

## **Explanatory Memorandum to:**

- **The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011 - Social Care, Wales 2011 No.962 (W.136);**
- **The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011 - Social Care, Wales 2011 No. 963 (W.137);**
- **The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011 – Social Care, Wales 2011 No. No.964 (W.138).**

This Explanatory Memorandum has been prepared by the Adult Social Services Policy Division of the Health and Social Services Directorate General and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

### **Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the regulations listed above. I am satisfied that the benefits outweigh the costs associated with them.

*Gwenda Thomas AM*

Deputy Minister for Social Services

24 March 2011

**Description**

1. In relation to local authority charging for non-residential social services the respective Regulations will introduce from 11<sup>th</sup> April 2011 the following:

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

- The classes of persons who may not be charged and the services for which a charge may not be made;
- That an authority's power to set a reasonable charge is subject to a maximum charge of £50 per week;
- The content and format of an invitation, and the responses to these, to request a means assessment to be issued to those receiving or to receive a service for which the authority makes a charge ;
- Where a means assessment is requested, sets out the process to be used including the financial safeguards that should be afforded to service users in those assessments;
- The procedure an authority should use in determining a charge and the effect of such a determination;

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

- For those in receipt of direct payments to obtain the non-residential services they require, corresponding provision to that for direct service users outlined in the above Regulations;

The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

- A right to request a review of any decision to impose a charge for the services received. In relation to those in receipt of direct payments a corresponding right to request a review of any decision to impose a contribution or reimbursement for the direct payments they receive;
- The situations in which a request for a review may be made, the content and format of that request and the acknowledgement that an local authority must issue;
- The process an authority must use in considering such requests, the timescales for this and the factors an authority must take into account in determining them;
- The actions an authority must take once a decision has been made and the arrangements for the payment of any charge, contribution or reimbursement in dispute during the period of the review and subsequently.

**Matters of special interest to the Constitutional Affairs Committee**

2. In order to bring into force in Wales the above Regulations it has become necessary to breach the 21 day rule. Given the level of detail that these Regulations have of necessity needed to cover, their development has required extensive and prolonged engagement with stakeholders; both those representing local authorities and those representing service users. This was to ensure that they afforded service users the consistency of approach and financial safeguards required, while at the same time introducing arrangements which were practical for authorities to administer. This process has, therefore, been highly technical involving charging, financial and complaint officers from local government, as well as a range of individuals from the organisations representing older and disabled people. This has included ensuring that, in relation to

direct payments, the changes account for all of the categories of individuals who are eligible to receive direct payments. That category is being extended and has recently been the subject of separate Regulations laid in relation to direct payments which will also come into force on 11<sup>th</sup> April. As a result it has not been possible to table these Regulations relating to local authority charging for non-residential social services before now.

### **Legislative Background**

3. The regulations are made by Welsh Ministers in exercise of the powers conferred upon them by sections 2(2), 3(1), 4(1)(d), 4(3)(b), 4(4), 5(2)(a), 5(4), 6(5), 7(2), 8(3), 9(4)(d), 10(4)(f), 11, 12 and 17(2) of the Social Care Charges (Wales) Measure 2010.

4. The three statutory instruments are subject to the negative procedure.

### **Purpose and Intended effect of the legislation**

#### Policy Intention

5. Homecare and other non-residential social services are provided by local authorities to disabled and older people who are assessed as having care needs that require such services. Over 66,000 adults in Wales receive community based services each year upon which they rely to support their every day living. Local authorities presently have the discretion to charge for these services and around 14,000 service users annually are charged.

6. Independent research has identified that wide variations exist in almost every aspect of this local authority charging; in the services for which a charge is made; in the means assessments undertaken to establish a service user's ability to pay a charge; in the allowances and disregards authorities have in their means assessments; in the level of charges for similar services; and in the way service users are informed of their charges and are able to have these reviewed if they wish. This has resulted in a wide range of differing processes, and a wide range in charge levels from relatively low amounts to unlimited charges, between authorities for the same services being provided. This has led to a perception of unequal and potentially unfair treatment of service users and confusion over the arrangements for charging that apply in any given local authority area.

7. As a consequence the Assembly Government has a "One Wales" commitment to obtain the legislative powers, and to then introduce, more consistency in local authority charging for these services so as to introduce a more level playing field between authorities for the benefit of service users. As a result following the making of the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008, last year Welsh Ministers obtained the powers to tackle this issue with the making of the Social Care Charges (Wales) Measure 2010. This allows Welsh Ministers via regulations and statutory guidance to introduce a new charging regime for non-residential social services so as to introduce more consistency in key elements of the charging process and in charges set themselves. The three statutory instruments covered by this Explanatory Memorandum each seek to implement respective parts of this new charging regime.

#### Effects

8. The three statutory instruments have differing effects:

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

- Classes of persons who may not be charged and the services for which a charge may not be made – presently authorities have the discretion to charge any class of person for the service they receive but are advised by guidance not to charge those with a diagnosis of CJD given the harm they have already suffered. The guidance also advises them not to charge those who have been assessed as having an income below a set level linked to their personal circumstances and disability (referred to as a “buffer”. This term is explained in more detail later). This is to protect service users with low incomes. The regulations seek to put both on a statutory basis. Authorities cannot charge for after care services provided in accordance with section 117 of the Mental Health Act 1983. The regulations seek to add to the services that cannot be charged for by including transport to a day service where transport is provided or commissioned by an authority and where this, and the attendance at the day service, have been identified as a requirement of a person’s care assessment. This is to put such individuals on a par with those older and disabled people who receive free bus transport through concessionary fares;
- Authority’s power to set a reasonable charge subject to a maximum charge of £50 per week – At present authorities are free to set their charges for the services they provide at whatever level they consider reasonable. Some authorities operate a weekly maximum charge that a service user would be expected to pay, albeit that such maximums can still be substantial sums (eg £200 or £300 per week); many authorities do not operate a maximum charge. The regulations seek to introduce a Wales wide maximum charge of £50 per week for all of the services an individual receives which are provided by the enactments listed in section 13 of the Measure. This is to reduce the wide variations in weekly charge levels between authorities that service users are asked to pay, sometimes for the same services. The only exception to this would be those services which an individual receives which substitute for ordinary living costs, as such the provision of meals or laundry services, which would be outside of this maximum;
- Requirement for a local authority to issue an invitation to a potential service user, or an existing service user in specified circumstances, to request the authority undertakes a means assessment to determine how much, if anything, they will be required to pay for their services - There is currently no standard approach between local authorities in the way in which service users are engaged with the process of seeking assistance in the cost of meeting the charges for non-residential care services. These regulations require all local authorities to issue an invitation to a potential service user (or an existing service user in certain circumstances, such a change in the type or level of the services he or she requires) to seek an assessment of their financial means with a view to the authority making a determination as to that person’s ability to pay the authority’s standard (or any) charge for the provision of the services he or she has been assessed as requiring;

- Content and format of an invitation, and the response to this, to request a means assessment required to be issued to those receiving or to receive a service – At present authorities undertake a means assessment on those to receive a service for the first time, or where the service is to change, or the financial circumstances of the service user has changed. However, there is nothing governing how, when and in what format authorities go about this. Hence practice in relation to these varies between authorities for what is a consistent part of the charging process. Section 4 of the Measure places a duty on an authority to invite a person who is to receive a service for which an authority has decided to charge to request a means assessment, while section 9 of the Measure extends this duty where the circumstances of the service, or the financial circumstances, of an existing service user have changed and an authority wishes to replace a determination of an existing charge. The regulations seek to introduce a consistent format for these invitations in terms of the information provided to services users, in terms of them being in writing or in any other format appropriate to the communication needs of the service user, and in terms of allowing users to nominate a third party to act for them, or assist them, in this process. The regulations also seek to introduce a consistent 15 working days that a service user has to respond to such an invitation and to provide any documentation or information the authority considers they require to make a decision on a charge. They also seek to allow a service user to provide such information by means of a home visit should they wish, or to request additional time to provide documentation or information should they feel they require this. They also allow for an authority to proceed to undertake a means assessment on the basis of known information should a service user not respond to an invitation, or seek an extension of time and not respond after that has elapsed;
- Where a means assessment is requested, the process to be used including the disregards of capital and income that should be afforded the service user in these – Authorities are currently advised by guidance that when undertaking a means assessment they should disregard the value of a person's main residence and where they also take into account other forms of capital, they should be as least as generous to the service user in applying those as the allowances set out in the regulations governing residential care charging. Authorities are also advised to disregard in full all amounts received by the service user as earnings or savings credits so as to promote the independence of service users. The regulations seek to put all of these disregards on a statutory basis. They also seek to introduce a further disregard in relation to ex-gratia payments made to those who contract hepatitis C and/or HIV through contaminated blood or blood products, given the purpose of these payments is to compensate those affected for the harm they have suffered;
- The procedure to be used in determining a charge and the effect of such a determination – Authorities are currently advised by guidance to ensure any charge set for a service does not reduce a service user's remaining income below the amount of their Income Support, Employment and Support Allowance or Guarantee Pension Credit, plus a "buffer" of at least 35% of that amount. This is to ensure that after charging users have at least a minimum amount to meet their daily living costs. In addition, authorities are advised to allow at least a

further 10% of a service user's entitlement (to make at least 45% in total) as a contribution towards the additional living costs a user will have as the result of a disability or medical condition. The regulations seek to put these financial safeguards for service users on a statutory basis. Where a service user is charged for the first time, or where an existing charge is to be amended, the regulations make it clear that an authority cannot impose that charge until the service user has been provided with a statement of that charge in accordance with section 10(4) of the Measure (which details the content and format of such statements);

#### The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

- These regulations make corresponding provision for those persons who are in receipt of direct payments to secure the provision of the non-residential social services they require, to that made for direct service users as outlined in the above mentioned regulations. This is so that persons who receive direct payments may benefit equally; provision is introduced for classes of persons and services for which a contribution or reimbursement from a direct payments can not be made or sought; such contributions or reimbursements being limited to a maximum of £50 per week; along with the arrangements governing the invitation, and responses to an invitation, to a means assessment where it is proposed that a contribution or reimbursement is to be sought from a person's direct payments; and the arrangements governing the undertaking of the means assessment, the determination of a contribution or reimbursement and the effects of such a determination;

#### The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

- Introduces a right to request a review of any decision to impose a charge, contribution or reimbursement for the services received – Authorities currently use a range of methods for reviewing a charge, contribution or reimbursement, ranging from a decision made by a senior officer in an authority to a panel of senior officers and councillors. The procedure and timescales authority's use in processing reviews also vary so that no two review processes in operation are the same. The regulations therefore seek to create a right for a service user or direct payments recipient to request a review of a decision to impose a charge, contribution or reimbursement, in connection with the services they receive and to define the circumstances in which a review can be requested. They also confirm that a request can be made either orally or in writing and that should they wish, a requester can appoint a third party (such as a friend, relative or advocacy) to handle the review for them or to help them with any part of the review;
- The content and format of an acknowledgement of a request a local authority must issue – The regulations set out a consistent acknowledgement of a request for a review that an authority must issue. This is to ensure that all requesters are provided with similar information, in a consistent format and timescale. Hence the regulations specify the content of an acknowledgement (eg how the authority will conduct the review, providing a named contact in an authority to speak to about

the review if they wish), that it should be provided within 5 working days of receipt of a request and that it should be provided in writing and in any other format to meet the communication needs of the requester (eg Braille). It must also confirm what additional information or documentation an authority requires to consider the request and confirm that if a requester wishes, such information or documentation can be provided by means of a home visit by an appropriate officer of the authority. It should also inform requesters that they have 15 working days to provide any additional information or documentation sought. An acknowledgement must also inform a requester that during the period of the review, they are not obliged to pay their charge, contribution or reimbursement, but that should they choose not to do so, depending upon the outcome of the review they make be asked to make any arrears of payment;

- The process an authority must use in considering requests, the timescales involved and the factors that must be taken into account in determining them – If an authority can determine a review immediately (eg it is a mathematical error in the calculation of the charge) the regulations set out that an authority should do this within 5 working days so that the acknowledgement issued also becomes the determination of the review. If the requester has problems in providing requested additional information or documentation within the 15 working days allowed, the regulations allow for the requester to ask for an extension of this period and for authorities to grant reasonable requests for such extensions.

The regulations place a duty on authorities to determine a review once they have sufficient information and documentation to do so and to implement its findings. A determination must be made within 10 working days of reaching this position and issued to a requester. Authorities also have a duty to appoint a member of members of its staff to deal with such reviews who must, in making a determination of a review, take into account certain specified factors. For example, the requirements of the Measure and regulations, the authority's charging policy, the requester's income and expenses and any circumstances that may affect the requester's ability to pay a charge, contribution or reimbursement. The regulations also place a duty on authorities to issue a statement of the charge, contribution or reimbursement to be levied should the outcome of the review lead to an amendment of these. Should the outcome of the review lead to an overpayment having been made, the regulations place a duty on authorities to refund such amounts in full within 10 working days of issuing the review's determination. Should it lead to an underpayment, authorities have the discretion to recover an arrears if they wish but where they choose to do so, the regulations place a duty on them to ensure that this does not cause undue financial hardship to the requester and if it does, to offer the requester the option of repaying any amount in periodic instalments.

## **Consultation**

9. The details of consultation undertaken are included in the Regulatory Impact Assessment below.

## **Regulatory Impact Assessment – Options, Costs and Benefits**

## The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

### Option 1: Do Nothing

10. Not making these regulations would leave local authorities with substantial discretion as to the class of persons which they charged for the receipt of non-residential social services, as to the services for which a charge is made, as to how they undertake their means assessments to consider a charge and in the level of the charge set. Inconsistency and perceived inequity in such charging practices, procedures and charge levels would remain with nothing to prevent this situation worsening. Service users would not have a right to receive an invitation for a means assessment or to request one, and where means assessments took place there would be no legislation to govern the operation, content, frequency or timings of these. Service users, and their financial means, would continue to be treated differently by differing authorities in this process. The financial safeguards for service users on low incomes who are charged for their services would not be enshrined in legislation, with authorities free to set charge levels at substantially higher amounts than the £50 per week proposed by the regulations to the detriment of service users' available income to meet their daily living costs.

### Cost

11. There would be no new cost implication for local government from this option but the potential for a new cost implementation for service users should authorities choose to maximise charge income further from charging for these services.

### Benefits

12. This option would provide no new benefits to recipients for non-residential social services but would allow local government, if it wished, to increase its income from this charging further.

### Option 2: Make the Legislation

13. Making the legislation would create a reasonable balance between authorities retaining an element of discretion to determine their own charging policy for non-residential social services and protecting the users of the service. Authorities would still retain the discretion to charge; to determine who to charge; the services for which it would make a charge; and in setting the level of that charge. What the regulations would do, however, is to set out certain categories of individuals who it would be unreasonable to charge at all; to set out services for which Ministers thought it was unreasonable to charge; to confirm forms of capital and income which Ministers consider ought to be excluded from the means assessment to aid users' ability to meet their daily living costs; and to introduce a Wales wide maximum charge to address the inequity of wide variations in charge levels across authorities for similar services. The regulations would also introduce an element of consistency across authorities in the means assessment and charging process, and in the provision of information to service users, so users in all parts of Wales would know what to expect when being charged. these.

### Costs

14. Following a detailed costings exercise with authorities it is estimated that making these regulations, and the corresponding regulations for direct payments recipients below, would cost £10.1 million per annum in total in lost income to authorities. In line with the Partnership Agreement with local government, where the Assembly Government will compensate authorities for new financial burdens, this amount of funding has been included in the local government settlement for 2011-12 onwards.

#### Benefits

15. Local authorities would still be free to determine certain elements of their charging policies to match local circumstances and priorities, while at the same time financial protection being afforded to those services users with particular circumstances or low levels of income. The charging process would be clearer in, and more consistent between, authorities to aid both charging officers and service users alike. In addition, the introduction of a Wales wide maximum charge would remove the inequity of wide variations in charge levels across authorities for similar services.

#### The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

16. The options, costs and benefits in relation to these regulations are the same as for the regulations above in relation to means assessments and determinations of charges for direct service users. The only difference would be that the impacts, costs and benefits would be in relation to the contributions and reimbursements imposed by authorities on those in recipient of direct payments to meet their assessed care needs, as opposed to a direct charge for a service provided. Hence the impacts, costs and benefits are on the means assessments, determinations and level of contributions and reimbursements in similar ways to those which result in a direct charge for a direct service user.

#### The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

##### Option 1: Do Nothing

17. While all authorities undertake a review of charging decisions at a user's request, the procedures, processes, timescales and nature of these vary greatly between authorities, even for reviews on similar issues. Hence not making the regulations will maintain the status quo of some users having their review decided quickly by a senior officer in an authority, while others with a similar complaint will have a lengthy review process to encounter with the possibility of having to appear in front of a panel of officers and councillors to explain their case. Given that the client group who are charged for services are disabled and older people, many service users will find complex procedures confusing and appearing before panels intimidating. Hence there has been a clear message from service user representatives that a quicker, simpler and consistent review process was required.

#### Cost

18. There would be no new cost implication to local government from this option.

#### Benefits

19. This option would provide no new benefits to those who wish to have their charge, contribution or reimbursement reviewed. Local authorities would be able to continue to operate their individual review procedures in their areas.

#### Option 2: Make the Legislation

20. Making the legislation will introduce a clear, consistent review process across all authorities, irrespective of the nature of the complaint. It will enable service users to have clear, consistent information about how their request for a review will be dealt with, what information or documentation they need to provide in support of this and what will happen to their charge, contribution or reimbursement during the review period. It will set a timescale for the review so that service users and authorities know what needs to happen by when, and provide for authorities to determine reviews in a quicker, more consistent manner.

#### Cost

21. There would be no new cost implication to local government from this option. All authorities already undertake reviews and so the regulations merely introduce a change in the way these are undertaken as opposed to placing new burdens on authorities.

#### Benefits

22. Introducing a clear, consistent review process across all authorities will address the inequitable manner in which authorities currently handle requests for a review of a charge, contribution or reimbursement. Those that request such reviews will be better informed about the process and in many cases will get a decision in a less intrusive manner, and quicker timeframe, than at present

#### **Consultation**

23. Following the making of the Social Care Charges (Wales) Measure 2010, Ministers established three stakeholder working groups, all of which had both service user and local government representation upon. One considered the detail of the operational changes that would need to be introduced by the regulations in relation to means assessments and determination of charges, both in relation to direct service users and those in receipt of direct payments. One considered the detail of the operational changes that would need to be introduced by the regulations relating to reviews of charging decisions, while the remaining group considered the practical arrangements authorities would need to undertake in preparation for the implementation of the regulations. Advice from these groups informed the drafting of the three regulations now being made.

24. In addition, a public consultation was held on a draft of the resulting regulations which concluded in February this year. Some 26 responses were received which have informed the final regulations being made.

#### **Competition Assessment**

25. Not applicable.

#### **Post Implementation Review**

26. Arrangements are being made with local authorities to undertake, following implementation of the regulations, a review of their impacts. This will include information on the numbers of services users who have benefitted from them, in relation to the

impact that this has had on their charge levels, the income local authorities have lost as a result of their implementation and whether there have been any unintended consequences of their introduction. This information will inform any review of the regulations that may be necessary, as well as any change to the financial arrangements put in place with authorities that may be required.