

Leicester  
City Council

**WARDS AFFECTED**  
None specific

**FORWARD TIMETABLE OF CONSULTATION AND MEETINGS:**  
Cabinet

**26 April 2004**

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**CHARGES MADE FOR AFTERCARE SERVICES UNDER  
SECTION 117 OF THE MENTAL HEALTH ACT 1983**

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**Report of the Corporate Director of Social Care and Health**

**1. PURPOSE OF THE REPORT**

- 1.1 This report sets out the advice and guidance of the Local Government Ombudsmen for England (LGO) provided in a Special Report published in July 2003 on the funding of aftercare under section 117 of the Mental Health Act 1983 (the Guidance), and seeks a decision on the implementation of the Guidance.

**2. BACKGROUND**

- 2.1 Section 117 of the Mental Health Act 1983 requires health authorities or primary care trusts and social services authorities (SSAs) to provide aftercare services for any person who has been discharged from compulsory detention in hospital until they are satisfied that the person concerned no longer needs such services.
- 2.2 Many SSAs, including the City Council, have made charges in relation to aftercare services and, in particular, residential accommodation. The High Court ruled on 28th July 1999 that charges may not be made for such services, a decision upheld by the Court of Appeal on 27<sup>th</sup> July 2000 and by the House of Lords on 25<sup>th</sup> July 2002. As a consequence of these judgements, it is now clear that some people have been wrongly charged by SSAs for accommodation, whilst others have funded their own accommodation in the belief that they would have to pay when this should have been provided free.
- 2.3 This has raised issues about the extent to which SSAs are liable for financial restitution. Some have sought either to make retrospective decisions that services are no longer being provided under section 117 or to apply cut-off dates when determining repayments.
- 2.4 The LGO issued the Guidance in July 2003, under section 23 (12A) of the Local Government Act 1974. It followed a number of complaints that SSAs had retrospectively

removed s117 aftercare, resulting in inappropriate charges being levied for aftercare services (including accommodation).

2.5 In summary, the LGO issued advice that:

- In general, SSAs should not carry out retrospective assessments purporting to remove a person from section 117 aftercare from an earlier date.
- SSAs should review any such retrospective assessments that have so far been made.
- For the next 12 months at least, complaints made about previous assessments to end section 117 aftercare should not be rejected by SSAs as out of time.
- Where previous assessments to end section 117 aftercare were not properly made, then restitution will generally be appropriate until a proper assessment is devised.
- People who have paid for section 117 aftercare should receive financial restitution with interest.
- SSAs should now put mechanisms in place to identify those persons improperly charged, or improperly deprived of financial assistance, and establish arrangements for reimbursing them or their estates.
- No generally applicable cut-off date should be used when calculating repayments. Cases where such cut-off dates have been applied should be reviewed

2.6 The Council has received sight of legal advice on the judgement commissioned by the National Association of Financial Assessment Officers before the LGO report was produced. This demonstrates the complexities involved, and the detailed legal position is expected to continue to develop and to be tested in the courts.

2.7 Locally, matters are further complicated by the fact that the City Council only became a unitary authority on 1<sup>st</sup> April 1997. The question of responsibility for restitution for City residents who should have been provided with free services prior to April 1997 requires negotiation with Leicestershire County Council.

2.8 The LGO plan to summarise in their 2003/04 annual report the progress being made by Authorities since the Guidance was issued.

### **3. RECOMMENDATIONS**

#### **3.1 Cabinet is recommended to:**

- a) Confirm the continuation of the existing practice of considering refunds as and when requested on an individual basis, regardless of any other measures to be taken.
- b) Consider whether, in principle, refunds should be made for all known cases, regardless of whether a request has been received (subject to detailed legal consideration of each individual case)
- c) Consider whether any steps should be taken to enable other, currently unknown, potential claimants to be identified and refunded.
- d) Agree that interest associated with financial restitution should be paid where appropriate.
- e) Note the potential resource implications, which may not be covered by existing budgets and provisions.
- f) Confirm the continuation of the current policy of not applying retrospective assessments or cut-off dates to remove s117 aftercare.
- g) Authorise the Corporate Director of Social Care and Health to agree a joint approach with Leicestershire County Council where claims span Local Government Reorganisation, or relate solely to care before 1997.
- h) Authorise the Corporate Director of Social Care and Health (in consultation with the Town Clerk and Chief Finance Officer) to agree a mechanism by which potential liability disputes between the City Council and Leicestershire County Council can be resolved without the need for litigation.

### **4. HEADLINE LEGAL AND FINANCIAL IMPLICATIONS**

- 4.1 The City Council is not obliged to implement the Guidance. However, a failure to do so may attract criticism for the City Council if the LGO receive a complaint on a matter covered by the Guidance.
- 4.2 The legal position is as set out in the Guidance annexed to the Supporting Information. There are a number of legal uncertainties that only the courts can definitively resolve. In the absence of such resolution, the City Council should give serious consideration to implementing the guidance on terms that favour affected service users or their estates rather than the City Council, provided that it is proportionate and reasonable to do so.

(Guy Goodman, Assistant Head of Legal Services – ext. 7054)

- 4.3 The cost of restitution, excluding interest, for known cases is approximately £532,400. (£77,000 prior to LGR in April 1997, and £456,000 since April 1997).
- 4.4 Interest costs have not been calculated in detail. However, a summary calculation shows that they could be expected to amount to around £200,000 - £250,000 on known refunds. It is not possible to estimate costs for unknown potential claims.
- 4.5 The workload involved in making restitution has not been scoped in detail, but it could not be managed within present staffing resources. It is estimated that up to £50,000 would be required to fund a small team for a year to complete the undertaking for known users. This figure could increase to £100,000 or more should the Council determine to identify service users and potential claimants not already known to the Department, and to calculate refunds.
- 4.6 There is currently a provision of £250,000 created from the Social Care and Health budget in 2002/03. A further £650,000 has been set aside in 2003/04. The contingency fund thus created is expected to be of sufficient size to cover the administration and costs of financial restitution for cases known to the Council.
- 4.7 No source of funding is currently identified for the potential costs of unknown cases or for the costs of the project team that would be required to identify such cases.

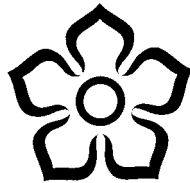
(Colin Sharpe, Head of Finance, Social Care and Health - ext. 8800)

### **Report Author**

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### **DECISION STATUS**

<b>Key Decision</b>	<b>No</b>
<b>Reason</b>	<b>N/A</b>
<b>Appeared in Forward Plan</b>	<b>No</b>
<b>Executive or Council Decision</b>	<b>Executive (Cabinet)</b>



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## **SUPPORTING INFORMATION**

### **Report of the Corporate Director of Social Care and Health**

#### **1. INTRODUCTION**

- 1.1 Section 117 of the Mental Health Act 1983 requires health authorities or primary care trusts and social services authorities (SSAs) to provide aftercare service for any person who has been discharged from compulsory detention in hospital until they are satisfied that the person concerned no longer needs such services.
- 1.2 Many SSAs, including the City Council, have made charges in relation to aftercare services and, in particular, residential accommodation. The High Court ruled on 28th July 1999 that charges may not be made for such services, a decision upheld by the Court of Appeal on 27<sup>th</sup> July 2000 and by the House of Lords on 25<sup>th</sup> July 2002. As a consequence of these judgements it is now clear that some people have been wrongly charged by SSAs for accommodation, and others have funded their own accommodation in the belief that they would have to pay when this should have been provided free.
- 1.3 This has raised issues about the extent to which SSAs are liable for financial restitution, and some have sought either to make retrospective decisions that services are no longer being provided under section 117 or to apply cut-off dates when determining repayments.
- 1.4 The LGO issued the Guidance in July 2003, under section 23 (12A) of the Local Government Act 1974. It followed a number of complaints that SSAs had removed s117

aftercare status, resulting in charges being levied for aftercare services. Members are asked to note that the removal of s117 has never been a practice at the City Council.

1.5 The Guidance is attached as an Annex.

## **2. THE CITY COUNCIL'S POSITION**

2.1 The City Council charged service users for aftercare services from Local Government Reorganisation (LGR) in April 1997 until the Court of Appeal's decision on 27<sup>th</sup> July 2000. No further charges were made from that date.

2.2 An exercise in the Summer of 2003 of those previously charged identified 44 service users known to the Council, broken down as follows. The refunds that would appear to be due for these, excluding interest, and subject to detailed consideration in the light of the emerging legal position, total £532,400 and are as follows:

- 8 service users who transferred from the County Council at LGR, and who were later identified as receiving services under s117. These people continue to receive services (£76,700 pre April 1997, £147,000 post April 1997)
- 15 service users who were provided with services between 1997 and 2002, and who are now either deceased or discharged from care (£105,800)
- 21 service users who were provided with services after 1997 and who continue to receive services (£202,900)

2.3 Additional cases continue to emerge, and currently it would appear that 49 service users may be entitled to restitution.

2.4 More problematical is identifying those who self funded their care on the basis that they would have been charged full cost had the Council, due to their higher levels of savings or income, arranged their care package. Any such people are not known to the Council:

- City residents who were entitled to free aftercare from the County Council and who died before the end of March 1997.
- City residents who were entitled to free aftercare from the County Council and who are still alive or have died since April 1997.
- City residents who have been entitled to free aftercare from the City Council since April 1997 (or a later date) to date, and who may or may not still be alive.

2.5 Whilst the third group is clearly the City Council's responsibility, there is a legitimate argument in respect of the first and second group as to whether liability lies in whole or in part with Leicestershire County Council.

2.6 In addition, the Council has already refunded approximately 13 service users upon request. However, the refunds were generally backdated to July 1999 (being the date of

the High Court ruling), whereas the LGO Guidance suggests that no such cut off date should be applied.

2.7 The actions proposed by the LGO, and the City Council's current position as shown in **bold**, are as follows:

- In general, SSAs should not carry out retrospective assessments purporting to remove a person from section 117 aftercare from an earlier date;
- SSAs should review any retrospective assessments that have so far been made;
- For the next 12 months at least, complaints made about previous assessments to end section 117 aftercare should not be rejected by SSAs as out of time;
- Where previous assessments to end section 117 aftercare were not properly made, then restitution will generally be appropriate until a proper assessment is devised.
  - **It does not appear that the City Council has undertaken any retrospective assessments or improperly ended aftercare services. No claims have been rejected as being out of time. The Corporate Director does not propose to implement any changes to this approach.**
- People who have paid for section 117 aftercare should receive financial restitution with interest.
  - **The City Council has made a small number of restitution payments on an ad-hoc basis, usually when specifically asked to by a service user or their representative. However, interest has not been paid, and a cut off date of July 1999 was generally applied, as the refunds were made before the LGO recommendations were received.**
- SSAs should now put mechanisms in place to identify those persons improperly charged, or improperly deprived of financial assistance, and establish arrangements for reimbursing them or their estates.
  - **The City Council is aware of a number of service users who were improperly charged, and were refunded on the basis of individual requests. However, there are no mechanisms currently in place to actively identify others.**
- No generally applicable cut-off date should be used when calculating repayments. Cases where such cut-off dates have been applied should be reviewed.
  - **The City Council has generally applied a cut-off date of July 1999, following the High Court ruling. This will need to be reviewed, and the process for pre-April 1997 charges is subject to discussions with the County Council, as outlined in this report.**

### **3. Further Steps to be Taken**

- 3.1 Failure to fully implement the guidance would leave the Council vulnerable to criticism, should the LGO be called upon to adjudicate upon a complaint made about matters covered in the Guidance.
- 3.2 Other councils are understood to be considering similar issues at present, and therefore it is not possible to say whether the general approach will be towards full compliance. The Ombudsmen's 2003/04 Annual Report later in the year may shed some light on this.
- 3.3 The City Council's actions have reflected many parts of the guidance. It is now proposed that interest will in future be paid on refunds. The main outstanding area is the identification of persons improperly charged or deprived of assistance, and the arrangements for reimbursing them. The Council's current practice is to respond to requests for refunds on an individual basis.
- 3.4 If the Council were to comply with the LGO's recommendation that the issues should be publicised, then the most likely effective mechanisms would include a press statement, the publication of an advertisement, and the display of notices in residential homes providing services for those with mental illness. Awareness could also be raised through liaison with the voluntary sector organisations working with and supporting the mentally ill.
- 3.5 Claims received would need to be verified by reference to records held by the Department, the County Council, General Practitioners and acute and community mental health services. It is impossible to estimate the likely number of claims, but a designated team within the Department would be required to take primary responsibility for verification and approval of claims.
- 3.6 Uncertainty would arise where claims could not be properly verified, for example where old records cannot be located or have been destroyed. Recent experience has also shown that data protection regulations can prevent the sharing of historical records between agencies. Questions about the onus of proof would occur, and persons claiming a refund will need to provide as much supporting detail as possible.
- 3.7 Cabinet is requested to form a view on how this recommendation should be addressed, noting the potential resource implications.

### **4. Resolution of issues with Leicestershire County Council**

- 4.1 Given that restitution issues span Local Government Reorganisation in 1997, it would be prudent to agree a joint approach to restitution with Leicestershire County Council. It would be necessary to agree which council should take overall responsibility for coordinating cases where both councils could potentially be liable, to avoid a difference of approach. It is proposed that this be delegated to the Corporate Director of Social Care and Health.



4.2 It would also be helpful to agree a mechanism by which potential liability disputes between the two councils for pre-1997 cases can be resolved without the need for litigation. It is proposed that this be delegated to the Corporate Director of Social Care and Health, in consultation with the Town Clerk and Chief Finance Officer.

**FINANCIAL, LEGAL AND OTHER IMPLICATIONS**

**1. Financial Implications**

These are set out in paragraphs 4.3 – 4.6 of the covering report.

**2. Legal Implications**

These are set out in paragraphs 4.1 and 4.2 of the covering report.

**3. Other Implications**

OTHER IMPLICATIONS	YES/NO	Paragraph References Within Supporting information
Equal Opportunities	No	
Policy	Yes	Throughout the report
Sustainable and Environmental	No	
Crime and Disorder	No	
Human Rights Act	Yes	Throughout the report
Elderly/People on Low Income	Yes	Throughout the report

**4. Background Papers – Local Government Act 1972**

Advice and guidance on the funding of aftercare under section 117 of the Mental Health Act 1983: Special Report (LGO, July 2003)

**5. Consultations**

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**6. Report Author**

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