

FINAL BUSINESS AND REGULATORY IMPACT ASSESSMENT

Title of Policy	The Community Care (Personal Care and Nursing Care) (Scotland) Amendment (No. 2) Regulations 2018
Summary of aims and desired outcomes of Policy	<p>Free Personal Care is currently in place for those aged 65 and over and this benefits nearly 78,000¹ people in Scotland. Following a feasibility study, it is the intention of the Scottish Government to legislate to extend the provision of free personal care to all adults who are assessed by their local authority as needing the service.</p> <p>The requirement not to charge for personal care is currently qualified to persons aged 65 or over. The amendment to the Community Care (Personal Care and Nursing Care) (Scotland) Regulations will realise our ambition to extend free personal care by removing this qualification.</p> <p>This legislative step will ensure that charging arrangements for personal care apply equally regardless of age and condition. This also means that people who may have declined support in the past due to concerns about the cost may choose to seek that care, if eligible.</p>
Directors: Division: Team:	Directorate for Health and Social Care Integration: Care, Support and Rights Division: Adult Social Care Policy

¹ <http://www.gov.scot/Publications/2017/08/1520>

Executive summary

1. The BRIA process encourages policy makers to identify issues and use available evidence to find proposals that best achieve the policy objectives while minimising costs and burdens. The BRIA is:

- a tool used by Government to assess and present the likely costs and benefits and associated risks of a proposal that might have an impact on the public, private, or third sector;
- a continuous process to help Government understand the issues associated with a proposal and avoid unintended consequences, fully think through the reasons for intervention, to weigh up various options for achieving an objective, and to understand the consequences of a proposed intervention.

2. BRIAs apply to primary and secondary legislation being introduced to the Scottish Parliament, as well as codes of practice or guidance.

3. This Business and Regulatory Impact Assessment (BRIA) has considered the potential impacts of the amendment to the regulations on the public, private, and third-sectors in Scotland.

4. This impact assessment is one of a package to accompany the amendment to the regulations. The others are: Children's Rights and Wellbeing Impact Assessment (CRWIA) and Equality Impact Assessment (EQIA).

4. Whilst the amendment to the regulations comes into force on 1st April 2019, the legislation is being introduced earlier to enable local authorities to plan for this change. This aims to ensure current systems in relation to care and financial assessments can be reviewed and if necessary updated to enable local authorities to meet this legislative requirement by 1 April 2019.

5. An Implementation Advisory Group (IAG) has been established to provide advice to support the implementation of the extension of the policy. The purpose of the IAG is to consider issues including the possible increase in demand and costs for uptake of services, interactions with the benefits system and with children's services, impact on local authorities' eligibility criteria and to assist in drafting guidance for local authorities and service users. Advice from IAG members is intended to ensure that implementation takes into account the impact on local authority systems, providers and related policy areas and is undertaken in a way that is sensitive to the needs of service users.

6. Further information about membership of the IAG is described below at **Consultation**.

Background

7. The Community Care and Health (Scotland) Act 2002² made provision for local authorities not to charge for social care which is personal care and then Scottish Ministers used regulation making powers to qualify that provision by limiting the requirement not to charge for personal care only in relation to persons aged 65 or over.

8. Free Personal Care for people aged 65 and over in Scotland currently benefits nearly 78,000 older adults, of whom approximately 47,000 receive personal care in their homes, and 31,000 in residential care. Approximately 9,000 people under 65 receive personal care for which they may currently be charged depending on local authority charging policies.

9. The Social Work (Scotland) Act 1968 (“the 1968 Act”) provides the legal basis for provision of social care in Scotland. The 1968 Act places a duty on Local Authorities to assess those in their area who may be in need of social care services, and provide such of those services as they deem necessary to meet individual needs. The 1968 Act allows Local Authorities to charge for care provided to individuals by the Local Authority, so long as that charge is reasonable.

10. For a number of years, the Scottish Government has worked with COSLA to improve the fairness of social care charging in Scotland. The Scottish Government is investing £11m a year to ensure that charges for social care are lower than they otherwise would be. This has been implemented by raising the threshold at which people become eligible to contribute financially towards their social care and through measures to ensure veterans retain the full value of their war pensions. The Scottish Government also ensured, in partnership with COSLA, that those in the last 6 months of a terminal illness receive their care at home for free, without having to worry about charges for social care at such a stressful time³. By the introduction of a standard financial assessment template across all Local Authorities, progress has been made towards greater transparency and consistency across Scotland.

11. Despite this progress, a number of popular and long running campaigns have continued to call for further changes to charges to social care, including the “Frank’s Law” campaign calling for the extension of free personal care to those under 65. The Scottish Government committed to undertake a feasibility study into the extension of Free Personal Care to people under 65 who need it, and examine the potential relationship with social security provision. This study was published in September 2017⁴. On 5th September 2017, the First Minister announced a commitment to implement Frank’s Law, by extending Free Personal Care to those aged under 65 who are assessed by their local authorities as needing this service, regardless of their age, condition and means.

² <http://www.legislation.gov.uk/asp/2002/5/contents>

³ S. 7.41 – COSLA Charging Guidance - <http://www.ccpScotland.org/pp/resources/cosla-guidance-care-charging-2017-18/>

⁴ <http://www.gov.scot/Publications/2017/09/6559>

Financial policy context

12. For older people and adults, gross expenditure on social care increased by £144 million between 2015/16 and 2016/17 – an increase of 4.8%. Integration Authorities are managing more than £8 billion of resources that NHS boards and councils previously managed separately, and resources are transferring from the NHS into social care with almost half a billion pounds transferred in 2017/18. In 2018/19, a further £66 million is being provided to local government for social care which will support implementation of the Carers (Scotland) Act, maintain payment of the real Living Wage, and increase payments for free personal and nursing care. However, the increases in funding for social care come against the backdrop of an ageing population contributing to an increasing demand for services.

13. A survey undertaken as part of the feasibility study found that local authorities currently collect in the region of £10m towards the cost of personal care services in non-residential settings for adults under 65. The extension of free personal care to under 65s would remove that source of income for local authorities which is used towards the cost of providing services. The estimated gross expenditure on personal care for younger adults in 2015-16 was £132m. This means that around 8% of gross expenditure on personal care for younger adults is funded through client contributions. In addition to the costs relating to existing service users, it is expected that moving to free provision of personal care would increase demand for services. This needs to be set within a context of the range of demands placed upon the social care system. It is therefore important to ensure that any policy changes which are expected to reduce income for social services are carefully considered.

Rationale for Government intervention

14. The extension of free personal care builds on previous action to improve the fairness of charging for social care and responds to long running public campaigns on this issue. This legislative step will ensure that charging arrangements for personal care apply equally regardless of age and condition. This may enable people who have declined support in the past due to concerns about the cost to choose to seek that care, if eligible.

15. The extension of Free Personal Care fits with the following National Performance Framework strategic objectives:

- We live longer, healthier lives;
- We have tackled the significant inequalities in Scottish society;
- Our people are able to maintain their independence as they get older and are able to access appropriate support when they need it; and
- Our public services are high quality, continually improving, efficient and responsive to local people's needs.

16. The extension to this policy will also go towards our national indicator of improving support for people with care needs.

Consultation

Within Government

17. The following Scottish Government departments have been consulted in the development of policy on the extension of free personal care :

- Self-directed Support branch, who provided advice on the SDS policy and how this may fit with free personal care;
- Independent Living Fund Scotland Policy and Sponsorship branch, who provided advice relating to the interaction of free personal care with this policy;
- Children and Families branch and Better Life Chances branch, provided advice in relation to transition of a child from children to adult services;
- Scottish Government's Social Work Advisor provided advice on a range of issues relating to the social work profession;
- Social Security branch, provided advice relating to the relationship between free personal care and social security benefits.
- Housing branch, provided advice relating to the guidance which may impact on housing issues.
- Access to Justice Team, provided advice relating to the impact on Scottish Legal Aid Scheme.

Consultation with external bodies

18. The following sources were consulted in the development of the feasibility study and wider policy development process which has fed into the preparation of the BRIA.

- A group comprising COSLA, Health and Social Care Partnership Chief Officer and Chief Finance Officer representatives, informed the development of a survey of Local Authorities / Health and Social Care Partnerships in July 2017, on the likely costs of extension and sought respondents' views on the risks and opportunities of doing so which was analysed by Scottish Government. (Following publication of the feasibility study, this group was expanded to become the IAG).
- Meetings with Chief Finance Officers', Chief Officers' and Chief Social Work Officers networks.
- Meetings with stakeholder groups: Scotland Against the Care Tax, Alzheimer Scotland, Parkinson's UK, the Older People's Development Group, Scottish Care and Coalition of Care and Support Providers in Scotland (CCPS).

Public Consultation

19. Scottish Government invited comments from the public on the feasibility study into the extension of free personal care during Summer 2017. The Feasibility Study Report was published in September 2017 on the Scottish Government website. We received a total of 96 responses to the consultation, 83 from individuals and 13 from

organisations. The vast majority of responses from members of the public supported the extension of free personal care to adults.

20. Individual meetings with Mrs Amanda Kopel of the “Frank’s Law” campaign were carried out and Mrs Amanda Kopel also attended an IAG meeting in March 2018, providing the group with a talk on her own personal experiences.
21. A round table meeting with Disabled People’s Organisations took place in August 2017. The organisations involved in this meeting were:
 - Scottish Independent Living Coalition
 - Inclusion Scotland
 - Self-Directed Support Scotland
 - Scotland Against the Care Tax
 - Glasgow Centre for Inclusive Living
 - Glasgow Disability Alliance
 - People First
 - Health and Social Care Alliance
 - Disability Rights UK
 - MECOPP – support for Minority Ethnic Carers
 - MND Scotland

Business Consultation

22. Scottish Care and CCPS, which are the main representative bodies for providers of social care in Scotland, are represented on the Implementation Advisory Group.

23. We received 13 written responses from organisations and charities as part of the feasibility study, including a number of organisations delivering services to people likely to be affected by the extension of free personal care.

24. Responses were received from:

- Scotland Against the Care Tax
- Sue Ryder
- Age Scotland
- Alliance
- Glasgow City Health and Social Care Partnership
- Motor Neurone Disease Scotland
- Scottish Commission for Learning Disability
- Parkinson’s UK in Scotland
- Marie Curie
- Inclusion Scotland
- Enable
- Scottish Care
- Alzheimers Scotland

Local Authority Consultation

25. Working with COSLA, and representatives of Chief Officers and Chief Finance Officers of Health and Social Care Partnerships, feedback was sought from local authorities and partnerships. A survey was sent to IJB Chief Finance Officers and Councils' Directors of Finance in July 2017. Responses were received from 29. Respondents highlighted the fairness of moving to end the difference of treatment based on age, while highlighting the practical issues involved in implementing the policy. The most consistent concern was the anticipated loss of income for care services and the need to address this as part of implementation.

Ongoing input to implementation

26. The IAG was set up to provide advice to assist Scottish Government, COSLA, local authorities and service providers in implementing the extension of free personal care.

27. Advice from IAG members is intended to ensure that implementation takes into account the impact on local authority systems, providers and related policy areas and is undertaken in a way that is sensitive to the needs of service users both current and new. Implementation is to be complete by April 2019.

28. The Implementation Advisory Group consists of officials from:

- Scottish Government
- COSLA
- Social Work Scotland
- Local Authorities
- Health and Social Care Partnerships
- Service Providers
- Social Work and
- Service User representatives.

Expected impacts of extension of free personal care

Options considered

29. In developing how to take forward policy on the fairness of charging, Scottish Government has considered options including further increases to charging thresholds and making all social care free. Further increases to charging thresholds would not tackle the difference of treatment between those over and under 65 in respect of free personal care. Scotland Against the Care Tax has called for all social care to be available free of charge and this issue has been considered by the Public Petitions Committee. In evidence provided to the Committee, Scottish Government estimated that such a policy could cost in excess of £200m per year. It is expected that such significant additional costs would require major reductions in provision of social care, with further raising of eligibility thresholds. Following the feasibility study, the extension of free personal care is considered to be an option that would deliver

important benefits in terms of fairness and equal treatment, and potentially enable some people to access care who had previously been deterred by charging policies.

Sectors and groups affected

30. This policy will impact on individual service users, local authorities who assess needs and provide or commission services, and private or third sector organisations that provide services to those affected. The costs and benefits to each group are considered below.

Benefits

31. The extension of free personal care would remove the current difference of treatment between those under and over 65 in respect of charges for personal care. Around 9,000 adults between the ages of 18 and 64 currently receive personal care services, for which they may currently be charged, depending on local authority charging policies⁵. These include people with a range of conditions including learning disabilities, mental health and physical disabilities. Such people will continue to be liable for any charges for any non-personal care elements of their support packages. The numbers of people receiving an overall financial benefit from the removal of charges for personal care, and the extent to which they benefit, will depend on their specific circumstances and the interaction with the overall local authority charging policy. Scottish Government and COSLA are considering proposals by Scotland Against the Care Tax in this respect.

32. Following the extension of free personal care to under 65s, there would be a number of people who are not currently receiving personal care services (either through choice, including choice based on the cost of receiving the service, or potentially lack of awareness of the availability of services) or who are privately arranging personal care services, who would be eligible to apply to their local authority for free personal care services. Work is on-going to identify the numbers of this group of people who might come forward. This would benefit those eligible individuals and may have important impacts on prevention to avoid or delay use of more costly and/or less appropriate institutional services.

33. Any increase in service provision to respond to additional demand would mean extra business for social care provider organisations.

Costs

34. Based on the feasibility study, it is estimated that younger adults, those under the age of 65, currently contribute around £10m in charges for their personal care services delivered in non-residential settings.

35. The Scottish Care Homes Census and the Care Homes (Quarterly Monitoring Survey) show that there were around 3,500 people aged under 65 who were long

⁵ It is estimated that around 9,170 people under 65 received personal care in 2015-16. Some of these people are not charged for care as their income and assets are below charging thresholds or their local authority does not apply charges for the services they receive.

stay residents in care homes from 2012-13 onwards and this number has been declining in recent years. Of those residents, 97% are supported by the Local Authority, suggesting that only 3% (around 120) are self-funders. The estimated cost of extending Free Personal Care to under 65s in care homes is likely to be under £1 million per annum.

36. The experience of providing free personal care to older people was that demand for services increases. Therefore, as well as determining the income expected to be lost to local authorities from existing clients who contribute towards the cost of personal care, Scottish Government analysts are undertaking modelling work to seek to estimate the potential impact of extending free personal care on service uptake based on various scenarios. This will inform budget discussions between Scottish Government and COSLA. Managing this impact is considered further in **Scottish Firms Impact Test** below.

Scottish Firms Impact Test

37. The Care Inspectorate regulates around 14,000 individual care services which include services delivered by local authorities, the third sector and independent businesses for a range of client groups. The client groups most likely to be affected by the extension of free personal care include those with learning disabilities, mental health problems and physical disabilities. Many of the services provided by these bodies are commissioned by local authorities. Therefore the resources made available to local authorities for social care will impact on businesses and other organisations providing services to these client groups.

38. The extension of free personal care will reduce the funding available to local authorities that it currently receives from financial contributions from eligible service users with sufficient qualifying income. It is also expected that the provision of a free service will attract increased demand for services that will place additional pressure on local authority budgets. These additional pressures could, if not addressed, have an adverse effect on local authorities and businesses providing social care. However, Scottish Government has undertaken to work with COSLA to identify the estimated costs of the extension so that this can be addressed in budget negotiations.

39. The feasibility study into the extension of free personal care included the results of a survey of local authorities that identified current income from charging of existing service users for non-residential personal care services to be approximately £10m. Scottish Government is working with COSLA and the Implementation Advisory Group to further identify the estimated costs of additional demand arising from the extension of free personal care. Both aspects will then be considered as part of negotiations with COSLA for the 2019-20 budget. A monitoring process will be established to trace the actual impact of the scheme following its introduction, so that this can be reflected in future budgets.

Competition Assessment

40. No significant impact is anticipated due to the factors outlined above.

Test run of business forms

41. This policy will not introduce any statutory business forms.

Legal Aid Impact Test

42. It is not envisaged that there will be any greater demands placed on the legal aid system as a result of implementing the extension of free personal care to those aged under 65 and who are assessed as needing the service by their local authority. There is continued potential (as is the case now) for individuals to challenge a local authority decision relating to service provision e.g. where the local eligibility criteria are not met. This would initially be undertaken through local authority complaints procedures as set out below – see Enforcement, Sanctions and Monitoring. As it is expected there may be greater numbers of people applying for free personal care, therefore there may be pro-rata higher volumes of challenges. However, this is not a function of the change in legislation as such but may be as a result of the expected increased numbers of individuals seeking access to free personal care over time.

43. It is considered the Act does not carry any implications for the legal aid fund, nor adversely affect the legal aid scheme. The Scottish Government's Access to Justice Team have considered this document and are in agreement with this view.

Enforcement, sanctions and monitoring

44. The IAG have agreed within its remit to identify a process for assessing the impact of the extension of free personal care and Scottish Government will work with COSLA and other stakeholders to consider the outcome of this assessment.

45. The Community Care and Health (Scotland) Act 2002 provides powers for the Scottish Government to regulate charging for non-residential care services. The Scottish Government has not exercised this power, allowing local authorities to set charges taking into account local circumstances and allowing local flexibility.

46. Individuals who are dissatisfied with their access to personal care may, as now, access the local authority's complaints procedure if that was applicable to a particular case. If unsatisfied with the outcome of the local authority's complaints procedure, the individual may thereafter approach the Scottish Public Services Ombudsman to consider any complaint.

47. No further enforcement provisions have been made in relation to the discharge of functions by local authorities. There are already general powers of control and enforcement which are conferred on Scottish Ministers in respect of local authorities.

Implementation and delivery plan

Subordinate legislation in place in June 2018

48. We have been working closely with Scottish Government Legal Department to ensure the subordinate legislation will be laid in Parliament by early May. This will then follow the affirmative statutory instrument legislation timetable going before the Delegated Powers and Law Reform Committee for consideration. The subordinate legislation will also be heard before the Health and Sport Committee who will consider the SSI's policy effect, taking evidence from the Cabinet Secretary for Health and Sport and officials.

Revised Guidance published during Summer 2018

49. Scottish Government, COSLA, the Implementation Advisory Group and local authorities are already working together to produce guidance for local authorities and service providers. In addition, Scottish Government also intend to publish information on the Care Information Scotland website for service users.

Budget discussions by Autumn 2018

50. Scottish Government and COSLA will work together to agree budgets and funding which will be incorporated into the Autumn Statement for the financial year 2019/20.

Implementation by local authorities by 1st April 2019

51. Scottish Government, COSLA and the IAG will work with local authorities to enable local authorities' procedures to be in place to carry out necessary care and financial assessments for free personal care by 1st April 2019.

Post Implementation Review

52. The IAG has agreed within its remit to identify a process for assessing the impact of the extension of free personal care and Scottish Government will work with COSLA and other stakeholders to consider the outcome of this assessment.

Summary and Recommendation

53. It is our intention to proceed with extending Free Personal Care by revoking Regulation 3 of the Community Care (Personal Care and Nursing Care) (Scotland) Regulations 2002.

54. In summary, this legislative step will ensure that charging arrangements for personal care apply equally regardless of age and condition. People who may have declined support in the past due to concerns about the cost would be able to receive that care, if eligible.

Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impacts of the policy and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: Shona Robison

Date: 27 April 2018

Cabinet Secretary for Health and Sport