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Circular No. CCD 1/2010

Directors of Social Work and Chief Social Work Officers for Scottish Local Authorities
Chief Executives of Scottish Local Authorities
Directors of Finance of Scottish Local Authorities
Other Organisations – see Annex A

21 January 2010

Dear Colleague

GUIDANCE AND DIRECTIONS FOR SELF ARRANGERS OF FREE PERSONAL AND NURSING CARE

This circular provides guidance and directions to local authorities on self arrangers of free personal and nursing care.

As you are aware, Lord Macphail's ruling in October 2007 suggested that the current legislation on free personal and nursing care may not have delivered the original policy intention and specifically, that a local authority is not under a statutory duty to provide free personal care funding for those in care homes whose care is arranged without the authority's involvement (a "self arranger"). The Scottish Government's view has always been that this reflects the existing legislation and guidance: that self arrangers are only able to attract free personal and nursing care funding by proactively requiring their local authority to assess their needs and thereafter the authority contracting on their behalf for the provision of personal and, where appropriate, nursing care.

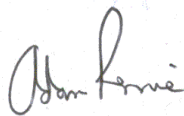
The Scottish Government and COSLA jointly acknowledge that Lord Macphail's ruling has raised uncertainty amongst some councils over the basis for personal and nursing care payments in respect of self arrangers. In response to this issue and as part of our wider discussions on aspects of the current legislation and guidance that require clarification, draft guidance and directions for self arrangers of free personal and nursing care were issued to local authorities on 22 July 2009 for consultation. The comments have been considered by the Free Personal and Nursing Care Legal Issues Group, on which both COSLA and the Scottish Government are represented. A final version of the Guidance and Directions is attached.

All enquiries relating to this circular should be addressed in writing to Jenny Stevenson at the above address or by telephone on 0131 244 5460 or by emailing jenny.stevenson@scotland.gsi.gov.uk.

This circular is also available on Scottish Health on the Web at:

<http://www.show.scot.nhs.uk/sehd/ccd.asp>

Yours sincerely



ADAM RENNIE

Deputy Director: Community Care

Circular Copied to:

Annex A

Age Concern Scotland
Alzheimer's Scotland
Association of Directors of Social Work
ARK Housing Association
Audit Scotland
Capability Scotland
Church of Scotland Board of Social Responsibility
Citizen's Advice Scotland
Commission for Racial Equality (Scotland)
Community Care Providers Scotland
COSLA
Direct Payments Scotland
ELCAP Ltd
ENABLE
Equal Opportunities Commission
Help the Aged
People First Scotland
RNIB Scotland
RNID Scotland
Scottish Care
Scottish Care at Home
Scottish Churches Parliamentary Office
Scottish Consortium for Learning Disabilities
Scottish Council for Voluntary Organisations
Scottish Council for Deafness
Scottish Federation of Housing Associations
Scottish Human Services Trust
Supporting People Enabling Unit
United Kingdom Home Care Association
Values into Action

GUIDANCE AND DIRECTIONS

Free Personal and Nursing Care – Self arrangers

Argyll & Bute Council v Scottish Public Services Ombudsman

Introduction

1. On 17 October 2007, the decision of Lord Macphail in Argyll & Bute Council v Scottish Public Services Ombudsman⁽¹⁾ (“the Macphail judgement”) was issued. It concerned free personal and nursing care funding in respect of a man assessed by the local authority as in need of residential care but whose family, rather than the local authority, had arranged such provision. Some aspects of the judgement have raised concern among local authorities over the basis for personal and nursing care payments in respect of self arrangers⁽²⁾.
2. The Independent Review of Free Personal and Nursing Care in Scotland by Lord Sutherland reported in April 2008⁽³⁾, acknowledging the Macphail judgement and related local authority concerns. COSLA, ADSW and the Scottish Government have since been engaged in a joint project to review the operation of the free personal and nursing care policy including examining, in detail, the Macphail judgement.
3. Whilst acknowledging that the Macphail judgement is specific to a particular set of circumstances, in light of the judgement this guidance provides advice to local authorities on the manner in which free personal and nursing care is to be provided to self arrangers assessed by the local authority as having needs that call for the provision of such services. It should be read alongside the Consolidated Guidance on Free Personal and Nursing Care (Circular CCD5/2003), the Personal Care and Nursing Care (Self Arrangers) (Scotland) Directions 2009 and the Guidance on National Eligibility Criteria and Waiting Times for the Personal and Nursing Care of Older People.
4. This guidance is issued under section 5 of the Social Work (Scotland) Act 1968. Section 5 provides that local authorities shall perform their 1968 Act functions under the general guidance of the Scottish Ministers. The Scottish Government has also issued related directions to local authorities – the Personal Care and Nursing Care (Self Arrangers) (Scotland) Directions 2009 under section 5(1A) of the 1968 Act.

⁽¹⁾ 2008 SLT 168.

⁽²⁾ In this document “self arrangers” are people who are receiving personal or nursing care services in care home accommodation or at home provided or secured by someone other than a local authority and who wish to access free personal or nursing care.

⁽³⁾ <http://www.scotland.gov.uk/Publications/2008/04/25105036/0>. ISBN 978-0-7559-5710-1.

The statutory background

5. Local authority provision of community care services is primarily made through the Social Work (Scotland) Act 1968 (“the 1968 Act”). Local authority funded care services are accessed through a needs assessment under section 12A of the 1968 Act. It is for the local authority to decide whether there is need that calls for the provision of a service under that Act and indeed what constitutes such need.

6. There is detailed statutory provision for charging for community care services. Sections 1 and 2 of the Community Care and Health (Scotland) Act 2002 (“the 2002 Act”) and the Community Care (Personal Care and Nursing Care) Regulations 2002⁽¹⁾ (“the 2002 Regulations”) provide that personal or nursing care services⁽²⁾ provided or secured by a local authority shall not be charged for by that authority. Charging for community care services and in particular the question of ability to pay should be considered separately from (i.e. after) decisions on whether to provide services taken following a needs assessment under section 12A of the 1968 Act.

The Macphail judgement

7. The circumstances involved a man who had been assessed by the local authority as requiring residential care. Following the assessment his family provided him with residential care. It was argued that the local authority had a duty to fund the personal and nursing care elements of that provision. However, Lord Macphail confirmed that section 1 of the 2002 Act only applies in circumstances where a local authority has provided or secured the care in question.

8. Consequently, it has been suggested that personal and nursing care payments in respect of persons for whom a local authority is not providing or securing care may be ultra vires the local authority. This document provides guidance to local authorities on the manner in which personal and nursing care should be provided to, or secured for, self arrangers in care homes who require such services. Providing or securing such care requires the local authority to fund it by personal and nursing care payments or by arranging care to people in their own homes.

⁽¹⁾ SSI 2002/303 as amended by SSI 2005/445 and 2009/138.

⁽²⁾ In this document “personal and nursing care services” means community care services provided under the 1968 Act that fall within the definition of “social care” for the purposes sections 1, 2 and 22 of the 2002 Act. It applies to Personal care for people aged 65 years and over and to Nursing care for all adults.

GUIDANCE

Stage 1: Needs assessment

9. A person who appears to be in need of community care services is entitled to receive a needs assessment under section 12A of the Social Work (Scotland) Act 1968 (“the 1968 Act”). Apparent need is determined at this stage by initial screening and, in deciding whether there appears to be a need for community care services, the local authority should disregard any existing care provision in place or the fact that the person may have the means to arrange and pay for care to meet their needs. Equally, in conducting a full needs assessment under section 12A(1)(a) of the 1968 Act, the local authority should again disregard any existing provision in place or the fact that the person may have the means to arrange and pay for their needs to be met. A person’s ability to arrange and pay for their own care is irrelevant to the assessment of needs.

Stage 2: Needs that call for local authority service provision

10. Under section 12A(1)(b) of the 1968 Act it is for the local authority to determine what constitutes need that calls for the provision of a community care service (i.e. eligible need). Either the local authority or another person can meet eligible need. If eligible need is not being met then the local authority will obviously require to do so. However, as a person’s needs might be being met as a result of their own arrangement or by arrangement made on their behalf, questions arise as to how the local authority should treat such an arrangement.

11. Free personal and nursing care is an entitlement for those who are assessed by a local authority as having personal or nursing care needs that call for the provision of services. If a self arranger expresses a desire to access free personal and nursing care, the local authority should explain that in order for them to do so it will be necessary for the local authority to assess their needs and, if they are assessed as having the appropriate level of need, that it will be necessary for the local authority to provide or secure the relevant care.

12. There are various scenarios in which self arrangers may seek to access free personal or nursing care. These are principally, but not exclusively, as follows-

- (a) following a needs assessment, a person may continue to seek local authority arranged care notwithstanding having arranged their own care on an interim basis;
- (b) a person may have asked for a needs assessment and for the local authority to take over the provision of care having arranged their own care to date; or

- (c) a person who has arranged their own care may ask for a needs assessment and local authority care provision on the basis that their funds have diminished below the level where they are able to fund all or part of their own care.

13. If the person is content that the local authority enter arrangements to provide them with care for the purposes of their accessing free personal or nursing care, then the local authority should obtain their agreement that, subject to assessment for eligibility, the local authority will arrange such care in lieu of their self arrangement, or part thereof, in one of the following ways-

- (a) in relation to care home accommodation, in accordance with the route 2 or route 3 procedures⁽¹⁾ set out in the consolidated guidance on Free Personal and Nursing Care; or
- (b) in relation to care at home by providing personal care services⁽²⁾ or securing them from a third party.

14. Once such agreement is reached between the self arranger and the local authority, the local authority should assess the self arranger in the normal manner under section 12A. Where a self arranger has intimated that, in order to access free personal or nursing care, they no longer intend to self arrange such elements of their care the local authority should, in discharging their functions under section 12A, take that into account by treating them as if they were a person who had no personal or nursing care service provision in place. The local authority should arrange to meet eligible need in the same manner that they would in the case of a person not in receipt of self arranged provision. For further guidance on meeting eligible need please refer to the Guidance on National Standard Eligibility Criteria and Waiting Times for the Personal and Nursing Care of Older People.

Timings

15. When a person calls for the provision of relevant care services the local authority should disregard the self arranged care and in making decisions about the provision of services should treat the person as they would a person not in receipt of self arranged care. Advice on standard maximum waiting times for personal and nursing care services can be found in the National Standard Eligibility Criteria and Waiting Times Guidance.

⁽¹⁾ "route 2 contract" – the mutual route - is where an individual asks the local authority to contract only for the personal and nursing care elements of a care home package to facilitate the making of free personal and nursing care payments, but leaving the individual to separately contract for the remainder of the package. A "route 3 contract" – the integrated route – is where the individual asks the local authority to contract for the whole care home package, with the individual being recharged according to means, subject of course to non-charging in accordance with the free personal and nursing care legislation.

⁽²⁾ Nursing care services are not relevant in the context of care at home.

Contractual arrangements

16. In accordance with CCD5/2003, local authorities should ensure that free personal and nursing care payments in respect of someone in a care home are underpinned by a route 2 or route 3 contract. In respect of care at home, the local authority may provide the service itself or secure the care from a third party. In the latter case, the local authority should put in place an appropriate contract with that third party. Free personal and nursing care payments made in respect of a person where the local authority is not providing or securing the care through an appropriate contract may be ultra vires the local authority.

17. A local authority that is providing or securing free personal or nursing care through an appropriate contract should make payments to the provider in respect of that care. The 2002 Act and the 2002 Regulations provide that such care cannot be recharged to the client.

Adam Rennie
A member of the Staff of the Scottish Ministers

Primary and Community Care Directorate
Edinburgh
January 2010

DIRECTIONS

The Personal Care and Nursing Care (Self Arrangers) (Scotland) Directions 2009

The Scottish Ministers make these Directions in exercise of the powers conferred by section 5(1A) of the Social Work (Scotland) Act 1968.

Citation and commencement

1. These Directions may be cited as the Personal Care and Nursing Care (Self Arrangers) (Scotland) Directions 2009 and come into force with immediate effect.

Interpretation

2. In these Directions-

“commercial terms” means other than on a voluntary, unpaid basis;

“relevant care services” means social care of a kind mentioned in section 1(1) of the Community Care and Health (Scotland) Act 2002;

“self-arranged care” means care provided to a person as a result of their own arrangement or arranged on their behalf by a third party other than a local authority, being residential accommodation together with relevant care services, or relevant care services at home, provided under a contract for such services (however constituted) on commercial terms; and

“the 1968 Act” means the Social Work (Scotland) Act 1968.

Application

3. (1) Where sub-paragraph (2) applies a local authority shall, in the discharge of its functions under sections 12, 12A or 13A of the 1968 Act, act in accordance with paragraph 4.

(2) This sub-paragraph applies where a person who is in receipt of self arranged care, or a person acting on their behalf, asks the local authority to provide to them, or secure for them, relevant care services.

Disregard of self arranged care

4. In deciding under section 12A of the 1968 Act whether the needs of a person call for the provision of relevant care services, the local authority shall disregard self arranged care and, in making decisions about the provision of any such services, shall treat that person as they would a person not in receipt of self arranged care.