

**Adult Social Care and Health Directorate**

## **Discretionary Funding**

# **Practice guidance in the application of defensible decision making**



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## Document Information

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## Document Governance

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## Glossary

ASCH	Adult Social Care and Health Directorate
DP	Direct Payment
DREA	Disability Related Expenditure Assessment
KCC	Kent County Council
LA	Local Authority
OSS	The Operational Support Service
PIP	Personal Independent Payment

# Practice Guidance

## Introduction

This guidance explains best practice to support the adult social care delegated authoriser (decision maker) when making a defensible decision about a discretionary disregard/funding.

It is supplementary guidance to KCC Charging Policy and Procedure for Residential and Nursing Care Homes Placements and KCC Charging Policy and Procedures for Home Care and other Non-Residential Services.

## 1. Key Principles

- 1.1 Under the [Care Act 2014](#), there is a degree of discretion when making some decisions on charging, taking into account individual circumstances.
- 1.2 Factual inquiries include making reasonable requests for information and evidence in order for a decision to be reached.
- 1.3 Making a judgment is based on the facts presented.
- 1.4 The adult social care delegated authoriser (*decision maker*) must promote the wellbeing of the person when making the decision and needs to balance this discretion with ensuring a person's assets are not maintained at public expense, are sustainable and provides value for money for Kent County Council (KCC).
- 1.5 Documentation is key. Decision makers must keep a record of their decisions. It provides a clear rationale for all the decisions made and the discussions that led to the decision(s). Decisions should withstand hindsight scrutiny. If at a meeting and a verbal decision was made, a contemporaneous record must be created as soon as possible.
- 1.6 Once a decision is made based on individual circumstances, whilst it does not set a precedent, KCC must ensure it's fair and equitable in that people are charged in the same way in similar situations. Decisions may be made on a "without prejudice" basis.
- 1.7 The communication conveying the decision should be made by the decision maker (Assistant Director/ Head of Service for Operational Support Service (OSS)). They should consider how to communicate the rationale and decision in a way that is understood and able to be acted upon.
- 1.8 A person (or representative) has a right to appeal or complain about the decision.

## 2. National Guidance

2.1 The [Care and Support Statutory Guidance](#) issued with the Care Act provides the statutory guidance when KCC is making decisions on charging. KCC must follow the [Care and Support \(Charging and Assessment of Resources\) Regulations 2014](#) and have regard to the guidance.

2.2 Regulations determine:

- the maximum amount KCC can charge a person
- the minimum amount of income a person must be left with after charging
- how to treat different types of income and capital
- what certain types of care and support must not be charged for
- the mandatory disregards in the financial assessment

2.3 In addition to the mandatory disregards in regulations, KCC has the power to exercise discretion when making other decisions on charging, taking into account individual circumstances.

2.4 Examples of discretionary powers include (but not limited to):

- apply a discretionary property disregard
- waiver the assessed charge because of the quality of care
- waiver the assessed charge where there is any doubt surrounding the financial information provided (*or not provided*) at the very beginning of the placement/care and support
- debt write off
- what are reasonable costs in an individual disability related expenditure assessment
- disregard additional sources of income

**Section 4** below provides some useful discretionary funding scenarios, including some actual Local Government and Social Care Ombudsman (LGSCO) decisions. Links to full reports provided

2.5 The LGSCO often finds fault with councils for “‘fettering their discretion’... *that is to say, for operating inflexible policies which do not allow for the application of discretion. This is because a blanket refusal to depart from a policy is arbitrary and likely to lead, at one time or another, to manifest injustice.*”

Extract from [Local Government and Social Care Ombudsman](#) complaint reference 19 002 276

### 3 Best practice guidance in the application of defensible decision making

3.1 When making a defensible decision about discretionary funding/disregard you must consider the following:

Getting the facts	Evaluate	Make A Decision
<ul style="list-style-type: none"> <li>• Ask probing questions and maintain a rigorous level of inquiry before embarking on decisions - don't assume that everything you are told is right.</li> <li>• What are the relevant facts at the time?</li> <li>• What information is not known? Can I learn more about the situation?</li> <li>• Do I know enough to make a decision?</li> <li>• Who has an important stake in the outcome?</li> <li>• Are some circumstances more important than others? Why?</li> <li>• What evidence have I gathered that supports the facts?</li> <li>• What consideration factors may be relevant?</li> <li>• What legislation is relevant to the decision? For example: <a href="#"><u>Human Rights Act 1998;</u></a> <a href="#"><u>Mental Capacity Act 2005;</u></a> <a href="#"><u>Care Act 2014 - wellbeing principle;</u></a></li> </ul>	<ul style="list-style-type: none"> <li>• Is the information provided by the person about their circumstances reliable?</li> <li>• Will decision not to exercise discretion have a disproportionate impact on the person and/or dependents wellbeing or best interests?</li> <li>• Consequences of decision to exercise discretion - what this means to the person</li> <li>• What are the risks to the person and/or KCC?</li> <li>• What key facts were relied upon e.g. income, assets, expenditure?</li> <li>• Is there is a compelling reason why evidence cannot be provided?</li> <li>• Consideration you weighed.</li> <li>• Competing issues you balanced, the options, the evidence in support</li> </ul>	<ul style="list-style-type: none"> <li>• What alternative funding is available e.g. benefits maximisation?</li> <li>• Don't delay or be rushed unless decision is urgent -. it may be worse if you wait</li> <li>• Interim decision may be appropriate = continually re-assess your decisions and explore longer term options as new information comes to hand</li> <li>• Consider the best way to communicate your rationale and decision to the person</li> <li>• Prepare for contentious decisions to be the subject of an inquiry, appeal, complaint, or legal challenge</li> </ul>

<p><u><a href="#">Equality Act 2010</a></u></p>	<p>and be clear why the ultimate decision was made</p> <ul style="list-style-type: none"> <li>• Are you satisfied that there is clear and compelling evidence that discretionary funding/disregard is appropriate?</li> </ul>	
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**Remember...**

Ensure your decision making is grounded in evidence. Collect, verify, and thoroughly evaluate information available.

A decision is defensible, if despite a negative outcome, it can be demonstrated that all facts were considered and evaluated based on individual circumstances.

## 4. Scenarios

The following scenarios illustrate examples of disregarding savings, debt write offs (approved and not approved), waivers, time limited discretionary funding, disability related expenses, exceeding the guide price and discretionary property disregards.

### 4.1. Disregarding half of mother's savings.

**Source:** Kent County Council (20 007 615); LGSCO: Decision: Not Upheld. Decision Date: 24 August 2021. Full report [click here](#)

**Summary:** *Mr X complains that the Council should have disregarded half of his mother's savings when assessing how much she should contribute to her care costs, because of her financial control over his father. Mr X says half of the savings belongs to his father, and the Council is depriving his father of money that is rightfully his. The Ombudsman does not find the Council at fault.*

**What happened**

- *Mrs P's son, Mr X, complained to the Council. He said the Council should treat Mrs P's savings as joint capital between Mr and Mrs P. Mr X said his mother had financially controlled and abused Mr P, and that any past expenditure was taken from Mr P's personal funds.*



- *The Council had a meeting with Mr X. Mr X asked the Council to apply its discretion and treat all of Mrs P's savings as joint savings, despite the savings being held in Mrs P's name alone. The Council considered the evidence Mr X provided about the alleged financial abuse.*
- *The Council decided that the evidence provided did not change its original decision. For this reason, the Council maintained that Mrs P should pay the full cost of her care.*

### **Analysis**

- *The Regulations and the Council's policy allow the Council to consider exercising discretion when making certain decisions on charging. I find that the Council considered whether or not to exercise its discretion when deciding how to treat Mrs P's finances. I find that the Council fully considered Mr X's argument and his evidence. This is appropriate and is evidence of good practice.*
- *The Council ultimately decided, after full consideration, that it would not disregard Mrs P's finances. This is a decision the Council is entitled to make and is in line with the law and the Council's policy. For this reason, I do not find the Council at fault. The Ombudsman cannot question the merits of a decision that is made without fault.*

## **4.2 Debt write off**

### **4.2.1 Approved**

#### **Summary**

A Local Authority (LA) needed to consider urgently if it is going to apply discretion to the debt to Care Home (YY) to secure person's (XX) placement or not? If not, the LA need to seek another placement but that is very likely going to be a higher cost than that LA are paying at YY Care home.

The LA anticipated the possibility of the debt occurring, paid by discretionary funding initially but to consider again now LA have no duty to pay this debt.

It would be LA decision to apply discretion to funding the debt to prevent XX from being moved from YY Care Home.

#### **Making the decision**

LA carefully looked at the circumstances that surrounded XX and the LA current and past financial commitment as a LA with funding XX care fees over a protracted period of time whilst XX has resided at YY Nursing Home.

The risks noted were to XX and the LA are as follows:

- *"The termination of placement served by YY Care Home would undoubtedly disrupt XX life as XX has called this placement home for some time; from*

*what was discussed, XX eligible care and support needs are being adequately met and there were no areas of concern raised.*

- *The LA in using its discretionary powers has meant that a large debt has accrued, and this is unsecured, and there is no firm plan in place to recover these monies which is not acceptable.”*

### **Comment**

What is missing is a joint professionals and family meeting to discuss a way forward for XX future funding at the YY Care Home and the repayment of the debt owed to LA and how XX /or family intend to pay the care fees in the event that the LA withdraw funding.

XX has been assessed as not being eligible for ordinary funding, this is because the second property abroad is included in the financial assessment and there is not a compelling reason to disregard the value of the second home from XX financial assessment from the facts obtained, and therefore the LA acted on the principle that XX should be self-funding placement fees.

The LA could take the view that a precedence has been set in respect of its financial commitment to care homes fees for XX because of the protracted period of time the LA provided funding assistance.

However, the LA decided that each period of funding extension requested must be considered on its own merit. There is no indefinite decision to continue to fund now and in the future; this remains the prerogative of the LA in using its discretionary powers, as with any decision, careful consideration will be given to the circumstances of each person’s situation.

The LA carefully consider XX circumstances and decided that the period of time the discretionary funding did not cover should have been considered as part of the initial discretionary funding request.

At that time, the LA should have considered using its discretionary powers to fund the placement fees as there was a gap and the reason there was a gap was that the LA ceased funding due to XX not being eligible for care and support and then the LA were approached to consider discretionary funding.

The LA agreed to the backdated charges without prejudice.

The LA was clear it cannot become complacent with the funding and debt situation in the meantime and wanted certain action to be initiated in a four-week period from a stated date.

It was confirmed no extension to funding will be considered without a clear plan in place to address both the matters of future care home fee payment and the debt owed to the LA.

#### **4.2.2 Approved.**

##### **Brief Description of why the debt accrued**

Issue with the provider portal resulted in the person not being charged correctly between specified dates. Following this being identified, there were further delays before the account was corrected and the charges were raised in 6 months later. Due to the delays in the invoice being raised it was agreed to seek a write off rather than pursue via debt recovery.

#### **4.2.3 Approved.**

##### **Brief Description of why the debt accrued**

It was discovered that following the implementation of the new local authority provider portal, a provider had not been paid for their services (or the person charged) for a period of eight months. A fix was applied to the system resulting in the correct charge being raised however this was not applied to the system and the charge raised until another five months. Due to the delay in the correct charge being raised and the person not being at fault for the error the local authority agreed to write off the balance for the period.

#### **4.2.4 Not approved.**

In the situation set out below, the decision maker concluded there was no compelling reason why the local authority (LA) would consider a debt write off as the charges that had been applied were accurate and the financial assessment reflected incomes etc. The person (XX) did not qualify for an individual Disability Related Expenditure Assessment (DREA). Charges were accurate and base on XX income and savings. A meeting was arranged with XX to discuss debt and a repayment plan.

**Background:** XX presented at the LA risk panel. XX had some complex health issues. XX had mental capacity in relation to finances/care and support needs and how XX would like these to be met.

XX was in receipt of a Direct Payment (DP) since 2016.

There was an accruing debt, because one was a result of XX Personal Independent Payment (PIP) benefit being stopped for a period of time – the DP was transferred using payroll company and a payment plan was set up and nominal payments had been made since, despite an agreed amount running alongside XX current financial contribution of which there is now also a debt. The repayment was agreed.

The issue of PIP was resolved and XX received a back payment. XX had enough disposable income therefore would not qualify for a DREA. The building debt has been addressed by the LA representatives on numerous occasions which is a trigger for random payments.

Despite constantly readdressing the debt with both XX and XX child (18+) offspring there was no resolution or attempt to pay this. XX did have another child (18+) and

LA planned to explore the possibility of the other child (18+) in managing the DP and discussed with XX.

LA representatives had been involved with XX for some years and it was felt that a visit from a debt recovery officer may also be beneficial to try to explain the seriousness/consequences of non-payment and set up a direct debit new repayment plan.

### **4.3. Waiver request agreed - care not regularly given**

**Source:** Kent County Council (20 011 177) LGSCO: Decision: Upheld. Decision Date: 31 August 2021. [Full report click here](#)

**Summary:** *“There was no fault in the way the Council conducted the financial assessment or arranged a care package, although there was poor communication about the process. However, the care visits by the Council’s commissioned care provider did not meet Mrs X’s needs. The Council agrees to waive the charges as the records show care was not regularly given. ....”*

**LGSCO Analysis:** *“...It is plain from the care agency records that the carers did not provide care at the level anticipated. Although Ms X had discussed with both the social worker and the care agency what her mother’s response was likely to be, there is no evidence much attempt was made to provide any of the promised care or properly build a rapport to enable Mrs A to trust the carers. That was fault which caused injustice to Mrs A and anxiety to Ms X. In my view Mrs A should not pay the care charges.”*

**Agreed action...:** *“Within one month of my final decision the Council will apologise to Ms X and waive the outstanding charges...”*

### **4.4. Discretionary funding- time limited**

**4.4.1** Agreed to fund under discretionary funding for a three-month period.

Reasoning: There were concerns around safeguarding and potential financial abuse which includes property.

#### **4.4.2. Exceptional disregard - assessed contribution for a period of six months**

There were concerns about self-neglect and unsanitary home environment.

Several care agencies in the past handed back the package of care due to poor home environment; drug use; non-engagement with care and their violent behaviour towards each other.

A professionals meeting was held to discuss the challenges currently faced by the care agency to meet the care needs of the person (XX). XX refused care due to the cost involved.

XX is at risk of self-neglect if support is not offered.

As part of the recommendations and to formulate plans to meet those needs moving forward, the chair of the professional meeting made a recommendation for a “*Financial Disregard*.” Copy of risk assessment and the minutes from the professionals meeting for further information were sent to the discretionary funding decision maker.

**Discretionary funding decision maker:** reviewed the information that had been provided and based on the level of risks involved it was agreed to apply an exceptional disregard for XX assessed contribution for a period of six months but should the level of assessed risk reduce during that time or stay the same at the end of the six months then the decision would be reconsidered nearer the time.

The decision maker recommend it would be useful to have a goal/ plan around financial management of essential costs such as social care fees worked towards during that time, however, it was recognise based on the information presented there were number of complexities involved with XX.

#### **4.5. Disability Related Expenditure Assessment.**

**Source:** Surrey County Council (16 012 510) LGSCO: Not upheld; Decision Date 19 Oct 2017. [Full report here](#)

##### **What the LGSCO found**

- *“The Council provides home care services for Mrs B due to her care needs. The Council carries out a financial assessment of Mrs B’s income and expenditure to calculate her contribution for the cost of care. The Council reviewed Mrs B’s contribution for the cost of care in September 2016. It calculated that she must pay £30 per week towards the cost of care.*
- *Mr B complained the Council had not taken account of disability related expenses. These are additional costs incurred due to disability. Mr B said that Mrs B’s fuel costs had increased from £60 to 150 per month because she had a live-in carer. The Council explained that it had assessed Mrs B’s disability related expenses in accordance with Government guidance and the National Association for Financial Assessment Officers guidance which formed part of the Council’s Charging Policy. In relation to fuel costs the Council said that it accepted Mrs B’s fuel costs were £150 per month. It explained the Government had identified typical annual fuel figures for various property types based on the Family Expenditure Survey. Any fuel costs above these amounts should be allowed as disability related expenses. Mrs B occupied a detached property, so the yearly fuel costs were expected to be on average £1555 per year. As Mr B paid fuel costs of £1800 per year this was a disability related expense of £245 per year. Therefore, the Council allowed a disability related expense of £5 per week for fuel costs.*
- *The Council noted Mr B said that his mother’s fuel costs had increased by £90 per month. But it said the evidence he had provided had not shown that*

*increase, fuel costs had increased generally, and, in any case, it had assessed the expense in accordance with guidelines.*

- *Mr B pursued his complaint regarding this matter, but the Council upheld its view that it had calculated Mrs B's contribution correctly and that it should not increase the amount for disability related expenses for fuel.*
- *I asked the Council whether it had considered using its discretion to increase the level of disability related expenses for Mrs B. The Council replied that it had considered whether a further disability related expense allowance should be made in view of Mr B's complaints. However, it said that having reviewed Mrs B's ability to pay and all relevant expenses it had decided no revision was justified. It said that there were no known exceptional circumstances to warrant an increase in the disability related expenses. I consider there is no fault in the Council's decision making. Therefore, the Ombudsman cannot question the decision as I explain in paragraph 2. It appears the Council has considered relevant guidance and it has also considered using its discretion."*

#### **4.6. Exceed the guide price-remain in care home**

The care and support planning process determined care home accommodation would best suit the person's needs. The person chose a care home which was available and suitable to their needs.

The care home cost more than the local authority expected to pay to meet the persons level of needs. A person agreed to pay the difference (top up) and the local authority made the arrangement in the more expensive care home.

After a couple of years, the person making the top-up payment had an unexpected change in their financial circumstances. This impacted on their ability to continue to pay the top-up fee. The top up arrangement ended.

No other willing and suitable third party was identified to pay the top up fee.

The social worker considered:

- person's need for social contact and emotional support
- the extent of their existing local social network
- how vital contact with family/ friends is to the person's health and wellbeing - i.e. to meeting their needs and/or Article 8 European Convention on Human Rights: right to a private and family life
- physical frailty and disability for some visiting relatives/friends.

A risk assessment demonstrated that a move to another care home would be detrimental to aspects of the person's wellbeing and outcomes most relevant to them. The person to remained in the care home.

The local authority negotiated a new contractual price with the current care home. The care and support plan was revised and the personal budget increased to cover the full care home fees.

## 4.7. Property disregard

**Source:** [Care and Support Statutory Guidance Annex B: Treatment of capital. 34\) Property disregards](#)

### 4.7.1 Example of emotional attachment to a property

*Bea is 62 years old and lives with her family in Kent. Her father Patrick is a widower who has been living in the family home in Teddington that she and her sister grew up in and where she occasionally stays to help her father. Patrick has been assessed as having eligible care and support needs that are best met by moving into a care home.*

*Although Bea is over the age of 60, the family home is not her main or only home, and the property is therefore not disregarded.*

### 4.7.2 Example of local authority discretion to apply a property disregard

*Jayne has the early signs of dementia but wishes to continue living in her own home. She is not assessed as having eligible needs but would benefit from some occasional support. Her best friend Penny gives up her own home to move in with Jayne. At this point, there is no suggestion that Jayne may need care in a care home.*

*After 5 years Jayne's dementia has reached the point where she needs a far greater level of care and support and following an assessment it is agreed her needs would best be met in a care home. On moving into the care home, the local authority uses its discretion to apply the property disregard as this has now become Penny's main or only home.*

### 4.7.3 Example of local authority discretion to apply a property disregard where the qualifying person moves into the property after the resident entered the care home

*Fred's family home is unoccupied because his father has died, and his mother is in a care home and Fred and his siblings have their own homes. The property is subject to a deferred payments agreement. Fred has a serious accident and becomes incapacitated. As a result, he is unable to work or pay for his existing home. He has nowhere else to live so he moves into the family home which becomes his only home. In the circumstances, the local authority exercises its discretion to disregard the property.*

### 4.7.4 Example of local authority discretion to apply a property disregard

*Hilda is 63 and lives in a rented flat. Her brother, Stephen, has recently died and his wife, Charlotte, has moved into a care home. Hilda suddenly loses her job and finds she unable to afford to live in her rented flat. As a result, Hilda moves into Stephen and Charlotte's house, and this becomes her only home. In the circumstances, the local authority exercises its discretion to disregard the property.*

**4.7.5 Source:** East Sussex County Council (17 006 551) LGSCO: Decision: Upheld. Decision Date: 14 February 2019. [Full report here](#)

**Summary:** Mr C complained about the way in which the Council dealt with his mother's financial assessment for residential care, particularly the issue around mandatory and discretionary property disregards. The Ombudsman decided to uphold Mr C's complaint and the Council has agreed to review its decision.

**4.7.6 By contrast, an example below of a local authority applying a non-discretionary property disregard: occupying a property when not physically present**

*Matt is 60 years old and has been living overseas for the past 10 years due to his job in the diplomatic service. When he is in England, he lives at the family home he grew up in. His father Ken has been assessed as having eligible care and support needs that are best met by moving into a care home. In Ken's financial assessment, the value of his property is disregarded as his son Matt is a qualifying relative that occupies the property as his main or only home. Although Matt is not physically present at the property at the point Ken moves into the care home, his alternative accommodation is only as a result of his employment and the family home is his main home.*

## **5. Appeals process (dispute discretionary funding decision)**

- 5.1. If an individual, or person acting on their behalf is not satisfied with the decision they have the right to use KCC's ASCH statutory complaints procedure.
- 5.2. If an individual, or person acting on their behalf is not satisfied with the outcome of the complaint or the council have not provided a response, within a "reasonable time" scale they have the right to inform the LGSCO.

## **Appendices**

### **1. Waivers and Write Offs Definition**

It is important to understand the difference between a write off and a waiver. A write off and a waiver will have differing budgetary impacts and it is incredibly important you use the right one. Once you have identified if a waiver or write off is required, then it is important the correct process is followed to ensure it is processed effectively. The processes are very different. You must ensure you have required appropriate level of authorisation before proceeding.

#### **1.1 What is a waiver?**

A waiver can be applied to a person's assessed charge, either wholly or in part if a complaint is upheld or partly upheld around the quality of care or there is any doubt surrounding the financial information provided by you at the very beginning of the



placement/care and support. You can mitigate the need for waivers by ensuring the necessary financial conversations take place and the charging later is assigned as appropriate. The delegated authoriser must carefully consider the details and facts provided, before making the decision, adhering to the corporate delegated governance matrix limits.

## **1.2 What is a write off?**

If a financial assessment has been completed correctly, KCC cannot simply adjust an account. Should a debt accrue due to an underpayment of the assessed charge then a write off may be considered. Please note the intention of a write off is not to simply remove the outstanding debt and should only be pursued after careful consideration. Write offs are completed in line with the Debt Management Process and are dictated by KCC Financial Regulations which can be found on KNet. To ensure the correct audit process followed, a write off must be processed by the Debt Recovery Team ONLY, not by any other team.

## **1.3 Waivers and Write Offs Training**

Client Financial Services along with the Policy and Quality Assurance Team launched a suite of learning modules for all staff in the Adult Social Care and Health (ASCH) Directorate and the Strengthening Independence Service (previously Lifespan Pathway Disabled Young People's Team (18-25) within the Children, Young People and Education Directorate. One of these "bitesize" modules is "Waivers and Write Offs" lasting about 10 minutes. It gives a brief overview of what is a Waiver, what is a Write Off and how they need to be actioned.