Deferred Payment Agreements – how they work

Under the Care Act 2014 local authorities in England have a duty to offer deferred payment agreements, so people should not be forced to sell their home in their lifetime to pay for care.

Local authorities must offer a Deferred Payment Agreement (DPA) to people who have local authority-arranged care and support, and also to people who arrange and pay for their own care, provided their eligible needs are to be met by care in a care home. The person must have less than (or equal to) the upper capital limit, £23,250 for 2015/16 in assets, excluding the value of their home, and their home is not disregarded, i.e. not occupied by a spouse or dependent relative.

Local authorities are also encouraged to offer the scheme to anyone who would benefit but does not fully meet the criteria, including people whose care and support is provided in supported living accommodation.

By entering into a DPA, a person can 'defer' or delay paying the costs of their care and support, perhaps until death; or can choose to use the deferred payment as a 'bridging loan' to give them more flexibility in deciding when to sell their home.

A person may, for example, decide to rent out their property during the course of their DPA (subject to the consent of the local authority for any person to occupy the property). Normally any rental income would be used to offset and reduce the total amount of debt accruing (as the person would be contributing more to their care costs from income, and hence has to defer a lesser proportion of care fees) - but local authorities can allow people to retain a percentage of any rental income as an incentive to rent their property. Local authorities may want to encourage rental of properties in other ways too, and should provide information and advice on rental.

The deferred payment is not 'written off' but repaid by the individual, or a third party on their behalf, at a later date.

Deferrals and top-ups

The local authority and the person needing care should have a rough idea of their likely care costs as a result of the care planning process. In principle, people should be able to defer their full care costs, including any top-ups but, at a minimum, must be allowed to defer their 'core' care costs. However, local authorities should accept any reasonable top-up that is affordable and sustainable given the property's available equity. This is subject to any contribution the local authority is allowed to require from the person's income - although the person has a right to retain a proportion of their income (the 'disposable income allowance') up to £144 per week.

A person may choose to keep less of their disposable income allowance and contribute more to the costs of their care, reducing the amount they are deferring. Similarly, a person may reduce their deferred debt by contributing to their care costs from payments by a third party, including from a financial product, or from their savings.

The agreement should be in place by the end of the 12-week property disregard period or within 12 weeks of the person approaching the local authority regarding a DPA. Where people qualify, during the 12-week property disregard period, local authorities will contribute towards the costs of the person’s care. This contribution does not have to be repaid (as is the case if someone benefits from the 12-week property disregard but doesn’t decide to enter into a DPA).

The person should be given a hard copy of their DPA and have reasonable time to consider it. The agreement must explain exactly how the deferred payment will work, clearly setting out all terms, conditions and information, including how the interest will be calculated, the administrative costs, a person’s right to terminate the agreement, and the circumstances in which the local authority might refuse to defer.

Best interests of people needing care

Deferred payment agreements must always be in the best interests of the person needing care and support and local authorities have a duty to provide clear and easy to understand information and advice on how their deferred payment scheme works so people can make well-informed choices about DPAs and other options for paying for care.

Local authorities should invite carers and/or families to participate in discussions and, with the person needing care’s consent (if they have capacity), should be given all the information that would otherwise be given to that person.

Where a person may lack capacity to request a DPA, a person with an Enduring Power of Attorney or Lasting Power of Attorney may request a deferred payment on their behalf.

Local authorities should give the person and a family member information and advice on how to obtain Lasting Power of Attorney and Deputyship, where this may be is needed. Where the local authority is the Deputy for a person, it may apply for a DPA where this is in the best interests of the person, although must not enter into an agreement with a person lacking the requisite mental capacity unless the proper arrangements are in place.

Local authorities and a person who has capacity and is applying for a DPA, may also want to consider options if the person were to lose capacity at a later date, including Deputyship, Legal Power of Attorney and advocacy.

The cost to local authorities

The DPA scheme is intended to be 'cost-neutral' to local authorities, which means they are entitled to charge interest on the deferred debt at no more than a nationally-set maximum interest rate that may change every six months on 1st January and 1st July. Interest can accrue on the amount deferred until the agreement is terminated and the amount is repaid, including after the person has died. Local authorities can also recoup administrative and legal costs.

Local authorities must obtain a valuation of the property and can pass on to the person applying for a DPA the reasonable property valuation costs as part of their administration charges. People may also request an independent assessment before agreeing with a valuation and proceeding with the agreement.

Local authorities must keep the person regularly informed about their DPA and provide a written statement every six months and within 28 days of request by the person.

A local authority should wait at least two weeks following the person's death before approaching the executor for repayment of the debt, which will fall due 90 days after the person has died. If a local authority concludes active steps to repay the debt are not being taken after this time, it may enter into legal proceedings to reclaim the amount due.

Ensuring security

Local authorities can refuse to offer a DPA if they feel there is not 'adequate security' in place to repay the debt.

Local authorities must accept a first legal mortgage charge against a property on the Land Register as 'adequate security'. However, local authorities also have discretion to accept a third-party guarantor with adequate security, a solicitor's undertaking letter, a valuable object such as a painting or other piece of art, or an agreement to repay the amount deferred from the proceeds of a life assurance policy. Local authorities must publish a policy of what types of security they are willing to consider.

Where a property is used as security to offer a DPA, the equity limit must be set at the value of the property minus 10%, minus £14,250 (for financial year 2015/16, which is in line with the lower capital limit) and the amount of encumbrance secured on it (ie any existing equity drawn down from the property, for example an outstanding mortgage where present or an equity release product). This limit provides some protection to local authorities against changes in the value of the security and should also mean that people qualify for local authority support if they deplete the equity available in their property.

Local authorities should revalue the security when the amount deferred equals or exceeds 50% of the value to assess any potential change in value and, consequently, the person's 'equity limit' and continue monitoring any potential further changes.

Local authorities should review the cost of the person's care once they have deferred 70% of the value of their chosen security to see if this may still be the right option for them, including implications for any top-up they might have and if they may have become eligible for means-tested support. If the agreement continues, the local authority must give the person 30 days' written notice of the date they are likely to reach the equity limit.

When calculating progress towards the equity limit the local authority must also include any interest and administrative fees to be deferred.

Local authorities may delegate responsibility for deferred payment agreements to another body, however they remain ultimately responsible for (and liable for) the DPA.

Refusal to defer more charges

Local authorities must give at least 30 days' notice if they decide not to defer any more charges for a person who has an active DPA. Repayment is still subject to the usual terms of termination and local authorities should provide the person with an indication of how their care costs will be met in future e.g. by the local authority or from their income and assets.

Refusal to defer might happen when:

- a person's total assets fall below the level of the means-test and they become eligible for local authority support;
- a person no longer needs care in a care home;
- a person breaches certain terms in their contract and the local authority cannot resolve the breach;
- the property becomes disregarded and the person consequently qualifies for local authority support in paying for their care; or
- a person has reached the 'equity limit'

Trading regulations and DPAs

Local authorities will need to consider whether the deferred payment agreements they enter into are regulated credit agreements to which the Consumer Credit Act 1974 (CCA) and Financial Services and Markets Act 2000 (FSMA) apply.

The scope of 'regulated credit agreements' is set out in article 60B of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ('the RAO'). A credit agreement is regulated unless exempt, and there are a number of exemptions in articles 60C to 60H of the RAO. **It is likely that most DPAs will fall within such an exemption but, if not, will need to comply with all applicable requirements of the CCA.** If an agreement is not exempt, it would be the local authority's responsibility to meet any of the conditions required by the CCA or the FSMA.

In addition, the local authority may need a relevant permission from the Financial Conduct Authority (FCA); though again in practice almost all DPAs secured against property should be exempt and not require the local authority to be registered with the FCA.

All deferred payment agreements will be subject to the Unfair Terms in Consumer Contracts Regulations 1999, and will not be binding if they are unfair to the borrowers.

Local authorities will also have to ensure that they do not contravene the Consumer Protection from Unfair Trading Regulations 2008.

The Sample Deferred Payment Agreement can be found at http://www.local.gov.uk/care-support-reform/-/journal_content/56/10180/6522542/ARTICLE

The complete Statutory Guidance covering deferred payment agreements can be found at https://www.gov.uk/government/news/final-care-act-guidance-published

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