



BRACKNELL FOREST COUNCIL

**ADULT SOCIAL CARE & HEALTH
DEBT RECOVERY POLICY & PROCEDURES**

POLICY DOCUMENT

Table of Contents

1.	Definitions and Abbreviations	3
2.	Legal Status	4
3.	Principles for Debt Recovery	4
4.	Timing of Debt Recovery	5
5.	Options to Recover Debt	5
6.	Diminishing or Lack of Mental Capacity	6
7	Recovering Debt & Deferred Payments	7
8	Issuing a Claim through the County Court	7
9	Complaints	9
10	Responsibilities	9

1. Definitions and Abbreviations

DPA	Deferred Payments Agreement.
The Council	In the context of this document means Bracknell Forest Council.
MCA	The Mental Capacity Act 2005.

2. Legal Status

- 2.1 The Care Act 2014 introduces a modern legal framework for the recovery of any debts that may have accrued as a result of the Council meeting a person's eligible care and support needs. Powers provided under Section 69 of the Care Act provide equal protection to both the Council and the person. Section 70 of the Care Act also provides the Council with the power to recover charges from a third party where a person has transferred assets to them in order to avoid paying charges for care and support.
- 2.2 Ultimately the Care Act enables the Council to make a claim to the County Court for a judgement in order to recover the debt. As a first step, the Council must offer a person the option of a deferred payment agreement (DPA) in order to recover the debt wherever a person could be offered a DPA, and can only make an application to the court should this be refused.

3. Principles for Debt Recovery

- 3.1 The recovery of debts from those who are receiving care and support is a sensitive issue given the potentially vulnerable nature of the individuals and the Council's ultimate responsibility to meet needs. There could be a number of reasons why the person has not paid an assessed charge. Given this, Council officers will bear in mind the following principles when approaching the recovery of debts:
- Possible debts must be discussed with the person or their representative;
 - The Council must act reasonably;
 - Arrangements for debt repayments should be agreed between the relevant parties;
 - Repayments must be affordable;
 - Court action should only be considered after all other reasonable avenues have been exhausted.
- 3.2 The Council will clearly discuss with the person or their representative at the outset that care and support is potentially a chargeable service and that, where the person has been assessed as being able to afford to do so, they will be required to contribute to the cost of that care. It will also be explained that this means there will be invoices and an agreement should be reached as to whom the invoices are sent, and if the person wishes, that their agreement and authority is obtained for the use of a representative.
- 3.3 The Council also recognises that it is bound by the public law principle of acting reasonably at all times and will act in accordance with human rights legislation, as well as the wellbeing principle set out in the Care Act. Given this, the Council will consider all other reasonable avenues before utilising the powers provided under the Act.
- 3.4 Before pursuing any course of action the Council will consider whether it is appropriate to recover the debt. Although it has the power to do so, and in many cases will wish to do so, there may be occasions when recovery is not pursued. An example of this may be:

- Where the amount of the debt is small and the costs of recovery would be disproportionate;

3.5 The Council will also consider how different approaches might impact on a person's wellbeing, in line with the general duty to promote a person's wellbeing.

4. Timing of Debt Recovery

4.1 The point at which a debt becomes due to the Council is the due date stated on the Council's invoice. If, for example, a bill was sent giving 21 days to pay, the payment becomes due on day 21. For any debts that accrued prior to the commencement of the Care Act 2014 the time period for recovering that debt continues to be three years as previously set out under Section 56 of the National Assistance Act 1948 as any change to this would be retrospective and unfair. For any debts occurring after the commencement of the Care Act 2014, the time period to recover debts has been extended to six years from the date when the sum would become due to the Council. Where a debt is taking some time to be recovered, provided legal proceedings have been issued within the limitation period, enforcement can continue. If it has not, the debt will be written off.

5. Options to Recover Debt

5.1 The Council will consider the full range of options available to recover the debt. This is particularly important as, if the claim does end up in court, the court is likely to consider what efforts have been made to resolve the issue first. Whilst it is at the discretion of the court to award costs, if no effort has been made to reach an agreement first a judge may hold against the Council when considering making an order for payment of the costs in the case. The greater the person's need, the more effort will be made to resolve the issue positively. Options may include negotiation, the use of an advocate to help the person understand the options available to them, supporting the family to gain a power of attorney or deputyship, the Council itself applying to be a deputy certain situations, or the use of independent mediation.

5.2 As a first step the Council will contact the person or their representative in an effort to ascertain why the contribution to their care and support costs has not been met. Where necessary, there will be more than one effort to contact the person in order to simply and quickly address the issue if possible, whilst balancing the need to minimise further delays.

5.3 In some cases the issue will be easily resolved as a result of the contact, either through the amount being paid, a repayment plan agreed, or from the offer of a DPA, where appropriate. However, some cases will be more complex e.g. if a person does not meet the eligibility criteria for a DPA, where a DPA is refused or there remains a dispute about the amount. Equally a person may be unhappy with their care provision, or could be depressed, have mental health issues or dementia. In many of these instances, social work assistance may be required.

5.4 The Council must establish whether the person has the mental capacity to make financial decisions. This is important as a person who lacks capacity to make financial decisions is in a different legal position from someone who has capacity.

While both may be liable for their debt, the way to proceed to recover the debt is different.

- 5.5 Where a person has mental capacity to make financial decisions, the Council can proceed to the County Court but does have alternative options and will consider using these first. Options include:

5.5.1 Negotiating an agreement.

This could be through dealing directly with the person or their representative to broker a solution. This can be done by the Council but, in some circumstances may be better led by an independent person such as an advisor or solicitor. In some cases it may be beneficial to involve an independent advocate to support the person to understand the options available to them.

5.5.2 Mediation

This is where an independent third party assists those involved to reach an agreement. This could be carried out by a professional mediation service but could equally be carried out by anyone who is not directly involved in the case, such as an independent practitioner or a local voluntary organisation. In these situations it is the people involved, not the mediator, who decides the course of action.

5.5.3 Arbitration

This involves an independent arbitrator hearing both sides of the issue and making a decision on behalf of the parties that will resolve the issue. Arbitration is usually binding on both sides and therefore the Council would not usually be able to take the case to court after the arbitrator has made a decision, unless the other party defaults on the terms of the arbitration decision.

6. Diminishing or Lack of Mental Capacity

- 6.1 A debt may have accrued as a result of diminishing or a lack of mental capacity. In such cases, a decision will be taken as to whether the matter is a safeguarding issue. If it is felt that it is indeed a safeguarding issue, the usual safeguarding procedures should be followed. Practitioners will carry out a decision specific capacity assessment where there is a diagnosis of mental impairment or mental disorder, or where the person's engagement with care planning shows they may lack capacity to make some decisions.
- 6.2 The Council will adhere to the guidance of the Mental Capacity Act 2005. Where people with mental capacity issues have relevant mental capacity assessments on file, and where they have appointed attorneys or deputies to make financial decisions for them, the Council will involve this representative in any financial decision making.
- 6.3 Where a person has an attorney for property and financial affairs or a deputy, these roles give the attorney or deputy the legal authority to make financial decisions on behalf of the person. The Council can discuss all the previously listed debt recovery options with the attorney or deputy.
- 6.4 Where the person lacking capacity has no attorney or deputy and has substantial debts, then an application for a deputy is required. The application has to be made to the Court of Protection. Where there are family involved with the person, they may

make the application to become a deputy. In cases where there is no family member or other suitable person willing to apply to be a deputy, the Council may make the application. The Council will always consider any risk of a conflict of interest where it applies to take on a property and financial affairs deputyship.

- 6.5 The Council will always seek to establish who has legal authority to make financial decisions on behalf of the individual, and will engage with that person.

7 Recovering Debt & Deferred Payments

- 7.1 Where a debt has accrued and a person could be offered a deferred payment agreement, the Council will offer the person, or their attorney or deputy, the option of repaying the debt through a DPA as set out in Section 69(2) of the Care Act 2014. A person could be offered a DPA if they are receiving care in a care home or are renting an extra care property, and the person has a form of security adequate to cover the DPA (usually a property).
- 7.2 The Council is only required to offer the DPA for the amount of the accrued debt and is not obliged to defer any future costs. However it will consider allowing the person to defer further payments so as to avoid any further accrual of debt.
- 7.3 This option is likely to be attractive to a person as the maximum interest rate for DPAs is set by regulations and is lower than the maximum amount the County Court can apply. It will also avoid the person needing to meet the costs of the Council if the County Court finds against them. For the Council, it will ensure the debt is secured, is less at risk and is likely to be quicker to secure.
- 7.4 Only where a person refuses the option of a DPA or does not meet the eligibility criteria can the Council seek to enforce the debt via an application to the County Court. The Council will therefore make sure a refusal, along with the reason, is recorded appropriately.

8 Issuing a Claim through the County Court

- 8.1 Where all other reasonable avenues have been exhausted, the Council may decide to proceed to the County Court in order to recover the debt owed. The County Court has been chosen to enable all parties involved to have an equal say regarding the debt that has accrued.
- 8.2 The Court will require the Council to prove the legal basis for the claim.
- 8.3 Issue of claim and other processes, including enforcement, attract a court fee. The level of the fee will vary depending on the amount that is being sought, and depending on whether the claim is issued online or by paper. Whilst there is an upfront cost to the Council to meet this fee, if an order or judgement is made in favour of the Council, the Court may add the fee to the debt recoverable.
- 8.4 In order for the Council to claim interest on the debt, it must include the relevant text in the section of the form entitled 'Particulars of claim'.

- 8.5 Once the Court has issued the claim, a Notice of Issue will be sent to the Council and a copy of the claim to the person the Council is seeking to recover the debt from. The person will then have the options of not responding to the claim, admitting the full amount of the claim, or defending the claim. If no response is received to the claim, or if the person admits part or the whole amount of the claim, and the Council accepts the part admission, the court can be requested to enter judgement against the person. The Council may then commence enforcement proceedings if the person does not pay the judgement. If the claim is defended or the person does not accept the part admission, the claim will proceed to the next stage.
- 8.6 If the person is a protected party, the Council may only issue and serve the claim. Any person who lacks capacity to litigate will need to have a Litigation Friend appointed. It is the responsibility of the Council to inform the Court that there is a need for a Litigation Friend. Where the person has an attorney or deputy, that person may be appointed as a Litigation Friend with the permission of the Court. Ultimately it is the Court that will appoint the Litigation Friend.
- 8.7 The role of the Litigation Friend is to represent the person in Court. They may therefore raise any issue that the person would such as disputing the debt, seek alternative arrangements to repaying the debt, or raise any other issue they consider relevant to the question of the debt. It is therefore essential that the Council has acted properly in relation to the person who lacks capacity and there is no evidence of any perceived harassment. This must be with regard to both care and debt recovery.
- 8.8 Once a final judgement or order has been made it is not possible to add any further debts that may have accrued. The Council will therefore need to consider what steps can be put in place to ensure that a person is able to meet their assessed contribution towards the cost of their care and support. If debts continue to accrue, the Council will need to begin the debt recovery process again.
- 8.9 Where there is a court order or judgement for payment but the person has not complied with it, the Council can choose to enforce the order.
- 8.10 There are various methods of enforcement and the Council will need to consider the most appropriate action taking into account the person's circumstances and their own responsibilities to the person. Possible methods include:
- A warrant or writ of control;
 - An attachment of earnings order;
 - A third party debt order;
 - A charging order.
- 8.11 A warrant or writ of control essentially enables enforcement agents or officers to take control of goods from a person's home or business. If the order is for £5,000 or less, an application for a warrant of control may be made to the County Court. If the order is for over £5,000 the Council may apply to the High Court for a writ of control.
- 8.12 An attachment of earnings order allows for the periodic deduction of monies by the person's employer (where they are known). It cannot be used if a person is unemployed or self-employed. An application may also be made to the court for deductions to be made from other earnings such as a pension. Earnings are

disregarded during the financial assessment of what a person can afford to contribute towards the cost of their care and so, in some instances, this may be an option.

- 8.13 A third party debt order will instruct a third party such as a financial institution that holds a bank or building society account for the person to pay out the available funds, less that institution's fees, to the Council. The process will only be successful if there are monies in the account on the day the financial institution receives the court order. Third party debt orders may not be made where the account is held in the name of more than one person. Savings are taken into account in the financial assessment of what someone can afford to contribute towards the cost of their care and this may therefore be a suitable option in some cases.
- 8.14 A charging order places a charge on a property or other assets owned by the person in order to secure the debt. This means that, just as with a DPA, payment will only be realised when the property or assets are disposed of. A further claim must be made for an order for sale to enforce the charging order. Where a person owns their property this is likely to be the most viable option for recovering the debt. It is similar to a DPA in that a charge is secured against the person's property but by order of the court. The charge is usually a first charge unless other charges such as a mortgage are already registered against the property.

9 Complaints

- 9.1 A person may wish to make a complaint about any aspect of the way the Council uses its powers under the Care Act. The Council has a clear complaints procedure and the person will be directed to this for information and advice on how to lodge a complaint or to contact the Local Government Ombudsman.

10 Responsibilities

10.1 Corporate Finance - Debtors

- Following the usual Corporate Debtors procedures in the initial stages.
- Ensuring that the person, or their attorney or deputy, is contacted in an effort to determine why payment has not been received.
- Ensuring that the person, or their attorney or deputy, is sign-posted to any applicable support resources.
- Ensuring that, where no payment has been received, a letter indicating final demand for payment is sent by recorded delivery. This letter should clearly state that failure to take action to settle the amount due may result in legal proceedings to recover the debt.
- Referring all debts over £1,000 and / or ninety days overdue, to the Debt Management Group for agreement on further action.

10.2 Debt Management Group

- Reviewing all debts more than ninety days overdue.
- Ensuring that care management concerns are considered as part of each case review.

- Recommending actions for debt recovery including possible legal action. Heads of Service are required to discuss with their Chief Officer each individual case, where legal action has become a possibility, prior to each Debt Management Group meeting.
- Recommending the write-off of sums where recovery is unlikely or may not be considered cost effective.
- Having established the facts in individual cases, and the views of the relevant Chief Officer, the Chair of the Debt Management Group will make the decision on whether to proceed with legal action.

10.3 Corporate Services – Legal

- Advising the Debt Management Group on all legal issues arising in respect of pursuing outstanding debt.
- Upon authorisation and receipt of instruction together with the necessary evidence, to commence legal action to recover outstanding debt.
- In respect of probate matters, upon authorisation to instruct specialist lawyers to commence legal action to administer the estate of the deceased.

10.4 Write-off

All agreed debt write-off will be completed in accordance with the Adult Social Care, Health and Housing Scheme of Delegation, and the Council's financial regulations.