

## Free Personal Care and Meals Preparation

---

### The City of Edinburgh Council

1<sup>st</sup> February 2007

#### 1 Purpose of report

- 1.1 To report on legal advice received on the Council's present and previous charging policy for meals and food preparation for older people living at home who have been assessed as unable to undertake these tasks without assistance.
- 1.2 To provide estimates of the recurring, annual cost of ceasing to charge service users for these services.
- 1.3 To recommend a reimbursement scheme and to provide estimates of the one-off cost of refunding charges for meals or food preparation to service users.

#### 2 Main Report

- 2.1 The City of Edinburgh Council agreed on 21st September 2006 to seek definitive legal opinion on the correct interpretation of Free Personal care legislation (the Community Care and Health (Scotland) Act 2002) in relation to charging for meals and food preparation. The Council also asked for a further report on work being undertaken to estimate any liability to repay service users charges for meals or food preparation.
- 2.2 Since 1st July 2002, it has been illegal for Local Authorities to charge people aged 65 or over for any personal care element in non-residential care services which the Local Authority is providing to them, or purchasing on their behalf, following an assessment of need.
- 2.3 Free Personal Care at home has no legal upper cash limit but Free Personal Care in residential care has an upper limit of £145 per week, plus £65 per week if Free Nursing Care is also provided. These residential and nursing care limits have not changed since 2002.
- 2.4 Scottish Executive guidance on Free Personal Care issued in 2002 and 2003 stated that: "*Food preparation and provision of meals are not included*" [in free personal care at home]. "*However assistance with eating, assistance to manage special diets and the assistance with the preparation of specialist meals (eg pureed foods) is included*". Accordingly, the Council charged people receiving meals and food preparation as part of their domiciliary support at home, subject to a means-test.

- 2.5 In September 2004, the Scottish Executive wrote to Councils to say that this guidance was *"inconsistent with Schedule 1 of the Community Care and Health (Scotland) Act 2002, which makes explicit that **assistance with the preparation of food should not be charged for.** The terms of the Act take precedence and must of course be observed"*. The letter promised corrected guidance "in due course". No further guidance was received and in March 2006 the Department ceased charging new and reviewed clients aged 65+ for meal preparation tasks, with the intention of reviewing all clients being charged. However, on 25<sup>th</sup> May 2006 the Scottish Executive provided further clarification, reminding Councils that *"meals provision is not included in the list of "care not ordinarily charged for" in Schedule 1 of the 2002 Act"*. The double negative logically entails that Councils can charge for meals provision. The same letter encourages Councils not to charge for "simple tasks". Because this guidance is not clear, the Council decided to seek a definitive legal opinion on the interpretation of the legislation on free personal care.
- 2.6 The Council's Legal Services commissioned legal opinion from Counsel following the Council Meeting on 21<sup>st</sup> September and with the Department of Health and Social Care provided a briefing that was discussed at a consultation meeting in chambers in October 2006. A written opinion from Counsel has now been received.
- 2.7 Counsel is of the opinion that since the Community Care and Health (Scotland) Act 2002 Act came into force on 1<sup>st</sup> July 2002, the Council has not had the power to charge clients for assisting with the preparation of food. The Council may charge for: shopping, providing food, and providing frozen meals; the Council cannot charge for: chopping up meat or vegetables, etc, mixing ingredients, cooking, re-heating frozen meals, putting food on a plate, cutting up food so it can be eaten, pureeing food, feeding and other assistance with eating, assistance with special diets, and prompting to remember to eat. Although the Council acted in good faith, charges levied have been *ultra vires*. People who were illegally charged have a claim for repayment on the grounds that an unlawful charge falls to be reversed.
- 2.8 The Department is aware that similar legal opinion has been obtained recently by several other Councils. Last year COSLA considered taking a "class action" through the Court of Session to seek legal clarification on the inclusion or exclusion of meals and food preparation from Free Personal care. However, we understand that individual cases were not available for such an action to be taken forward. COSLA subsequently focussed its attention on extensive discussions on guidance and funding issues with the Scottish Executive; assisting individual Councils with Free Personal Care implementation through peer review; and collecting information (not yet complete) from Councils on current charging policy and funding issues. In addition, COSLA secured significant additional funds for Councils in the Local Government Finance Settlement for 2007-08 to cover a range of pressures and challenges.
- 2.9 In Edinburgh, the Department of Health and Social Care had ceased charging new and reviewed clients aged 65+ for meals preparation tasks in March 2006 and had issued revised guidance to practitioners. (The guidance was appended to the previous Report to Council on 21<sup>st</sup> September 2006). In Counsel's opinion the Department's March 2006 guidance is consistent with the 2002 Act.
- 2.10 Careful consideration has been given to Counsel's opinion and, as a result, my recommendation is for the Council to adopt an appropriate scheme of repayment.

- 2.11 As reported to the Council on 21st September, it has been necessary to undertake a sample survey of current clients' computerised records and paper case files in order to establish reliable estimates of the costs of ceasing to charge and/or refunding older people for meals or food preparation at home. This is because charges are recorded on the Department's current computer systems in relation to the domiciliary care package as a whole, not in relation to specific care tasks within the package, such as meals preparation. (These systems are due for replacement in a later phase of the SWIFT Project).
- 2.12 Reliable best estimates from a random sample of 267 cases indicate that, as at 31st March 2007, the Council would need to refund charges for meals preparation of £2.054M for around 820 current service users.
- 2.13 The methodology used to estimate the costs of reimbursing previous charges assumes that the current service package had been in place from each client's service start, and that the current financial assessment applies to the whole period of service, excluding known breaks in service, with the maximum charge per hour changing each year in line with changes in the Council's charging policy. These assumptions are necessary to make the review of meals charges practicable: to track each change in service volumes, and each change in personal financial circumstances, over each service user's history, would require significant additional administrative expenditure and time.
- 2.14 The annual income lost to the Council is estimated at £934k in 2007-08, rising to £1.010M and £1.085M in the following two years, assuming that the 9.2% per year growth in free personal care at home experienced since 2002 continues.
- 2.15 The Department has seconded staff to a dedicated team to review the remaining open cases for a 7 week period which started in late January 2007. The cost of the review team is around £25,000. The intention is to make all back-payments for current service users by the end of this financial year, if the recommendations in this Report are approved by Council.
- 2.16 In addition, there will be a number of former service users, now in residential care, moved away, or deceased who were charged for meal or food preparation at home for some period in the past. It will be difficult to identify the beneficiaries of deceased service users back to 2002 from Departmental records and to establish entitlement. The Department therefore intends to address these practical issues through a "scheme of reimbursement" which will offer refunds to appropriately evidenced claims.

### **3 Financial Implications**

- 3.1 An estimated £2.054M is required for one-off back payments to current service users plus an additional amount for former service users. Consideration should be given to funding this unforeseen expenditure from the Council's contingency reserves.
- 3.2 The annual income lost to the Council is estimated at £934,000 in 2007-08, rising to £1.010M and £1.085M in the following two years, allowing for 9.2% per year growth in free personal care at home experienced since 2002. This recurring shortfall is being considered within the 2007-10 budget setting process.
- 3.3 The Review Team mentioned in paragraph 2.14 will cost around £25,000.

## 4 Recommendations

4.1 It is recommended that the Council:

- (1) Recognises the requirement to correct an anomaly in its charging policy for domiciliary care services for older people.
- (2) Agrees to refund from Council Reserves existing and ceased service users who should have received meals related services free under the current assessment criteria for free personal care.
- (3) Agrees to consider the shortfall in free personal care funding for 2007-10 within the budget setting process.
- (4) Requests the Director of Health and Social Care to implement as quickly as practicable a scheme of re-imburement for service users based on the approach described in this report.
- (5) Notes the establishment of a seconded review team within the Department of Health and Social Care to quantify and then action refunds due.
- (6) Notes that the Chief Executive will write to the Scottish Executive enclosing this report, together with a more detailed statement from the Department of Health and Social Care supporting the repayment cost calculations, and will request that the Scottish Executive reimburse the Council for this unbudgeted expenditure.



**Peter Gabbitas**  
Director of Health and Social Care

---

<b>Appendices</b>	None
<b>Contact/tel</b>	Mike Brown, Manager: Performance and Information. 0131-553 8302
<b>Wards affected</b>	All
<b>Background Papers</b>	Report to Council, 21 <sup>st</sup> September 2006: <i>Free Personal Care – Charging Policy for Meals Preparation</i> :