

# ADULT SOCIAL CARE DEFERRED PAYMENT AGREEMENTS POLICY

## Document Approval

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# ADULT SOCIAL CARE DEFERRED PAYMENT AGREEMENTS

## POLICY

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### Why do we have this policy?

This policy exists for anyone in Sandwell who receives residential adult social care services and who is a “self-funder”, i.e. is liable to pay the full cost of their care because their main or only home has a value above the Government’s capital limit, but whose other capital excluding the home (savings and other assets etc.) are lower than that capital limit.

The person does not have to be someone who has been assessed as needing residential care by Sandwell Metropolitan Borough Council (SMBC). However, if SMBC are not meeting the person's needs, the council still need to agree that if they had assessed the person, they would have determined that they need residential care.

Such people can take up a deferred payment agreement (DPA) with us to cover their care costs, if they are unable or unwilling to sell their former home, either on a short-term basis or in their lifetime. Whilst they have a DPA in place, the property is excluded from the person's financial assessment and hence they pay reduced or no contributions. We meet the cost of the person's care (after any reduced contributions the person still pays).

In effect, we are loaning the person the contributions they would have been paying on the value of the property if it had been counted in their financial assessment. This gives them flexibility regarding paying their care costs.

They will be entering into a legally binding agreement with Sandwell Metropolitan Borough Council. For the long-term DPA, we will also place a 'legal charge' against the property as security for the loan. A legal charge is what mortgage companies would put against any property they were lending money on – it is made with the Land Registry against the title of the property, and means that it cannot be sold or otherwise disposed of without the council's knowledge.

This policy covers those areas of DPAs where the law gives us the power and discretion to make decisions as to the arrangements we will consider. Other areas of DPAs are defined by national legislation and regulation, so we no discretion and must provide the core national DPA scheme following current government regulations. Such areas are detailed in separate practice guidance

on all aspects of DPAs for staff, and a factsheet for users of services, carers and the public.

Anyone reading this document should understand that this policy has been created and approved by the council and can be amended or changed in accordance with the council's democratic procedures.

The law says that where we have discretion, we must consider each case separately; we cannot set rules that (for example) say that we will never provide a DPA in situations where the law gives us discretion. That would “fetter our discretion” – stop us applying our judgement - which is not legal. Nothing in this policy is intended to “fetter the discretion” of SMBC, and any references in any of our adult social care documents to “the policy” or “this policy” or similar should be treated as a reference to the relevant part of this document.

However, councils also have a duty to use public funds wisely and avoid funding (or making allowances for) care and support that could be considered extravagantly overgenerous or completely unreasonable by “the man in the street” - this is a recognised legal definition of “reasonableness” as defined in the “Wednesbury Principle” (a court case in 1948).

This policy aims to balance these two requirements and to be clear and transparent on how and when SMBC will offer people a Deferred Payment Agreement so that staff, users of services, carers and the public can understand the purpose of this policy and how we make decisions on who DPAs are offered to and how they operate.

### [What is the law behind this policy?](#)

This policy is based on the following documents from the Department of Health and Social Care:

- The Care Act 2014 (which repealed all previous national charging policies and guidance such as Fairer Charging and Charging for Residential Accommodation) sections 34 to 36
- The Care and Support (Deferred Payment) Regulations 2014 (as amended by the Care and Support (Deferred Payment) (Amendment) Regulations 2017)
- The Care and Support Statutory (CASS) Guidance October 2014

**Please note:**

In line with the Credit Act 1974 and Financial Services & Markets Act 2000, our DPAs are **not** regulated credit agreements

Deferred payment agreements made between the council and any person (or their representative) prior to 1 April 2015 will continue subject to the terms and conditions of that agreement. Agreements made on or after 1 April 2015 will be subject to the terms and conditions in the agreement at that time, whilst those from 1<sup>st</sup> November 2022 are made in accordance with this policy and hence Care Act requirements.

**Please note**

As indicated above, this policy document only covers those areas of DPAs where the law gives us the power and discretion over the arrangements we will consider. For the full picture of the operation of a DPA, please refer to our staff practice guidance or public factsheet.

### Short-term DPA

As an alternative to a full DPA, if the person entering long-term residential care has their main home up for sale, we can provide a short-term arrangement for meeting their fees.

Rather than requiring a charge on the property, a short-term DPA can be based on an undertaking signed by the person's solicitor guaranteeing to pay the amount owed to the council when the sale is completed. For the current administration fee, please see the **[Sandwell Fees Costs and Allowances]** document - *click to follow link*)

### Independent financial advice

In an area of legal complexity such as property and loans when a Deferred Payment Agreement is proposed, the financial risks to both the applicant and SMBC are such that people must be urged to seek independent financial advice before proceeding with an application for a DPA.

### Who do we have to offer a DPA to?

The Care Act guidance sets out who we must offer a DPA to (full or short-term as appropriate) if they meet *all* the Act's criteria, which are;

- i. The person normally lives in the council's area, or the council is going to meet their care needs *and*;
- ii. The person has needs which the council assesses should be met by provision of care in a care home – for people who arranged their own care, the criteria is met if the council would have so assessed them *and*;
- iii. The person has less than (or equal to) the upper national capital limit (for current value see **[Sandwell Fees Costs and Allowances]** document - *click to follow link*) in assets *excluding* the value of their main or only home (e.g. in savings, bonds, land or other property) *and*;
- iv. The person's home has not been "disregarded" by the council (see **[Sandwell Contributions Policy]** - *click to follow link*) and so its value is included in our financial assessment and hence may need to be sold.

### Who can we choose to offer a DPA to?

We can apply our discretion in terms of who we offer a DPA to. Each case will be looked at on its own merits, but we may consider applications from people who do not meet all the statutory criteria above, taking account of the following;

- whether they have any other accessible means to help them meet the cost of their care and support, e.g. they are unable to offer a first charge on their property, but are offering other forms of security for the deferred payment;
- if they are narrowly not entitled to a DPA based on the criteria above, e.g. they have slightly more than the current upper capital limit, or they are likely to meet the criteria soon;

### When we can refuse a DPA application

We are permitted to refuse some applications for a DPA even if the person meets the eligibility criteria above, if we consider that there is a risk of the person defaulting or not repaying the debt because;

- i. There is already a first charge on the person's property;
  - ii. The person's property is uninsurable or not insured;
  - iii. The property is leasehold, and the freeholder does not agree to the legal charge being placed on the property;
  - iv. The person client wants to defer more than they can provide adequate security for;
  - v. The person is seeking a top up;
  - vi. The person is not agreeing to the terms and conditions of the DPA.
- 
- i. In the top-up situation, we may seek to offer a DPA which is limited by the sustainability principles of the Care Act to ensure the amount is

sustainable for the person to repay. They can then choose whether they wish to agree to that reduced sum;

- ii. if their property is uninsurable but has a high land value, we may choose to accept a Land Registry charge against the land as security instead.

### Security and insurance for a DPA

The Council's policy is that security would normally be a first charge on a suitable property for a long-term DPA, (or a solicitor's undertaking for the short-term DPA). We would *generally* not accept other forms of security for a DPA. If there is a first charge already, we would expect the person applying to check with the existing charge-holder that they consent to SMBC having a first charge (i.e. priority for repayment over their loans) before we would proceed.

It is a condition of the DPA Scheme that any property being used as security has appropriate arrangements in place to maintain it whilst the person is in care, and to have adequate insurance for their property. If the property is to be left empty for an extended period of time, the person will need to ensure their insurance covers this adequately and that any terms required by the insurer are met. We will request copies of the insurance policy on a six-monthly basis to ensure our security is protected.

We would generally not accept the following as security for a DPA;

- i. Any property not registered with the Land Registry;
- ii. A mobile or park home;
- iii. An equity release product or "lifetime mortgage";
- iv. Property abroad;
- v. Supported living accommodation.

### When a property has more than one owner or interested party



We must protect the council against future claims from other parties who have, or claim to have, an interest in a property that a person wishes to use as security for a DPA. This would be a property that;

- is jointly owned, or;
- someone else has a beneficial interest in (including mortgages or equity release products secured on the property), or;
- which has other occupiers.

To prevent any such claims, we require all the owners' or interested parties' consent and agreement to the charge being registered with the Land Registry, and their acceptance that this means that the property will be sold when the debt is due to be repaid to the council.

### Other issues in agreeing to a DPA

The potential complexity of property ownership means that Sandwell Metropolitan Borough Council may also apply further restrictions in some situations, as follows;

- i. where the title of the property is already registered, but one or more registered party is unable to give legal agreement for a charge, (for example, they have died), we cannot proceed with the DPA until the necessary amendments to the Land Registry entries have been made;
- ii. where the title of the property is based on "tenants in common", we require all parties involved to be a part of the DPA and the legal charge for the property to be an acceptable form of security;
- iii. if the property is leasehold, a DPA application can be made, but sometimes restrictions are placed on the title registered at the Land Registry. To overcome this, the agreement of the head landlord/ultimate freehold owner to our legal charge being put on the property must be

obtained and paid for by the person applying for the DPA before the property can be used as security;

- iv. Where part of the value of the property has been realised through a mortgage or equity release product, we will need written proof of the residual equity in the property and the written consent of any third party/parties where applicable;
- v. if the property is a mobile home, where it is the land that is registered and not the mobile home, the Council will not be able to accept the mobile home as security;
- vi. Where the person is intending to move to rented supported living accommodation, the Council would not consider an application for a DPA for their existing property.

### How much can be deferred?

SMBC is only required to offer a DPA for the costs of care and support which we consider necessary to meet the person's assessed care needs, which may be less than the actual cost charged by the care home that the person has chosen (and may already be living in).

We have discretion to fund both our contract rate for that type of care home and any excess charge for the specific home as a top-up, and have chosen to do so. We will base our decision on the equity available in the security the person is offering, and the sustainability of the DPA given the equity available from the person's form of security.

### Valuing security

We will obtain a valuation for the property from the council's own valuer, and agree the outcome with the person applying or their representatives. The valuation fee is payable by the person applying (but can be added to the debt rather than being paid up front. The person applying may also get an

independent valuation in addition to ours; if the two valuations vary significantly, both parties must agree a valuation to be applied, if necessary by means of our appeals process – see [Reviews, appeals and complaints](#) (*click to follow link*) below.

If a specialist valuation is required for particular types of security, we will arrange that, but will not proceed until the person applying has agreed that the fees for this are acceptable (again, they can be rolled up into the DPA).

We may require a revaluation of security at the applicant's cost;

- In certain circumstances where values or the person's resources may have changed significantly;
- every two years to ensure that there is sufficient equity in that security to enable the DPA to continue;
- at the point when the amount we have deferred reaches or exceeds 70% of the value of the security.

Any potential change in the value will affect the person's 'equity limit' which will also need to be reassessed to ensure that there is enough equity in the security to allow further deferred payments. *Please see [Care Act Deferred Payments](#) - click to follow link - or our public factsheet on the equity limit and the total a person may defer).*

[People who have capacity but fail to enter into a DPA](#) Care Act guidance is that where a person asks for a deferred payment agreement, they and the council should aim to have the DPA finalised and in place by the end of the "12-week disregard period" (where applicable – see [\[Sandwell Contributions Policy\]](#) (*click to follow link*) for more information on this), or within 12 weeks of them approaching us regarding a DPA in other circumstances.

Consequently, we will always aim to achieve this deadline, but if the person applying fails to complete their arrangements for the DPA within the 12-week deadline without good reason, we may - in line with the Contributions Policy referred to above - deem them to be a self-funder.

If a person fails to complete a DPA application by not signing the agreement, the Council does not have security for the debt that is owed to it. In these circumstances, the Care Act, ultimately, enables us to make a claim to the county court for a judgment in order to recover the debt.

This means that they will be charged for the full costs of their care whilst the Council follows the detailed process set out at Annex D of the Care and Support Statutory guidance. *Please see **Care Act Deferred Payments** - click to follow link.*

### [People who lack capacity to enter into a DPA](#)

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. Where the local authority has an in house or contracted deputyship service, and there is no family, this service should make the application.

### [Interest and administrative fees](#)

We are permitted to cover our costs in operating the deferred payment agreement scheme by charging *interest* on the sums deferred (to cover the

cost of lending and the risks to us associated with lending such as defaulting) and by fees (which cover our administrative, legal and valuation costs in setting up an agreement). These are updated each April.

We have chosen to charge interest at the rate specified in government regulations which is the national maximum interest rate. This will be revised every 6 months, on the first of January and July respectively, to track the market gilts rate specified in the most recently published report by the Office of Budget Responsibility (OBR) plus a 0.15% default component.

The current rate and our current fees are set out in our **[\[Sandwell Fees Costs and Allowances\]](#)** - *click to follow link*.

At the person's request, we can add fees to the debt rather than them being paid when they arise. Interest is automatically added to the debt due, unless the person asks us to invoice them for separate payment.

### [Renting out the property](#)

As we will have a charge on the property on which a DPA has been made, our agreement is required if the person wishes to rent out the property, and proof of suitable arrangements in terms of buildings cover etc. may be requested.

If we do agree that the person can rent out the property, they should be made aware that we will include their net rental income, (i.e. allowing for management fees and other costs) as income for financial assessment purposes. This may lead to them having to pay more contributions.

### [When we may stop deferring funds](#)

Care Act guidance sets out when we must stop deferring any more funds, but there are also situations where we have discretion to do so, and we have decided that our policy is to stop deferring additional funds;

- i. when the total capital assets that the person has fall below the upper capital limit (for current value see **[Sandwell Fees Costs and Allowances]** document - *click to follow link*) as this means they are now eligible to apply for us to contribute towards the cost of their care, rather than us just lending funds;
- ii. when they are no longer eligible for care in a care home ;
- iii. if the person breaches any condition set out in the DPA agreement contract that states we will stop making payments, and we are unable to resolve that breach with the person;
- iv. if the property becomes “disregarded” for any reason (see **Sandwell Contributions Policy** - *click to follow link* for more details) and so its value is no longer included in our financial assessment, meaning the person is eligible to apply for us to contribute towards the cost of their care, rather than us just lending funds;
- v. When the person’s capital assets - excluding the property that is the security for the DPA – is, or becomes, more than the upper capital limit (for current value see **[Sandwell Fees Costs and Allowances]** document

If we do stop deferring additional funds, (for these discretionary reasons or for those reasons set out in the Care Act), we will not demand repayment, but the total sum deferred up to that point will still be due, and will have ongoing interest and administrative charges added until it is repaid to us.

### [Ending the agreement and repaying the Council](#)

The person holding a Deferred Payment Agreement can bring it to an end at any time by giving notice on the day they wish it to end. This may arise, for example, if they are selling the property involved. On that date, they must repay the total amount that the Council advises them is owed. If they do not

pay the sum by that date, then by signing the DPA in the first place, they are agreeing to the Council charging them interest at a rate equivalent to 4% per annum above the base rate of the Bank of England at that time, for every day that they are late in repaying the Council, from the day after the agreement has ended.

Otherwise, the Agreement will end on the date the person dies, in which case their estate is liable to repay the total sum due to the council up to that date within 90 days of their death. Again, if the estate does not make that payment, the Council can charge interest at a rate equivalent to 4% per annum above the base rate of the Bank of England at that time, for every day that it is late in repaying the Council, from the 91st day after the Resident's death.

### Other aspects of deferred payment agreements

As indicated above, this policy document only covers those areas of DPAs where the above law and regulation gives us the power and discretion over what arrangements we will consider.

Other important elements are set out in law and regulation and include;

- How much can be deferred;
- The equity limit;
- Contributing to care costs from other sources;
- Choice of accommodation and care costs;
- Deciding if a person's DPA is sustainable;
- Making the agreement;
- What the council must do while the agreement is in place;
- What the person who applied must do while the agreement is in place;
- Terminating a deferred payment agreement.

For the full picture of the operation of a DPA, please refer to our staff practice guidance or public factsheet as appropriate [\[add links to both\]](#)

### Reviews, appeals and complaints

Anyone who uses our services (or their representative) has the right to challenge our decision about whether we should give a DPA and in what form. Such concerns are dealt with through our Review and Appeals procedures, as set out in our [\[Sandwell Contributions Policy\]](#) - *click to follow link*.

If the person who uses our services (or their representative) is unhappy about how staff behaved or their attitude, disagreement with the level or quality of service, or the time taken to complete the agreement, then the council's complaints procedure applies. Full details on our website. [\[add link\]](#)

### Feedback

We welcome feedback from people who use services on the contribution policy and will use it to conduct future reviews. Contact details can be found in our guidance and on our website at [\[add link\]](#).