioned above, which are listed with web links in the **Appendix** in section 13.

Your local authority must follow the wording of the **Care Act 2014** and its new supporting regulations when administering the means test. It must also have regard to the new **statutory guidance** supporting the Act. This means that it is not legally binding on local authorities in exactly the same way, but they generally do have to apply it. Section 78 of the *Care Act 2014* requires local authorities to '**act under the general guidance of the Secretary of State for Health**'. This means that local authorities must do what the statutory guidance says unless they have a good, justifiable, reason not to in a particular case. The courts previously confirmed this principle in a case under the old law, which used the same words (*R v Islington ex parte Rixon* (1997 - 98 1 CCLR 199)).

The *Care Act 2014* will come into force in **two stages**: in April 2015 and April 2016.

Some of the key changes being introduced in April 2015 are:

- The promotion of **individual wellbeing** as an overarching principle within all the activities of a local authority including: assessment, eligibility, prevention, means testing and care and support planning.
- A new set of **national eligibility criteria** for the adult requesting services and also for their carer(s) leading to rights to services for both; the previous four locally set eligibility levels have now become one. It is intended to have approximately the same eligibility level as the previous 'substantial' one. This is the first time carers will have an absolute right to have their eligible support needs met. Further information about this can be found in Factsheet 41, *Social care assessment, eligibility and care planning*.
- The whole system is now administered via **personal budgets**, meaning that elements such as assessment must be person-centred (based on your views of your needs) and outcomes focused (based on what you want to achieve in your life).
- A 'universal' local authority **information and advice** duty to all those with needs for it; including assistance in obtaining financial advice.
- New local authority '**market shaping**' duties to ensure appropriate and adequate local service provision.

There are many other changes from April 2015, which are described within our range of updated factsheets on adult social care.

The **April 2016 changes** relate to the implementation of new rules on paying for care based on the **Dilnot** care funding recommendations made in 2013 and the subsequent government response. These include:

- The introduction of **care accounts**, which will track personal expenditure towards meeting assessed, eligible, care needs, towards the new cap; they will be adjusted annually in line with the rise in average earnings. Some local authorities may start to assess for them ahead of April 2016.
- The introduction of **independent personal budgets** option, where contribution to the care account is monitored without the means test.

Further regulations and statutory guidance will be created to support the planned funding-related changes in April 2016 following a government consultation.

The transitional system and eligibility

In this factsheet we will describe the transitional system that is now in existence between April 2015 and April 2016. We will amend it next year in light of the new charging rules mentioned above. Government advice on how local authorities should manage the transition over the next couple of years is set down in section 23 of the statutory guidance. Here, it states that the new national eligibility criteria is intended to allow for the same level of access to care and support to be maintained in adult social care in the vast majority of circumstances and cases.

Some terminology that will be used in this factsheet

In this factsheet references to the '**local authority**' or '**council**' will refer to the adult social services department of the local authority or council. The relevant social services department may be called the 'community' department or 'adult social services' or 'older persons' department or 'team'. We will use the term 'local authority' in this factsheet to describe this type of service. However, the term 'local authority' can also describe: a county council in England, a district council for an area in England for which there is no county council, a London borough council, or the Common Council of the City of London.

'**Adult**' means a person aged 18 or over.

A '**partner**', as used within this document, could be part of a married couple (spouse) or a civil partnership.

The term '**care home**' is used to mean any home that is registered with the Care Quality Commission (CQC) to provide accommodation together with personal care and also possibly nursing care. This includes local authority homes and independent homes, which are run by private or voluntary sector providers. These are all regularly inspected and monitored by the CQC based on national standards. The CQC's terms for them are **nursing home** (requiring a registered nurse to be on site) and **care home**. A specialist service such as 'dementia care' may also be added to the descriptions found on the CQC's website.

2 Property and the local authority means test

The basic procedure

Under sections 14-17 of the *Care Act 2014*, local authorities have a general **charging power** (or discretion) where they have decided to meet an individual's social care needs, for example assisting with a care home placement. This is the same for carers, but we're not focussing on them in this factsheet.

Before you can receive any financial assistance with the cost of care home accommodation, the local authority must **assess** your care needs, decide that you meet the new national **eligibility** criteria and agree a **care and support plan**, which identifies residential care as meeting your needs. This should generally be after they have assisted you to look into all the other possible care and support options within your own home. The agreed aims and actions must be documented in your care and support plan along with other elements such as your **personal budget**, which states the amount both you and/or the local authority will have to pay to meet your needs.

A **means test** must then be promptly carried out to see whether you should contribute to the cost.

Property is one of the capital assets, listed in the new statutory guidance and charging regulations, as potentially being eligible for inclusion in the residential care means test. It is mentioned in Annex B of the statutory guidance and Schedule 2 of the charging regulations.

Other forms of capital could include savings and investments. Your **income** will also be taken into account in the means test.

If you are going to become a care home resident with capital over certain limits you will generally have to meet the full cost of your accommodation and personal care in a care home. For the financial year 2015/16, the **upper capital limit** for the means test in England is **£23,250**. As noted above, this figure will change significantly in April 2016.

General information on the charging rules can be found in the Age UK's Factsheet 10, *Paying for permanent residential care* and various on other factsheets. Further information about getting a social care assessment is contained in Age UK's Factsheet 41, *Social care assessment, eligibility and care planning*.

2.1 Valuation of capital in the form of property

If a property is not disregarded, its value will be assessed in the means test at its **present market value**, less any mortgage or loan secured on it, and **less 10% of its value** where there would be expenses involved in selling it. The 10% rule is only for calculating the value of a property before its sale. Once the property has been sold the resident will be treated as having the actual share of the sale proceeds he or she receives once any secured debts and the actual expenses of sale have been paid.

This rule is confirmed in Part 5 of the charging regulations, entitled 'Treatment and calculation of capital' and in Annex B of the statutory guidance, entitled 'Treatment of capital'.

3 Property that is disregarded

3.1 Mandatory disregards

Note: Your property must be disregarded where your relative meets the qualifying conditions and has occupied your property as their main or only home since before you entered the care home.

The value of your home is not included in the means test for any **temporary** stay in a care home. See Age UK's Factsheet 58, *Paying for temporary care in a care home*, for further information about short-term and temporary placements.

For **permanent** care, any interest in your former home will generally be taken into account as capital. There are exceptions to this rule, which are set out below. In the following circumstances the value of your **main or only** home **must be disregarded**. This is where you no longer occupy the property but it is occupied **in part or whole** as their main or only home by:

- your partner, former partner or civil partner, except where they are estranged;
- a lone parent who is your estranged or divorced partner;
- a relative (defined in Annex B of the statutory guidance) of yours or member of your family who is:

- aged 60 or over; or
- a child of yours aged under 18; or
- incapacitated.

This mandatory disregard only applies where the property has been **continuously occupied** by one of those listed above since before you went into a care home. The rule is confirmed in **Schedule 2 of the charging regulations and Annex B of the statutory guidance**, where further clarification of the definitions of the terms is also provided:

The term **'relative'** includes: (a) parent (including an adoptive parent); (b) parent-in-law; (c) son (including an adoptive son); (d) son-in-law; (e) daughter (including an adoptive daughter); (f) daughter-in-law; (g) step-parent; (h) step-son; (i) step-daughter; (j) brother; (k) sister; (l) grandparent; (m) grandchild; (n) uncle; (o) aunt; (p) nephew; (q) niece; (r) or the spouse, civil partner or unmarried partner of (a) to (k) inclusive.

For the purposes of the disregard the meaning of **'incapacitated'** is not closely defined. However, Annex B of the statutory guidance advises that it is reasonable to conclude that a relative is incapacitated if either of the following conditions apply:

- (a) they are receiving one (or more) of the following benefits: incapacity benefit, severe disablement allowance, disability living allowance, personal independence payments, armed forces independence payments, attendance allowance, constant attendance allowance, or a similar benefit; or
- (b) they do not receive any disability related benefit but their degree of incapacity is equivalent to that required to qualify for such a benefit.

Medical or other evidence may be needed before a final decision is reached in this context.

The meaning of **'occupy'** is not closely defined. In most cases it will be obvious whether or not the property is occupied by a qualifying relative as their main or only home. However, there will be some cases where this may not be clear. The statutory guidance states that the local authority should undertake a factual inquiry weighing up all relevant factors in order to reach a decision. An **emotional attachment to the property alone** is not sufficient for the disregard to apply.

3.2 Circumstances where it may be unclear

Circumstances where it may be unclear whether a qualifying relative is occupying your main or only home might include where they have to live elsewhere for the purposes of their employment, for example a member of the armed services or the diplomatic service. Whilst they live elsewhere in order to undertake their employment, the property remains their main or only home. Essentially the qualifying relative is occupying the property but is not physically present out of necessity. The local authority should take account of the **individual circumstances** of each case and be able to give **reasons** for its decision. Annex B of the statutory guidance provides a **list of factors** to assist the local authority in making a disregard decision in this context:

- Does the relative currently occupy another property?
- If the relative has somewhere else to live do they own or rent the property (i.e. how secure/permanent is it?)
- If the relative is not physically present is there evidence of a firm intention to return to or live in the property?
- Where does the relative pay council tax?
- Where is the relative registered to vote?
- Where is the relative registered with a doctor?
- Are the relative's belongings located in the property?
- Is there evidence that the relative has a physical connection with the property?

3.3 Discretion to disregard

Annex B of the statutory guidance provides local authorities with a discretionary power to disregard the value of a property where it is the home of someone else not included on the above list, such as a relative under 60 who has been caring for the resident for a substantial period or a friend who is over 60. The local authority does not have to exercise this power but should give individual consideration to any requests to do so. An example of local authority discretion to apply the property disregard is provided in Annex B:

Jayne has the early signs of dementia but wishes to continue living in her own home. She is not assessed as having eligible needs, but would benefit from some occasional support. Her best friend Penny gives up her own home to move in with Jayne. At this point, there is no suggestion that Jayne may need care in a care home. After 5 years Jayne's dementia has reached the point where she needs a far greater level of care and support and following an assessment it is agreed her needs would best be met in a care home. On moving into the care home, the local authority uses its discretion to apply the property disregard as this has now become Penny's main or only home.

Note: Although the qualifying age for pensions and other related benefits is increasing, the Government has decided to keep the age where a property is disregarded where a relative is living in it at 60 years.

3.4 After you have entered a care home

Annex B of the statutory guidance confirms that your property could possibly be disregarded when a qualifying relative moves into your property after you have entered a care home. Where this happens the local authority will need to consider **all the relevant factors** in deciding whether the property should be disregarded. Factors such as the **timing and purpose** of the move may be relevant to establishing if the property can be defined as your relative's main or only home in this context.

Note: The purpose of the disregard in these circumstances is to safeguard certain categories of people from the risk of homelessness.

Annex B of the statutory guidance requires local authorities to consider whether the principle reason for the move is that it is necessary to ensure that your relative has somewhere to live as their main or only home. It also advises that the disregard would not be appropriate where a person moves into a property **solely to protect the family inheritance**. Your local authority will need to take account of the individual circumstances of each case. To assist with this decision Annex B provides a list of factors that the local authority should take into account:

- Was the relative occupying another property as their main or only home at the time of the previous financial assessment?
- Could the relative have reasonably expected to have the property taken into account at the time they moved into the property?
- Would failure to disregard the property result in the eligible relative becoming homeless?
- Would failure to disregard the property negatively impact on the eligible relatives own health and wellbeing?

It also provides two illustrative examples:

Fred's family home is unoccupied because his father has died and his mother is in a care home and Fred and his siblings have their own homes. The property is subject to a deferred payments agreement [explained later]. Fred has a serious accident and becomes incapacitated. As a result he is unable to work or pay for his existing home. He has nowhere else to live so he moves into the family home which becomes his only home.

In the circumstances, the local authority exercises its discretion to disregard the property.

Hilda is 63 and lives in a rented flat. Her brother, Stephen, has recently died and his wife, Charlotte, has moved into a care home. Hilda suddenly loses her job and finds she is unable to afford to live in her rented flat. As a result, Hilda moves into Stephen and Charlotte's house and this becomes her only home.

In the circumstances, the local authority exercises its discretion to disregard the property.

3.5 The 12-week property disregard

Schedule 2 of the charging regulations and Annex B of the statutory guidance **require** the local authority to disregard your property for the first 12 weeks of being a permanent resident in a care home when it is providing assisting with the placement. If your stay was initially temporary the 12 weeks run from the date it is decided your care is permanent. If your property is sold within this 12-week period the disregard ceases to have effect from the date of sale and the proceeds will be counted as capital.

A local authority **must** also provide the 12-week property disregard when one of the other statutory property disregards (listed above) unexpectedly ends because the qualifying relative has died or moved into a care home: An illustrative example is provided at Annex B:

Win and Ern have been married for 60 years and brought a home together. 18 months ago, Win moved into a care home as a result of dementia. During her financial assessment, the value of the home she shared with Ern was disregarded as Ern is her husband, was over 60 years old and still lived in the property.

Ern has been in good health and there is no reason to anticipate a sudden change in circumstance. Unfortunately Ern suffers a heart attack and passes away, leaving the property to Win. There is no longer an eligible person living in the property, meaning its value can now be taken into account in what Win can afford to contribute to the cost of her care [the financial assessment].

Given this was unplanned for, Win and her family need time to consider what the best option might be. The 12 week disregard would therefore be applied.

In addition, a local authority has **discretion** to choose to apply the disregard when there is a sudden and unexpected change in the person's financial circumstances. In deciding whether to do so, the local authority must consider the individual circumstances of each case. The statutory guidance mentions a fall in share prices or an unanticipated debt as examples and it also provides an illustrative example to assist with the use of this discretionary power:

Harry is a widower who owns his own home. 10 months ago he moved into a care home as a self-funder. He has been meeting the bulk of his costs from shares he received as part of his redundancy package. Due to an unexpected event, the value of his shares is suddenly reduced by half, meaning he is unable to meet the cost of his care.

Although already in a care home and likely to remain responsible for paying for this care, Harry approaches the local authority for assistance and to seek a Deferred Payment Agreement. During the financial assessment the local authority agrees that the circumstances could not have been foreseen and uses its discretion to disregard the value of his property for the first 12 weeks. This provides Harry with the space he needs to make arrangements for the Deferred Payment Agreement to be put in place and enable him to continue to meet the cost of his care.

Action: If the local authority knows that you own your own home but doesn't tell you about the available disregards, you should complain using the authority's complaints procedure. The local authority could be liable to reimburse you if it fails to allow you a statutory disregard and you pay more towards your care costs than you should have as a consequence.

Top-up and the 12-week property disregard

Whilst your property is subjected to the 12-week property disregard you can top-up your residential care additional payments yourself (where the cost of the care home is more than the amount specified in your personal budget) from certain disregarded resources. This was previously known as a self-top-up and is now called a **first party top-up**. Local authorities should consider any request for top-ups, but retain discretion over whether or not to agree in a specific case. This power is confirmed in chapter 9.49 of the statutory guidance and in the *Care and Support and Aftercare (Choice of Accommodation) Regulations 2014*.

There is further information on top-ups in Age UK's Factsheet 60, *Choice of accommodation – care homes*.

3.6 Moving from a disregarded property

If your spouse, partner or other relative lives in a disregarded property, they may at some point wish to move, perhaps to somewhere smaller and more manageable. However, the existing disregard only applies to the original property and once it has been sold your share of the proceeds of sale could be taken into account in the financial assessment.

Annex E of the statutory guidance, entitled 'Deprivation of assets', advises that it **would not be reasonable** for local authorities to treat a resident as having deprived themselves of capital on purpose if they make part of their share of the proceeds from the sale available to their spouse or civil partner to buy a **more suitable property**. It provides an illustrative example to assist in use of this discretion:

Max has moved into a care home and has a 50% interest in a property that continues to be occupied by his civil partner, David. The value of the property is disregarded whilst David lives there, but he decides to move to a smaller property that he can better manage and so sells their shared home to fund this.

At the time the property is sold, Max's 50% share of the proceeds could be taken into account in the financial assessment, but, in order to ensure that David is able to purchase the smaller property, Max makes part of his share of the proceeds from the sale available.

In such circumstance, it would not be reasonable to treat Max as having deprived himself of capital in order to reduce his care home charges.

Unmarried partners and other relatives on whose account the original property has been disregarded could ask the authority to be treated in the same way as a spouse or civil partner if they wish to move.

The statutory guidance does not cover some related issues, such as how any funds left over after the purchase should be apportioned or whose name the new property should be put into. The approaches adopted by individual local authorities on these and other related points may vary.

4 Ownership of property

Note: In some cases there may be a difference between the legal and the beneficial ownership of a property. You are treated as having a beneficial interest in a property if you would be entitled to a share of the proceeds if it were sold. Most people will be legal and beneficial owners.

If you contribute towards the purchase price of a property, or otherwise contribute towards it later on, you may be able to establish a beneficial interest in the property, even if it is legally owned by someone else.

If a property was purchased under the 'right to buy' scheme at a discounted price, the person who attracted the discount may be treated as having a beneficial interest equivalent to the discount obtained, even if he or she did not contribute any money towards the purchase.

If the beneficial interests in a property are disputed it may become necessary to consult a solicitor. If more than one person has a beneficial interest then the property will be valued as if it is jointly owned.

4.1 Ownership disputed

Annex B of the statutory guidance states that where ownership is disputed, a local authority should seek written evidence to prove where the ownership lies; also, that if a person states they are holding capital for someone else, the local authority should obtain evidence of the arrangement, the origin of the capital and intentions for its future use and return to its rightful owner.

5 Valuation of jointly owned property

Jointly owned property is valued differently than other forms of capital in the means test in that the local authority has to take account of **joint owners having different interests**, rather than assuming that each has an equal interest. This rule is set out in Part 5 of the charging regulations, entitled 'Treatment and calculation of capital'. Regulation 24 in Part 5 states that (emphasis added):

(1) Where the adult and one or more other persons are beneficially entitled in possession to any capital asset except an interest in land -

(a) unless paragraph (2) applies, each person is to be treated as if each of them were entitled in possession to an equal share of the whole beneficial interest; and

(b) that asset is to be treated as if it were actual capital.

(2) This paragraph applies where the local authority is satisfied that the adult is beneficially entitled in possession to a share which is less than or, as the case may be, more than an equal share of the whole beneficial estate.

(3) Where paragraph (2) applies the adult's share of the whole beneficial interest will be the actual share (as determined by the local authority) and is to be treated as if it were actual capital.

Note: Land and buildings are both listed as types of capital that can be included in the residential care means test in Annex B of the statutory guidance.

Unfortunately, the above point about the different approach to property (a long-held means test principle) set out in the charging regulations **isn't clearly explained within Annex B** of the equivalent statutory guidance. At paragraph 12, it states that (emphasis added):

Where a person has joint beneficial ownership of capital, **except where there is evidence that the person owns an unequal share**, the total value should be divided equally between the joint owners and the person should be treated as owning an equal share. Once the person is in sole possession of their actual share, they can be treated as owning that actual amount.

Annex B confirms that where a care home resident is joint owner of a capital asset, for example property, the local authority has to base its valuation on the sale value of the resident's beneficial interest to a **'willing buyer'** on the **open market** at the time of the means test. The local authority should not, therefore, simply assess the value of a property as a whole (or equivalent properties) and then divide it up into the shares owned and then assert that this is the true value of the beneficial interest.

Annex B also states that if you and the assessing officer both agree that, after deducting any relevant amounts, the total value of your property is more than the upper capital limit of £23,250 or less than the lower capital limit of £14,250 then it is **not necessary to obtain a precise valuation**. However, the local authority should bear in mind how close you are to the upper capital limit when deciding whether or not to obtain a precise valuation.

5.1 Disputes over valuation

If there are any disputes over the property valuation, Annex B of the statutory guidance requires a precise property valuation to be arranged. It states that this must be undertaken by a professional valuer who must provide a current market valuation. Annex B goes on to state that:

Where the value of a property is disputed, the aim should be to resolve this as quickly as possible. Local authorities should try to obtain an independent valuation of the person's beneficial share of the property within the 12-week disregard period where a person is in a care home. This will enable local authorities to work out what charges a person should pay and enable the person, or their representative, to consider whether to seek a deferred payment agreement.

The trust purpose

Note: When property is jointly owned, it is, in effect, owned in trust in legal terms – each person holds it in trust for the other(s).

For the resident's beneficial interest in jointly owned property to have a value to a willing buyer on the open market they must be able to realise its value. This may relate to their potential ability to apply to a Court to enforce sale of the whole property. When faced with a request such as this a Court must have regard to section 14 of the *Trusts of Land and Appointment of Trustees Act 1996* (the 1996 Act), and section 15 (1), which requires the following considerations:

- the **intentions** of the persons (if any) who created the trust [jointly owned property] at the date of purchase of the home
- the **purposes** for which the property subject to the trust is held.

The second point relates to the purpose for which the trust (legal arrangement to jointly own property) was set up. Whether this purpose is still subsisting (in existence) at the time of the means test is central to the attribution of value to the resident's beneficial interest. This is because it may create an impediment to an intended enforced sale once purchased by a willing.

There are two leading cases that provide guidance on this point for the purposes of residential care charging. In the case of *Wilkinson v CAO*¹ the purpose of a gift of property was not to provide a home. Mrs Wilkinson's share in a jointly owned property came to her as an inheritance on her mother's death. It was **an absolute gift** to Mrs Wilkinson and her sister, in equal shares, with no restriction or other intended purpose. Here Mummery LJ decided that a sale could be enforced thus creating a market value for Mrs Wilkinson's beneficial interest.

This can be contrasted with the earlier case of *Chief Adjudication Officer v Palfrey*². Here, Mr Palfrey, a joint property owner, had gone into residential care and the question arose as to how his share in the **family home** should be valued for the purpose of assessing his entitlement to Income Support.

The house had been acquired by him and his daughter as beneficial joint tenants. Hobhouse LJ concluded that, even though Mr Palfrey was no longer present:

Where the capital asset is a jointly owned dwelling house held for the purpose of accommodating the joint owners and that purpose is still subsisting, there is nothing obscure or abstruse in the conclusion that the amount of capital which the applicant's joint possession of that dwelling house represents may fall, for the time being, to be **quantified in a nominal amount**.

Based on this reasoning, the **'subsisting' purpose** would disappear if the joint tenant vacated the property at some future point.

If you are told that the resident's share has a value due to the following reasons you should seek advice:

- the local authority has taken the value of the property and just divided it by the number of joint owners;
- the local authority will 'offer' to be the willing buyer; or
- any willing buyer would be able to force a sale.

¹ [2000] EWCA civ 88.

² [1995] 11LS Gaz R39, {1995} Times, 17 February.

The type of advice required will relate to **the individual case facts**. You may be able to clarify the issue by phoning an advice line such as Age UK Advice or by visiting local advice service. However, in some cases it may be necessary to obtain advice from a property lawyer or other professional who is expert in the correct approach to property valuation.

Pension Credit and property.

For Pension Credit, the value of your home is ignored for periods of temporary care. If your care is permanent, the value of your property can be ignored for up to 26 weeks (or longer if reasonable) as long as steps are taken to dispose of it. You can still receive Pension Credit during this period if you qualify based on your income and capital other than your former home.

If you are in permanent care but your house is not up for sale, the value of your interest in your former home will generally be included in the means test for Pension Credit. A former home still inhabited by a partner or relative is disregarded under similar rules to those used by the local authority. There is no discretionary disregard of a property which the local Authority can take into account. So if the local authority has used its discretion to ignore the value of your home or arranged for a deferred payment it may still be taken into account for Pension Credit.

As there is no upper capital limit for Pension Credit, a resident with a low income and a low-value property might in some circumstances be able to claim Pension Credit while the property is being taken into account in the assessment.

See Age UK's Factsheet 48, *Pension Credit*, for further information.

5.2 Pension Credit and jointly owned property

The Pension Service value jointly owned property as if it is held in equal shares unless you own it jointly as tenants in common in which case it is your actual share that is valued. If there is little or no market for the care home resident's share in the property, its value may be low or even nil, particularly if the joint owner lives in the property.

If you are unhappy about the valuation you should appeal. If the property is subsequently sold, you will be treated as having the share of the proceeds to which you are entitled.

Note: With regard to the valuation of jointly owned property in the local authority means test, the Government has removed the wording that was in the previous statutory guidance referring to a possible ‘nil’ valuation. However, see section 5.1 above regarding the required procedures for disputed valuations.

6 Deferred payment agreements

The *Care Act 2014* (sections 34-36) establishes a new, ‘universal’, deferred payments system for adult social care.

The application of the new system is set out in chapter 9 of the statutory guidance, entitled ‘Deferred payments agreements’, and the *Care and Support (Deferred Payments) Regulations 2014*, which will be called the in this text (see web link in the Appendix at section 14).

Note: In this section we will summarise the main points of the new deferred payments procedure, which is set down in extensive statutory guidance, that supports the Act and the deferred payments regulations.

The statutory guidance states that the new scheme is intended to result in a person not generally being forced to sell their home in their lifetime to pay for their residential care.

By entering into a deferred payment agreement you **delay paying** the costs of your care and support until a later date usually by agreeing to have a legal charge placed on your property. It can also provide **additional flexibility** for when and how you pay for your care and support. Payment for care and support is **deferred and not ‘written off’** – the costs of provision of care and support will have to be repaid by you (or a third party on your behalf) at a later date.

The scheme is now **‘universally’ available** throughout England meaning that your local authority is required to offer deferred payments to you if you meet certain criteria governing eligibility for the scheme. However, local authorities must also ensure in each case that adequate security is in place for the amount being deferred, so that they can be confident that the amount deferred will be repaid in the future.

The Government also wants local authorities to offer the scheme **more widely than previously** to anyone they feel would benefit who may not fully meet the criteria. The statutory guidance states that:

A deferral can last until death, however, many people choose to use a deferred payment agreement as a '**bridging loan**' to give them time and flexibility to sell their home when they choose to do so. This is entirely up to the individual to decide.

6.1 The eligibility criteria

As stated above, you **must be offered** the choice of entering into a deferred payments agreement by your local authority if you meet the **eligibility criteria** and you are able to provide **adequate security**. This is the case if you are having local authority-arranged care and support or if you are arranging and paying for your own care and support.

The deferred payments regulations state that someone is eligible for, and therefore must be offered, deferred payments if they meet **three criteria** at the point of applying for a deferred payment agreement. These are set down in the statutory guidance as:

- anyone whose needs are to be met by the provision of care in a care home. This is determined when someone is assessed as having eligible needs which the local authority decides should be met through a care home placement;
- anyone who has less than (or equal to) £23,250 in assets excluding the value of their home (i.e. in savings and other non-housing assets); and
- anyone whose home is not disregarded, for example it is not occupied by a spouse or dependent relative as defined in regulations on charging for care and support.

Note: With regard to the first point above, chapter 9 of the statutory guidance also states that 'When someone is arranging their own care and support and the authority has not performed an assessment, this condition is satisfied when someone would be assessed as having eligible needs were the authority to have carried out such an assessment'. The mechanism for substantiating this is not further explained in the text.

6.2 Discretion regarding people who do not meet the criteria

Chapter 9 of the statutory guidance states that local authorities can be '**more generous**' and offer deferred payment agreements to people who do not meet the above criteria. It sets out considerations that a local authority may take into account in deciding whether someone who does not meet all of the criteria above should still be offered deferred payments. These include (but are not limited to):

- whether meeting care costs would leave someone with very few accessible assets (this might include assets which cannot quickly/easily be liquidated or converted to cash);
- if someone would like to use wealth tied up in their home to fund more than just their core care costs and purchase affordable top-ups;
- whether someone has any other accessible means to help them meet the cost of their care and support; and/or
- if a person is narrowly not entitled to a deferred payment agreement given the criteria above, for example because they have slightly more than the £23,250 asset threshold. This should include people who are likely to meet the criteria in the near future.

6.3 People in supported living accommodation

Chapter 9 of the statutory guidance gives local authorities **discretion** to enter into deferred payment agreements with people whose care and support is provided in supported living accommodation if they intend to retain their former home and pay the associated care and accommodation rental costs from their deferred payment. Further details on precisely what qualifies as supported living accommodation are set out in deferred payments regulations, at section 3. However, the statutory guidance also states that deferred payment agreements cannot be entered into to finance mortgage payments on supported living accommodation.

6.4 Discretion to refuse a deferred payment agreement

Chapter 9 of the statutory guidance provides local authorities with discretion to refuse a deferred payments agreement request in certain circumstances even if you meet the general eligibility criteria. This power is intended to provide local authorities with a **reasonable safeguard** against default or non-repayment of the accrued debt. A local authority may refuse a deferred payment agreement despite someone meeting the eligibility criteria:

- where a local authority is unable to secure a first charge on the person's property;
- where someone is seeking a top up; and/or
- where a person does not agree to the terms and conditions of the agreement, for example a requirement to insure and maintain the property.

With regard to the second point, the statutory guidance advises that your local authority should still seek to offer a deferred payment agreement but should be guided by the principles set down within the guidance to determine **a maximum amount that is sustainable** (or reflects their core care costs without any top-ups) and agree a deferral.

It also adds that in any of the above circumstances, a local authority should consider whether to exercise its discretion to offer a deferred payment anyway. For example, if your property is uninsurable but has a high land value, the local authority may choose to accept charges against this land as security instead.

6.5 Where the local authority may stop deferring care costs

Situations where a local authority may refuse to defer any more charges for a person who has an active deferred payment agreement are also described in the chapter 9 of the statutory guidance. Local authorities **cannot demand repayment** in these circumstances, and repayment is still subject to the usual terms of termination (see section 6.16 below). The local authority should provide a minimum of 30 days, advance notice that further deferrals will cease; and should provide the person with an indication of how their care costs will need to be met in future. Depending on their circumstances, the person may either receive local authority support in meeting the costs of their care or may be required to meet their costs from their income and assets.

The statutory guidance states that local authorities exercising the power to cease deferring additional amounts should consider their decision to do so taking into account the person's circumstances and their overarching duties under the well-being principle. Circumstances in which a local authority may refuse to defer any more charges are listed in the statutory guidance at 9.16. These are:

- when a person's total assets fall below the level of the means-test, and they become eligible for local authority support in paying for their care;
- where a person no longer has need for care in a care home (or where appropriate supported living accommodation);
- if a person breaches certain predefined terms of their contract (which must be clearly set out in the contract) and the local authority's attempts to resolve the breach are unsuccessful and the contract has specified that the authority will stop making further payments in such a case; or
- if, under the charging regulations, the property becomes disregarded for any reason and the person consequently qualifies for local authority support in paying for their care, including but not limited to:

where a spouse or dependent relative (as defined in charging regulations) has moved into the property after the agreement has been made, where this means the person is eligible for local authority support in paying for care and no longer requires a deferred payment agreement; and

where a relative who was living in the property at the time of the agreement subsequently becomes a dependent relative (as defined in charging regulations). The local authority may cease further deferrals at this point.

6.6 Information and advice specifically for deferred payments

Under the *Care Act 2014*, local authorities have a **duty to provide information and advice** about people's care and support needs, including deferred payment schemes – see section 12, below. Chapter 9 of the statutory guidance sets out the standards that a local authority must adhere to in relation to deferred payments.

In order to be able to make well-informed choices, it is essential that people access appropriate information and advice before taking out a deferred payment agreement. It is also important that people are kept informed throughout the course of the deferred payments agreement, and that they (and the executor of their estate where appropriate) receive the necessary information upon termination of the agreement.

Local authorities must also provide appropriate information, advice and support where an individual has lost mental capacity or may do in the future; and act in their best interests as defined by the *Mental Capacity Act 2005*.

Note: If a local authority identifies someone who may benefit from or be eligible for a deferred payments agreement or a person approaches them for information, it must tell them about the local scheme, how it works and the choices that are available to fund meeting their needs.

This information should as a minimum:

- set out clearly that the fees are being deferred or delayed and must still be paid back at a later date, for example through the sale of the home (potentially after the individual's death);
- explain the types of security that a local authority is prepared to accept;
- explain that if a home is used as security, the home may need to be sold at a later date to repay the amount due;
- explain that the total amount they can defer will be governed by an equity limit which may change if the value of their security changes;
- explain the circumstances where the local authority may cease to defer further amounts (such as when the person qualifies for local authority support in paying for their care), and the circumstances where the local authority has to stop deferring further amounts (such as when the person reaches their equity limit);
- explain how interest will be charged on any amount deferred;
- explain that they may be liable to pay administrative charges;
- explain what happens on termination of the agreement, how the loan becomes due and their options for repayment;
- explain what happens if they do not repay the amount due;

- set out the criteria governing eligibility for deferred payments;
- detail the requirements that must be adhered to during the course of the deferred payments agreement;
- explain the implications that a deferred payment agreement may have on their income, their benefit entitlements, and charging;
- provide an overview of some potential advantages and disadvantages of taking out a deferred payments agreement, and explain that there are other options for paying for their care that they may wish to consider;
- note the existence of the 12-week property disregard, which will afford those who qualify for it some additional time to consider their options in paying for care; and
- suggest that people may want to consider taking independent financial advice (including flagging the existence of regulated financial advice), in line with the guidance set out in chapter 3 on information and advice in the statutory guidance.

The statutory guidance requires local authorities to provide **easy to read information** about how the local scheme works in formats that also ensure compliance with the requirements of the *Equality Act 2010*. This must be provided at the earliest appropriate opportunity during the period of the 12-week disregard.

Local authorities should advise people (where appropriate) that they will need to consider how they plan to **use, maintain and insure** their property if they take out a deferred payments agreement. They should also advise if they intend to place **conditions on how the property is maintained** whilst the agreement is in place. They will usually include requirements for people to maintain and insure their homes within the terms and conditions of a deferred payment agreement.

Local authorities should develop basic information and advice for homeowners on **how they may choose to use their property** when they enter residential care, for example information on how they may go about renting their property, and the potential impact on other people living in the property if a sale is required after their death. They should signpost people to more specialist organisations who can provide further advice on this issue, including information about their legal responsibilities as landlords and their obligations to any potential tenants.

6.7 How much can be deferred?

Note: In principle the amount that can be deferred should be capable of covering the whole of your care costs. However, in certain circumstances, a local authority may require a contribution from a person's income (see 6.9 below).

However, it does not relate to the separate **daily living cost** charge set out in section 14-17 of *the Care Act 2014*, which all those receiving local authority support to stay in residential care must pay.

The following points are a **summary** of the extensive information in chapter 9 of the statutory guidance on the amount that can be deferred.

The local authority will need to consider whether a person can provide **adequate security** for the deferred payment. Usually, this requirement for 'adequate security' will be fulfilled by securing their deferred payment agreement against their **property**.

If the person is considering a **top-up**, the local authority should also consider whether the amount or size of the deferral requested is **sustainable** given the equity available from their chosen form of security. A discussion of sustainability may be helpful in all cases to ensure the person is aware of how much care their chosen form of security would afford them.

Three elements will dictate how much a person can defer:

- the amount of equity a person has available in their chosen form of security (usually their property);
- the amount a person is contributing to their care costs from other sources, including income and (where they choose to) any contribution from savings, a financial product or a third-party; and
- the total care costs a person will face, including any top-ups the person might be seeking.

6.8 Equity Limit

Note: When considering the equity available, local authorities must be guided by an 'equity limit' for the total amount that can be deferred and ensure that the amount deferred does not rise above this limit.

The equity limit will leave some equity remaining in the security used for the deferred payments agreement, which will both act as a **buffer** to cover any subsequent interest which continues to accrue, and will provide a small '**cushion**' in case of small variations in value of the security.

In the majority of cases a property will be used as security, so the equity limit will provide a cushion against changes in house prices. When calculating progress towards the equity limit, the local authority must also include any interest or fees to be deferred.

If the person intends to secure their deferred payment agreement with a property, local authorities must obtain a **valuation of the property**. People may request an independent assessment of the property's value (in addition to the local authority's valuation). If an independent assessment finds a substantially differing value to the local authority's valuation, the local authority and person should discuss and agree an appropriate valuation prior to proceeding with the agreement.

Note: Where a property is used as security for a deferred payment agreement, the equity limit must be set at the value of the property minus ten percent, minus £14,250 (for financial year 2015/16, in line with the lower capital limit) and the amount of any encumbrances (legal claims by another party) already secured on it, for example a mortgage.

This limit **provides some protection** to local authorities against changes in the value of the security (such as possible house price fluctuations) and the risk that they may not be able to recoup the full amount owed, but also should mean that people qualify for local authority support if they deplete the equity available in their property (and are consequently not at risk of having to sell their home to pay for care).

Local authorities should, when someone is approaching or reaches the point at which they have deferred **70% of the value of their chosen security**, **review** the cost of their care with the person, discuss when the person might be eligible for any means tested support, discuss the implications for any top-up they might currently have, and consider jointly whether a deferred payment agreement continues to be the best way for someone to meet these costs.

The statutory guidance states that local authorities **must not allow additional amounts to be deferred** beyond the equity limit, and must refuse to defer care costs beyond this. However, interest can still accrue beyond this point, and administrative charges can still be deferred.

6.9 Contributing to care costs from other sources

A person may meet the costs of their care and support from a combination of any of **four primary sources**:

- income, including pension income;
- savings or other assets they might have access to, this might include any contributions from a third party;
- a financial product designed to pay for long-term care; or
- a deferred payment agreement which enables them to pay for their care at a later date out of assets (usually their home).

The share of care costs that someone defers will depend on the amount they will be paying from the other sources listed above. Local authorities may require a contribution towards care costs from a person's income, but chapter 9 of the statutory guidance (at 9.44-9.47) confirms that the person has a right to retain a proportion of their income, which is called the **Disposable Income Allowance (DIA)**. This is a fixed amount (up to £144 per week) of a person's income which the local authority must allow the person to retain (if the person wants to retain it). The local authority can require the person to contribute the rest of their income, but must allow the person to retain as much of their disposable income allowance as they want to.

Note: The DIA for deferred payments is not the same as the Minimum Income Guarantee (MIG) amount, which is covered in Regulation 7 of the charging regulations. The DIA is covered in Regulation 6 of the *Care and Support (Deferred Payment) Regulations 2014*, as follows:

(1) If in any week during which the agreement is in force the adult's weekly income exceeds £144, a local authority is permitted not to —

(a) defer an amount due to the authority under section 14 or 30(2) for meeting the adult's needs for that week by the provision of accommodation in a care home or supported living accommodation; or

(b) advance an instalment or part of an instalment under the loan agreement for the purpose of assisting the adult to obtain for that week the provision of care and support in a care home or supported living accommodation.

(2) But the amount which under this regulation the local authority may decide not to defer or advance in respect of that week may not exceed the amount by which the adult's income in that week exceeds £144.

A person **may choose to keep less** of their income than the DIA disposable income allowance. This might be **advantageous** to them as they would be contributing more to the costs of their care from their income, and consequently reducing the amount they are deferring (and accruing less debt to their local authority overall). However this must be entirely at their own discretion and the local authority must not compel them to retain less than the DIA if the person wants to retain the full amount.

If a person decides to **rent out** their property during the course of their deferred payments agreement, a local authority should permit them to **retain a percentage** of any rental income they possess. Local authorities may consider whether to offer other incentives to individuals to encourage rental of properties, though the decision as to whether or not to rent a property must be the person's and theirs alone.

A person may also contribute to their care costs from **payments by a third party** (including any contributions available from a financial product) or from their savings. Contributing to care costs from another source would be beneficial for a person as it would reduce the amount they are deferring (and hence reduce their overall debt to the local authority). A local authority must not compel a person to contribute to their deferral from these sources.

6.10 Care costs

Before considering in detail how much they will be deferring, a person and usually the local authority should have a rough idea of their likely care costs as a result of the care planning process. Someone may wish to vary their care package (or any top-ups they may be considering) following consideration of what they could afford with a deferred payment agreement, but should approach the process with an approximate idea of what their care costs are likely to be.

Note: In principle, people should be able to defer their full care costs including any top-ups.

As a minimum, when local authorities are required to offer a deferred payment agreement they must allow someone to defer their **'core' care costs**. To ensure sustainability of the deferral, local authorities have discretion over the amount people are permitted to top-up. Local authorities should consider any request for top-ups, but retain discretion over whether or not to agree to a given top-up. **Local authorities should accept any top-up deemed to be reasonable** given considerations of affordability, sustainability and available equity. Local authorities must be aware of the duties set out in relation to top-ups and additional costs in the *Care and Support and Aftercare (Choice of Accommodation) regulations 2014*.

6.11 Sustainability

When deciding on the amount to be deferred in a discretionary deferred payment agreement (particularly when considering top-ups), the statutory guidance requires that both parties should consider a range of factors to satisfy themselves that the arrangement is sustainable:

- the likely period the person would want a deferred payments agreement for (if they intend to use it as a 'bridging loan');
- the equity available;
- the sustainability of a person's contributions from their savings (if they are making one);
- the flexibility to meet future care needs; and
- the period of time a person would be able to defer their care costs for.

Local authorities should discuss with the person the projected limit of what their equity could cover, given their projected care costs, and how their care costs might change over time.

Local authorities and individuals should also consider the **length of time that a person's intended contribution to care costs from savings would last**, if they intend to contribute to their care costs from their savings. This should include consideration of the impact on their care if a person's savings are depleted (normally this would involve increasing the amount the person is deferring).

An important factor in the sustainability of a deferred payment agreement will be any **future care and support needs** someone might face, and local authorities and people should consider allowing flexibility for changes in circumstance, including possible escalations of needs, when deciding how much someone should defer. When agreement has been reached between a person and the local authority as to how much they want to defer, the local authority must ensure this is clearly and unambiguously set out in the deferred payment agreement.

The amount being deferred should be **reviewed on a regular basis** to ensure the deferred amount does not exceed the equity limit as discussed above. Local authorities should have particular regard to the amount deferred as it **approaches the equity limit**.

6.12 Obtaining adequate security

A local authority must have **adequate security** in place when entering into a deferred payment agreement to cover the cost, interest and any administration fees. The *Care Act 2014*, at section 43, gives two examples of security that local authorities must accept:

- an obligation on the adult to give the authority a charge over the adult's legal or beneficial interest in the property which the adult occupies as his or her only or main residence (or in a property which the adult used to occupy as such) to secure payment of the adult's deferred amount;
- a guarantee from another person to pay the adult's deferred amount.

What else may constitute 'adequate security'?

Chapter 9 of the statutory guidance advises local authorities to consider whether another type of security could be provided if a person cannot secure their deferred payment agreement with a charge on their property. At 9.59 it recommends securing a 'first legal mortgage' charge against a property on the Land Register as a possible alternative. A 'first legal mortgage' is a type of legal charge – given its full legal name. Paragraph 9.59 states that this **must** be accepted by a local authority as adequate security if appropriate, whereas other forms of security **may** be accepted by a local authority. If this option is not possible the guidance requires the publication of:

an explicit and publicly-accessible policy of what other types of security [the local authority is] willing to consider in addition to a first charge, but local authorities may consider the merits of each case individually.'

Examples of **other forms of security** that a local authority may choose to consider include:

- a third-party guarantor – subject to the guarantor having/offering an appropriate form of security;
- a solicitor's undertaking letter;
- a valuable object such as a painting or other piece of art; or
- an agreement to repay the amount deferred from the proceeds of a life assurance policy.

The security should also be **revalued** when the amount deferred equals or exceeds 50% of the value of the security to assess any potential change in its value and consequently the person's 'equity limit' should also be reassessed. After this revaluation, local authorities should revalue the security periodically to monitor any potential further changes in value. If in either case there has been any substantial change the local authority should review the amount being deferred as well.

6.13 Jointly owned property

Chapter 9 of the statutory guidance requires that in cases where an agreement is to be secured with a jointly-owned property, local authorities must seek all of the owners' consent (and agreement) to a charge being placed on the property. All of the owners will need to be signatories to the charge agreement, and the co-owners will need to agree not to object to the sale of the property for the purpose of repaying the debt due to the local authority following the same procedure as in the case where an individual is the sole owner of a property.

6.14 Interest and administration charges

Chapter 9 of the statutory guidance states that the new deferred payment agreement scheme is intended to be run on a cost-neutral basis. Local authorities are now able to recoup the costs associated with deferring fees by charging interest. Local authorities can also recoup the administrative costs associated with the agreements, including legal and ongoing running costs, via **administration charges** which can be passed on to the individual.

Administration charges and interest can be added on to the total amount deferred as they are accrued, although a person may request to pay these separately if they choose. The agreement must make clear that all fees deferred, alongside any interest and administrative charges incurred, must be repaid by the person in full. The local authority must also notify the individual in writing whenever they are liable for an administration charge.

The interest rate

Where local authorities charge interest this **must not exceed** the maximum amount specified in the deferred payment regulations. This states that the interest rate is a rate that 'does not exceed the relevant rate for the relevant period plus 0.15%'. The national maximum interest rate is published by the central government and it changes every six months, on 1st January and 1st June. Local authorities must ensure that any changes to the national maximum rate are reflected within their authority and are applied to any agreements they have entered into (unless they are already charging less than the national maximum). Individual agreements must also contain adequate terms and conditions to ensure that the interest rate within any given agreement does not exceed the nationally-set maximum.

The interest charged and added to the deferred amount will be compounded, and local authorities should ensure when making the agreement that individuals understand that interest will accrue on a compound basis i.e. calculated at various set periods based on the increased amounts owed over time.

Note: Local authorities must inform people before they make the agreement if interest will be charged, what interest rates are currently set at, and when interest rates are likely to change.

Interest can accrue on the amount deferred even once someone has reached the 'equity limit'. It can also accrue after someone has died up until the point at which the deferred amount is repaid to the local authority. If the local authority cannot recover the debt and seeks to pursue this through the **County Court system** the local authority may charge the higher County Court rate of interest.

The administration charge

Local authorities must set their administration charge at a **reasonable level**, and this level must **not be more than the actual costs** incurred by the local authority in provision of their deferred payments scheme. The deferred payments regulations provide details of the types of administrative costs that can be included within the calculations. These may include the costs incurred by a local authority whilst:

- registering a legal charge with the Land Registry against the title of the property, including Land Registry search charges and any identity checks required;
- undertaking relevant postage, printing and telecommunications;
- costs of time spent by those providing the service;
- cost of valuation and re-valuation of the property;
- costs for removal of charges against property;
- overheads, including where appropriate (shares of) payroll, audit, management costs, legal service.

Local authorities should maintain a **publicly-available list** of administration charges that a person may be liable to pay.

6.15 Making the agreement and its contents

Chapter 9 of the statutory guidance states that where someone chooses to enter into a deferred payment agreement, local authorities should aim to have the agreement finalised and in place by the end of the initial **12-week** property disregard period where applicable, or within 12 weeks of the person approaching the local authority in other circumstances.

Decisions on a person's care and support package, the amount they intend to defer, the security they intend to use and the terms of the agreement should only be taken following discussion between the local authority and the individual. Once agreement in principle has been reached between the local authority and the person, it is the local authority's responsibility to transpose the details agreed into a **deferred payment agreement**, taking the legal form of a contract between the local authority and the person.

The local authority should provide a **hard copy** of the deferred payment agreement to the person, and they should be provided with **reasonable time** to read and consider the agreement, including time for the individual to query any clauses and discuss the agreement further with the local authority. The agreement **must clearly set out all terms, conditions and information** necessary to enable the person to ascertain his or her rights and obligations under the agreement. Paragraph 9.77 of the statutory guidance states that these must include:

- terms to explain how the interest will be calculated and that it will be compounded if it is to be added to the deferred amount;
- information as to administrative costs the individual might be liable for;
- terms to explain how the adult may exercise his or her right to terminate the agreement, which should explain the process for and consequences of terminating the agreement and specify what notice should be given (see the section entitled 'terminating the agreement' below);
- terms to explain the circumstances in which the local authority might refuse to defer further fees (either when it is required to stop deferring, for example if the person has already deferred up to their 'equity limit', or when it has powers to stop deferring, such as when a person qualifies for local authority support in paying for their care);
- that the local authority will secure their debt either by placing a legal (Land Registry) charge against the property, or by some other means specified;

- a term requiring the local authority to provide the person with a written statement every six months and within 28 days of request by the person, setting out how much the person owes to the authority and the cost to them of repaying the debt;
- a term which explains that the maximum amount which may be deferred is the equity limit and that this is likely to vary over time;
- a term which requires the local authority to give the adult 30 days written notice of the date on which they are likely to reach the equity limit;
- a term which requires the adult to obtain the consent of the local authority for any person to occupy the property; and
- an explanation that the local authority will stop deferring its charges and making advances under a loan agreement if the person no longer receives care and support in a care home or supported living accommodation or if the local authority no longer considers that the adult's needs should be met in such accommodation.

Paragraph 9.78 states that if the agreement is **not for the deferral of charges due to the authority** (a 'loan'-style agreement), the agreement must also contain:

- a term to make clear that the authority will make advances of the loan to the adult in instalments;
- a term to make clear that the purpose of the loan is to pay for costs of care and support in a care home or supported living accommodation. This should explain –
 - the consequences of any failure by the adult to pay those costs of care and support; and
 - that the adult must inform the local authority if he or she no longer receives or intends to receive care in such accommodation.

Paragraph 9.79 also requires the deferred payments agreement to stipulate:

- the value of any accrued or possible administrative charges, and where possible a breakdown of their calculation;
- the means of redress if either party feels the other has broken the terms of the agreement;

- the person's responsibilities regarding maintenance and insurance of their home;
- the person's responsibility to notify the local authority of any change to their income, home or care and support;
- the person's responsibility to notify the local authority if they intend to rent or sell their property and if someone has gained or may gain a beneficial interest in their property;
- the local authority's responsibility to give the person 30 days written notice if it intends to cease to defer charges (or make loan instalments) under the agreement;
- a clear explanation of the consequences of taking out a deferred payments agreement for the person and their property, including anybody who may reside in the property;
- the equity limit of their security (as in section 7.1.5) and the scope for this to change upon revaluation of the security used for the agreement;
- the process for varying any part of the agreement; and
- the process by which the local authority can require a re-valuation of a person's chosen form of security.

The statutory guidance goes on to require (at 9.80) that local authorities should ensure at a minimum:

that people **sign or clearly and verifiably affirm** they have received adequate information on options for paying for their care, that they **understand** how the deferred payments agreement works and understand the agreement they are entering into; and

that they have had the opportunity to ask **questions** about the contract. A term reflecting this should be included in the agreement itself.

Local authorities will need to consider whether the deferred payment agreements they enter into are **regulated credit agreements** under the relevant legislative requirements. The agreements will also be subject to the ***Unfair Terms in Consumer Contracts Regulations 1999*** and the ***Consumer Protection from Unfair Trading Regulations 2008***. Further information about these requirements is provided in the statutory guidance at paragraphs 9.81-9.83.

6.16 Responsibilities while the agreement is in place

Chapter 9 of the statutory guidance states that local authorities must, at a minimum, provide people with **six-monthly written updates** of the amount of fees deferred, of interest and administrative charges accrued to date, and of the total amount due and the equity remaining in the home. They should also provide the person with a **statement on request** within 28 days. Local authorities may provide updates on a more frequent basis at their discretion.

The update should set out the amount deferred during the previous period, alongside the total amount deferred to date, and should also include a projection of how quickly someone would deplete all equity remaining in their chosen form of security up to their equity limit.

They should also **reassess** the value of the chosen form of security once the amount deferred **exceeds 50%** of the security (and periodically thereafter) and adjust the equity limit; and review the amount deferred if the value has changed.

6.17 Contractual responsibilities while the agreement is in place

Note: The deferred payment agreement sets out various contractual requirements on the individual as well as on the local authority. These are discussed in chapter 9 of the statutory guidance and are summarised below.

If the local authority is exercising its right to require the adult to make a **contribution from income**, it should include in the legal agreement provisions requiring the person to notify the local authority of any changes in their income.

The agreement should also contain provisions requiring the adult to notify the authority of **changes in their need for care and support**, if those changes are ones which will mean that the authority must or is entitled to stop making further instalments under the agreement or to alter the amount of the instalments.

Similarly, if the agreement has been entered into on the basis that the adult's **property has not been disregarded** for the purposes of the financial assessment (described in section 3 above) and it is a term of the agreement that the local authority will cease making or reduce the amount of instalments it makes, the agreement should require the person to **inform the authority of changes** which mean that the property may be disregarded.

The local authority should include in a contract, provisions requiring someone to ensure that appropriate **arrangements are in place to maintain their home** whilst they are in residential care. In particular, the contract should require that their home is maintained adequately, and require someone to have in place an arrangement for regular maintenance to take place. Local authorities should also require the person to have **adequate insurance** for their property. If their home is to be left empty for an extended period of time, the person will need to ensure their insurance covers this adequately and that any terms required by the insurer are met.

The local authority must include in a contract, provisions which require the person to obtain the authority's **consent before allowing someone to move into the property** after the agreement has been made. In these circumstances, the local authority may (if it is reasonable to do so) require written consent from the person which places the debt owed to the local authority above any beneficial interest they may accrue in the property.

6.18 Termination of agreement

Chapter 9 of the statutory guidance states that a deferred payment agreement can be terminated in three ways:

- at any time by the individual, or someone acting on their behalf, by repaying the full amount due (this can happen during a person's lifetime or when the agreement is terminated through the deferred payments agreement holder's death);
- when the property (or form of security) is sold and the authority is repaid; or
- when the person dies and the amount is repaid to the local authority from their estate.

If it has been agreed on the basis of a form of **security other than property**, local authorities need to make provision in the original agreement for its conclusion in the event that the given security is disposed of or comes to fruition.

Note: On termination, the full amount due (including care costs, any interest accrued and any administrative or legal fees charged) must be paid to the local authority.

If a person decides to **sell their home**, they should notify the local authority during the sale process. They will be required to pay the amount due to the local authority from the proceeds of the sale, and the local authority will be **required** to relinquish the charge on their property.

A person may decide to repay the amount due to the local authority **from another source, or a third party** may elect to repay the amount due on behalf of the individual. In either case, the local authority should be notified of the person's/the third party's **intention in writing**, and the local authority **must** relinquish the charge on the property on receipt of the full amount due.

If the deferred payment is **terminated due to the person's death**, the amount due to the local authority must be either paid out of the estate or paid by a third party. A person's family or a third party may wish to settle the debt to the local authority by other means of repayment (as may be the case if the family wanted to avoid having to sell the property or means of security), and the local authority **must accept an alternative means of payment** in this case, **provided** this payment covers the full amount due to the local authority.

The **executor** of the will or **Administrator** of the Estate can decide how the amount due is to be paid; either from the person's estate (usually via the sale of the house or potentially via a life assurance policy) or from a third party source.

A local authority should wait at least **two weeks following the person's death** before approaching the executor with a full breakdown of the total amount deferred (but a family member or the executor can approach the local authority to resolve the outstanding amount due prior to this point).

Responsibility for arranging for repayment of the amount due (in the case of payment from the estate) falls to the executor of the will.

Note: Interest will continue to accrue on the amount owed to the local authority after the individual's death and until the amount due to the local authority is repaid in full.

If terminated through a person's death, the amount owed to a local authority under a deferred payment agreement falls **due 90 days after the person has died**. After this 90 day period, if a local authority concludes active steps to repay the debt are not being taken, for example if the sale is not progressing and a local authority has actively sought to resolve the situation (or the local authority concludes the executor is wilfully obstructing sale of the property), the local authority may enter into **legal proceedings to reclaim** the amount due to it. Further general information on debt recovery can be found at Annex D of the statutory guidance.

Note: In whichever circumstance an agreement is terminated the person (and/or the third party where appropriate) must be provided with a full breakdown of how the amount due has been calculated by the local authority.

Once the amount has been paid, the local authority should provide the individual with confirmation that the agreement has been concluded, and confirm (where appropriate) that the charge against the property has been removed.

7 Giving away your assets

Often someone's home is their main asset and one that they would like to pass on to their beneficiaries. It can therefore seem an attractive option to transfer property out of your name, for example to children or into a trust, so that you do not have to use its value to meet care costs.

Caution is advised before taking any such action. The local authority can look at any such transfer and, if it seems that it was done to obtain assistance more quickly than would otherwise be the case, may assess you as if you are still in possession of the transferred property. The rules on this issue are set down in the new statutory guidance at Annex E, entitled 'Deprivation of assets'. Similar rules apply to means-tested benefits.

For further information see Age UK's Factsheet 10, *Paying for permanent residential care*, and Factsheet 40, *Deprivation of assets in the means test for care home provision*.

8 Business assets

As discussed above, the presumption in statutory guidance and charging regulations is that all of your eligible capital and income can be considered by the local authority for the residential care means test.

However, the statutory guidance, at Annex B, entitled 'Treatment of capital', also allows a **26 week or longer disregard** of the assets of any business owned (or part-owned) by a new care home resident who has had to stop self-employed work due to illness or disablement. This is in the **short-term** where the intention is to take up work again in the future when the person is able.

With regard to **permanent** residents, Annex B gives the local authority discretion to disregard the capital value of eligible business assets for a **reasonable period of time**, providing steps are being taken to realise the capital value. If **no immediate intention** to realise the capital value in the business assets is demonstrated, Annex B advises local authorities to take their value into account in the means test.

It advises the local authority to **obtain information** about: the nature of the business asset; the resident's estimate of the length of time necessary to realise the asset; the resident's share of assets; a statement of what, if any, steps have been taken to realise the assets, what these steps were and what is intended in the near future; and any other relevant evidence, for example the person's health, receivership, liquidation or an estate agent's confirmation of placing any property on the market.

9 Paying for yourself

If, following the 12-week property disregard, which is required at the start of the process, the local authority refuses to enter into a deferred payment agreement, it is likely that the authority's contract with the care home will be ended and you will need to make your own contract. The statutory guidance says that having capital above the upper limit (£23,250 in 2015/16) does not in itself mean that you should be expected to make your own arrangements in a care home.

Your local authority must satisfy itself that you are able to make your own arrangements or have others who are willing and able to do so for you. If there is no one in this position, the authority should still make arrangement. This is in the context of there not being a 'right to request' service provision for a fee in residential care similar to the right for non-residential care.

Adults who fund their own residential or non-residential social care have access to an independent complaints review service provided by the Local Government Ombudsman.

10 Park/mobile homes

It can be difficult to know whether certain types of property, such as park/mobile homes (PMH), should be included within the residential care means test. There is a general presumption in the statutory guidance and charging regulations that all eligible capital assets should be included alongside eligible income. However, there are also exceptions in certain circumstances such as for the property disregards discussed above. The statutory guidance, at Annex B, and the charging regulations also confirm that **personal possessions** (chattel) can't be included in the means test.

HM Revenue and Customs produces a document entitled *SDLTM 10023 – Mobile Homes, Caravans and Houseboats*³. This document provides a useful summary of how these types of possessions are dealt with in a similar context and this may also inform their consideration in an adult social care situation. It shows that there is a continuum of ownership status ranging from that which is clearly a long-term lease to a license, which is more like rental. Evidential aspects include elements such as the landlord's right of entry. There may be a number of other complexities in each case, for example regarding the division of ownership between the park/mobile home itself and the ground it stands upon. As a result, each case must be considered individually.

It may be possible to agree a deferred payment on this type of property where it is someone's permanent and only home, depending on the ownership arrangements. The question the local authority must ask is: does the park/mobile home owner have a beneficial interest in the property and land which they can be used to secure payment of the future care home fees? If the answer is no, the only possible type of deferral could be in terms of a short-term arrangement where efforts are being made to sell the park/mobile home.

Age UK's Factsheet 71, *Park homes*, provides more information including on owner's organisations that may have expertise regarding the issue discussed above.

11 The information and advice duty

Section 4 of the *Care Act 2014* states that a local authority **must** establish and maintain a service for providing people in its area with information and advice relating to care and support for adults and support for carers. The service must provide information and advice on the following areas:

- the local care and support system and how it operates;
- the choice of types of care and support, and the choice of providers available to those who are in the authority's area;
- how to access the care and support that is available;

³ <http://www.hmrc.gov.uk/manuals/sdlmanual/sdlm10023.htm>

- how to access independent financial advice on matters relevant to the meeting of needs for care and support; and
- how to raise concerns about the safety or well-being of an adult who has needs for care and support.

With regard to this duty, a local authority must have regard to the importance of identifying local people who would benefit from this service to ensure that its provision enables people to:

- to identify matters that are or might be relevant to their personal financial position in this context;
- to make plans for meeting needs for care and support that might arise; and
- to understand the different ways in which they may access independent financial advice on matters relevant to the meeting of needs for care and support.

The information and advice provided or arranged by the local authority must be accessible and appropriate.

‘Independent financial advice’ means financial advice provided by a person who is independent of the local authority in question.

Note: See section 6.6 above for information and advice duties specific to deferred payments.

11.1 The independent advocacy duty

Section 67 of the *Care Act 2014* sets up a new independent advocacy right for people who struggle to understand or make decisions about their care and **have no ‘appropriate person’** to help them engage in the process. This builds on the scheme that already exists (under the *Mental Capacity Act 2005*) for people who have a significant mental impairment, but it has a wider reach.

Under the Act people are entitled to the support of an independent advocate at key stages in their interactions with the local authority. This right applies to people who have ‘**substantial difficulty**’ in doing any of these:

- understanding relevant information (about social care and health issues);

- retaining that information;
- using or weighing up the information;
- communicating their views, wishes or feelings.

If you care for an older person in this category, then she or he will probably not be entitled to an advocate, because you will be seen as an ‘appropriate person’, so an advocate won’t be necessary.

12 Challenging local authority and benefits decisions

If you disagree with a decision about the local authority assessment there is a complaints procedure you can follow. Ask the local authority for details of its procedure, which it is required to provide. If you are not satisfied with the outcome of your complaint you can take it to the Local Government Ombudsman. For information about the local authority complaints procedure and other avenues of complaint see Age UK’s Factsheet 59, *How to resolve problems and make a complaint about a local social care*.

If you disagree with a decision about your entitlement to benefits you can either ask for the decision to be revised or appeal against it. There are strict time limits for challenging a decision: in most cases, this must be done within one month of the date of notification. Further information is available in the Department for Work and Pensions leaflet GL24, *If you think our decision is wrong*.

A local advice agency may be able to offer advice or help you make an appeal against a social security or local authority decision.

Action: There may not be a satisfactory solution to your problem. If you feel the rules are unfair ask your Member of Parliament to raise the issues with either the Secretary of State for Work and Pensions or the Secretary of State for Health. Contact Age UK for further information on how to complain about the local authority.

From April 2016, a **new appeals system** is due to be implemented which will enable decisions taken by a local authority under Part 1 of the *Care Act 2014* to be challenged and reviewed.

13 Appendix

There are four main sources for the new law and rules on adult social care on which this factsheet is based:

1/ The Care Act 2014

<http://www.legislation.gov.uk/ukpga/2014/23/contents/enacted>

Part 1 of the Act is the main source for this factsheet as it replaces over 60 years of adult social care legislation.

2/ Care and Support Statutory Guidance, issued under the Care Act 2014:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366104/43380_23902777_Care_Act_Book.pdf

This large document supports the *Care Act 2014* and the regulations listed below. A local authority must have regard to its relevant sections when administering the charging system. There is significant overlap with some of the regulations for example regarding section 8 'Charging and financial assessment' and the Annexes at the end of the document, particularly B and C on the treatment of capital and income.

3/ The final negative regulations under part 1 of the Care Act 2014:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/376204/2903119_Care_Act_Negative_Regulations_Master.pdf

This document contains many new regulations including the *Care and Support (Charging and Assessment of Resources) Regulations 2014*, which closely resembles the previous CRAG document that has now been superseded.

4/ The final affirmative regulations under part 1 of the Care Act 2014:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366048/43738_2902999_Regs_Affirmative_Accessible.pdf

A significant regulation within this document is the *Care and Support (Eligibility Criteria) Regulations 2014*.

Note: The terms 'negative' and 'affirmative' refer to the regulations' status prior to finally coming into force in April 2015.

14 Useful organisations

Care Quality Commission (The)

The independent regulator of adult health and social care services in England, whether provided by the NHS, local authorities, private companies or voluntary organisations. Also protects the rights of people detained under the Mental Health Act.

CQC National Customer Service Centre, Citygate, Gallowgate, Newcastle upon Tyne, NE1 4PA

Tel: 0300 0616 161 (free call)

Email: enquiries@cqc.org.uk

Website: www.cqc.org.uk/

Citizens Advice

National network of advice centres offering free, confidential, independent advice, face to face or by telephone.

In Wales there is a national phone advice service on 0344 477 2020. It is available in some parts of England on 0344 411 1444. In Scotland, there is a national phone advice service on 0808 800 9060.

To find details of your nearest CAB check your phone book, or in:

England or Wales, go to www.citizensadvice.org.uk

Northern Ireland, go to www.citizensadvice.co.uk

Scotland, go to www.cas.org.uk

Visit www.adviceguide.org.uk for online information.

Department of Health

Government department with overall responsibility for social care including residential care homes.

Tel: 020 7210 4850 (national call rate)

Website: www.dh.gov.uk

Elderly Accommodation Counsel

Provides information on all forms of accommodation, support and care for older people.

EAC FirstStop Advice, 3rd Floor, 89 Albert Embankment, London, SE1 7TP

Tel: 020 7820 1343

Email: info@firststopadvice.org.uk

Website: www.housingcare.org

Equality Advisory and Support Service

This new service replaced the helpline run by the Equality and Human Rights Commission in October 2012.

FREEPOST Equality Advisory Support Service FPN4431

Tel: 0808 800 0082

Textphone: 0808 800 0084

Website: www.equalityadvisoryservice.com/

Independent Age

A charity that provides free and impartial advice on home care, care homes, NHs services, housing and other issues for older people, their families and provisional on community care.

6 Avonmore Road, London, W14 8RL

Tel: 0800 319 6789

Email: charity@independentage.org

Website: www.independentage.org

Pension Service (The)

For details of state pensions, including forecasts and how to claim your pension.

Tel: 0845 60 60 265 (lo-call rate)

Textphone: 0845 6060 285

State Pension Forecasting Team: 0845 3000 168 (lo-call rate)

Website: <https://www.gov.uk/browse/working/state-pension>

Relatives & Residents Association (The)

The Relatives & Residents Association gives advice and support to older people in care homes, their relatives and friends.

1 The Ivories, 6-18 Northampton Street, London, N1 2HY

Tel: 020 7359 8136

Email: info@relres.org

Website: www.relres.org

Veterans UK

Website bringing together services for veterans including advice on pensions, compensation and welfare services.

Tel: 0800 1914 2 18

Email: veterans-uk@mod.uk

Website: www.gov.uk/government/organisations/veterans-uk

15 Further information from Age UK

Age UK Information Materials

Age UK publishes a large number of free Information Guides and Factsheets on a range of subjects including money and benefits, health, social care, consumer issues, end of life, legal, employment and equality issues.

Whether you need information for yourself, a relative or a client our information guides will help you find the answers you are looking for and useful organisations who may be able to help. You can order as many copies of guides as you need and organisations can place bulk orders.

Our factsheets provide detailed information if you are an adviser or you have a specific problem.

Age UK Advice

Visit the Age UK website, www.ageuk.org.uk, or call Age UK Advice free on 0800 169 65 65 if you would like:

- further information about our full range of information products
- to order copies of any of our information materials
- to request information in large print and audio
- expert advice if you cannot find the information you need in this factsheet
- contact details for your nearest local Age UK

Age UK

Age UK is the new force combining Age Concern and Help the Aged. We provide advice and information for people in later life through our publications, online or by calling Age UK Advice.

Age UK Advice: 0800 169 65 65

Website: www.ageuk.org.uk

In Wales, contact:

Age Cymru: 0800 022 3444

Website: www.agecymru.org.uk

In Scotland, contact Age Scotland

by calling Silver Line Scotland: 0800 470 8090

(This line is provided jointly by Silver Line Scotland and Age Scotland.)

Website: www.agescotland.org.uk

In Northern Ireland, contact:

Age NI: 0808 808 7575

Website: www.ageni.org.uk

Support our work

Age UK is the largest provider of services to older people in the UK after the NHS. We make a difference to the lives of thousands of older people through local resources such as our befriending schemes, day centres and lunch clubs; by distributing free information materials; and taking calls at Age UK Advice on 0800 169 65 65.

If you would like to support our work by making a donation please call Supporter Services on 0800 169 87 87 (8.30 am–5.30 pm) or visit www.ageuk.org.uk/donate

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