

**Open Report on behalf of Glen Garrod,  
Executive Director for Adult Care and Community Wellbeing**

Report to:	<b>Adults and Community Wellbeing Scrutiny Committee</b>
Date:	<b>04 July 2018</b>
Subject:	<b>Payment Arrangements for Residential Care and Residential Care with Nursing</b>

**Summary:**

This item invites the Adults and Community Wellbeing Scrutiny Committee to consider a report on Payment Arrangements for Residential Care and Residential Care with Nursing, which is due to be determined by the Executive Councillor for Adult Care, Health and Children's Services on 10 July 2018. The views of the Scrutiny Committee will be reported to the Executive Councillor, as part of her consideration of this item.

**Actions Required:**

- (1) To consider the attached report and to determine whether the Committee supports the recommendation(s) to the Executive Councillor for Adult Care, Health and Children's Services set out in the report.
- (2) To agree any additional comments to be passed to the Executive Councillor for Adult Care, Health and Children's Services in relation to this item.

**1. Background**

The Executive Councillor for Adult Care, Health and Children's Services is due to consider the report on Payment Arrangements for Residential Care and Residential Care with Nursing and make a decision on 10 July 2018. The full report to the Executive Councillor is attached at Appendix 1 to this report.

**2. Conclusion**

Following consideration of the attached report, the Committee is requested to consider whether it supports the recommendations in the report and whether it wishes to make any additional comments to the Executive Councillor. The Committee's views will be reported to the Executive Councillor.

### 3. Consultation

The Adults and Community Wellbeing Scrutiny Committee is being consulted on a proposed decision by the Executive Councillor for Adult Care, Health and Children's Services.

### 4. Appendices

These are listed below and attached at the back of the report	
Appendix 1	Report to the Executive Councillor for Adult Care, Health and Children's Services – Payment Arrangements for Residential Care and Residential Care with Nursing

### 5. Background Papers

No background papers within Section 100D of the Local Government Act 1972 were used in the preparation of this report.

This report was written by:

Carolyn Nice, Assistant Director (Adult Frailties and Long Term Conditions), who can be contacted on 01522 553762 or [Carolyn.Nice@lincolnshire.gov.uk](mailto:Carolyn.Nice@lincolnshire.gov.uk) and David Coleman, Chief Legal Officer who can be contacted on 01522 552134 or [David.Coleman@lincolnshire.gov.uk](mailto:David.Coleman@lincolnshire.gov.uk)

**Open Report on behalf of Glen Garrod, Executive Director for Adult Care and Community Wellbeing**

Report to:	<b>Councillor Mrs P A Bradwell OBE, Executive Councillor for Adults, Health and Children's Services</b>
Date:	<b>10 July 2018</b>
Subject:	<b>Payment Arrangements for Residential Care and Residential Care with Nursing</b>
Decision Reference:	<b>I016051</b>
Key decision?	<b>No</b>

**Summary:**

To report to the Executive Councillor the outcome of a review of the Council's payment arrangements for residential care and residential care with nursing following findings and recommendations made by the Local Government and Social Care Ombudsman ("the Ombudsman").

To seek a decision from the Executive Councillor whether to accept the recommendations of the Ombudsman and change the payment arrangements to provide for no involvement of the provider in the collection of payments of Third Party Contributions or implement a modified form of its current payment arrangements for Third Party Contributions and Resident Contributions subject to variations being made to the Council's contract.

**Recommendation(s):**

That the Executive Councillor:-

1 Notes the findings and recommendations of the Ombudsman as set out in the Ombudsman's Report and summarised at Appendix A and the impacts of accepting the recommendations attached at Appendix B

2 Decides between the following options:-

- a) that the Council accept the recommendations of the Ombudsman and changes its payment arrangements for residential care and residential care with nursing so that the Council pays the full amount inclusive of Third Party Contributions and Resident Contributions to the provider and the third party pays Third Party Contributions and service users pay Resident Contributions to the Council without any involvement of the provider
- b) that the Council does not accept the recommendations of the

Ombudsman and instead implements a modified form of the Council's existing payment arrangements for Third Party Contributions and Resident Contributions for residential care and residential care with nursing as reflected in the contractual amendments attached at Appendix C; or

- c) that the Council does not accept the recommendations of the Ombudsman and instead (i) implements a modified form of the Council's existing payment arrangements for Third Party Contributions and Resident Contributions in the contractual amendments attached at Appendix C for a minimum period of three years and (ii) reviews its payment arrangements again in the financial year 2021/22.

- 3 Delegates to the Executive Director for Adult Care and Community Wellbeing in consultation with the Executive Councillor for Adults, Health and Children's Services authority to take all decisions and enter into all such contract documents as shall be necessary to give effect to the chosen option.

**Alternatives Considered:**

The options specified and analysed in the body of the Report.

**Reasons for Recommendation:**

The Council accepts (as it is obliged to do) the findings set out in the Ombudsman's Report.

The Council is not required to accept the recommendations of the Ombudsman if it has cogent reason not to.

Whilst the law is that a local authority can decline to accept the Ombudsman's recommendations if it is reasonable to do so, here the effect of not following the recommendations may amount to departing from statutory Care Act guidance as well. It is possible to depart from this guidance if there are cogent reasons for doing so. Hence overall, in this case, the Council should proceed on the basis that it is not required to accept the Ombudsman's recommendations if it has cogent reason not to do so.

Acceptance of the Ombudsman's recommendations would be in accordance with the views of the Ombudsman, would generally be welcomed by the care home provider market and would arguably be easier for third parties to understand. It would also clearly be in accordance with statutory Care Act guidance.

On the other hand acceptance of the Ombudsman's recommendation would have significant impacts on the Council including financial and operational impacts as identified at Appendix B. The Council may decline to accept the recommendations and depart from the Guidance if it has cogent reason to do so.

The changes to the Council's contract for residential care and residential care with nursing set out in Appendix C are considered to address the substantive concerns of the Ombudsman with the existing arrangements and are consistent with an approach which minimises divergence from the Care Act Statutory Guidance insofar as they constitute a divergence at all.

In the circumstances the scale of the impacts of following the Ombudsman's recommendation as set out in Appendix B taken together with the steps identified in Appendix C to clarify the payment obligations of the Third Party and service user give cogent reason for the Council to diverge from the Care Act Statutory Guidance insofar as the amended arrangements may be considered not to comply and cogent reasons on the basis of which the Executive Councillor can decide not to accept the Ombudsman's recommendations.

Although it would not address the financial impacts identified in Appendix B the Executive Councillor may determine that the position should be reviewed in three years' time when the Council will have better information as to the success of steps to address the operational and system issues identified in Appendix B, which might in turn decrease the impacts identified there.

## **Background**

- 1.1 At its meeting on 6 March 2018 the Executive received a report by the Ombudsman of the results of an investigation into allegations of maladministration. A copy of the Ombudsman's Report and an analysis of the relevant findings and recommendations relating to the current decision are attached at Appendix A.
- 1.2 The findings and recommendations of the Ombudsman can be divided into two categories. Those relating to the individual placement and dealt with in paragraphs 1.14 to 1.20 of the 6 March Executive Report were accepted by the Executive at the time and have been acted on and complied with.
- 1.3 The second category of findings and recommendations related to the arrangements the Council has in place for payment and recovery of Third Party Contributions under its contracts for residential care and residential care with nursing. The findings have not been challenged by legal proceedings, which means that the Council must accept them, which it does. As to the recommendations, on the 6 March 2018 the full Executive approved the carrying out of a review of the implications of making a change to those arrangements and delegated the decision to the Executive Councillor. It is a decision on this point that is the subject matter of this Report.

## **Context of the Decision**

- 1.4 At regular intervals the Council consults with the residential care market, identifies the cost of providing residential care in Lincolnshire and on the basis of the information it has it determines a weekly payment which is the amount it would expect to pay for care to meet service user needs. This is known as the Council's Usual Costs.

- 1.5 In contracting with the market for residential care the Council obtains rates from homes which it seeks to keep at its Usual Costs. Some homes do contract at the Council's Usual Costs. Some homes charge the Council an amount in excess of the Usual Costs.
- 1.6 In making a placement of an individual in residential care the Council must comply with the Care and Support and Aftercare (Choice of Accommodation) Regulations 2014 and have regard to associated Guidance. The Council must offer to a service user at least one place at its Usual Costs and preferably more than one. Where it makes an offer of a placement at Usual Costs and the individual service user chooses to take up more costly accommodation the Council is not obliged to place the person in that accommodation unless the difference between the Usual Costs and the actual cost of the accommodation is met by a third party. This is generally referred to as a top-up. Within the Council's contract it is referred to as a Third Party Contribution.
- 1.7 Where a placement is made and irrespective of whether there is a third party top-up, each service user will undergo a financial assessment on the basis of which they may be assessed as required to make a contribution to the cost to the Council of arranging their care. This is known as a Resident Contribution.
- 1.8 Where a placement is made involving a Resident Contribution and/or a Third Party Contribution the Council's contract currently provides that the Council will make payment to the Provider of the full amount of the cost of care including the Resident Contribution and the Third Party Contribution. However, before this occurs, the contract requires the Provider to make attempts to recover the Resident Contribution from the service user and the Third Party Contribution from the third party and where this does not succeed the Council pays the provider and recovers the amount of the contributions from the service user and the third party respectively.
- 1.9 These arrangements are further underpinned by a Third Party Agreement in which the Third Party contracts with the Council to pay the Third Party Contribution and agrees with the Council to make that payment to the Provider.

### **The Ombudsman's Decision**

- 1.10 The Ombudsman investigates whether there has been maladministration and whether a complainant has suffered injustice as a result. In his Report, the Ombudsman made a finding that the Council's Third Party Contribution payment arrangements did not follow the Care and Support Statutory Guidance and that the Council had not given adequate reasons to depart from the Guidance in this way (details in Appendix A). The Ombudsman said that this was maladministration and impliedly also found that it had caused injustice to the complainants.

- 1.11 On the basis of this the Ombudsman made a number of recommendations as to the way in which the Council structures and administers such arrangements in future. They are set out in paragraph 60 of the Ombudsman's Report as follows:-
- Review its procedures to ensure that people are offered the option to pay the top-up fee directly to the Council;
  - Review its top-up fee contract to reflect the option to pay the top-up fee directly to the Council;
  - Review existing top-up agreements to bring them into line with the Care Act; and
  - Assess whether staff are aware of the Council's duties under the Care Act and provide further training if necessary.
- 1.12 As a matter of law the Council must accept findings made by the Ombudsman that there has been maladministration by the Council and that the complainant has sustained injustice, unless it has these findings overturned on Judicial Review. There was no Judicial Review challenge here. Once it has accepted these findings, the Council will then decide whether to accept the recommendations. It is important therefore to determine the precise nature of the Ombudsman's findings.
- 1.13 The relevant parts of the Ombudsman's Report are analysed in Appendix A together with relevant extracts from the statutory guidance. Appendix A also sets out the legal basis governing the Council's consideration of the findings and recommendations of the Ombudsman.
- 1.14 On the basis of the findings as set out in the Ombudsman's Report and analysed at Appendix A the Council must give consideration to whether it accepts the Ombudsman's recommendations as set out in paragraph 1.11 above. In making that decision the Executive Councillor should note that the Council does not have to accept the recommendations of the Ombudsman if it has cogent reason not to.

### **Options Analysis**

- 1.15 In order to come to a conclusion on this point it is necessary to identify and appraise the potential options.
- 1.16 In deciding what to do, the starting point is to give full weight to the Ombudsman's finding that the Council is guilty of maladministration, and of resultant injustice caused by it in this case, including the effects on the complainant and his family.
- 1.17 Then it is necessary to follow what the Guidance says about Third Party Contributions, unless there is good reason not to. The Executive Councillor should consider the burden which may be placed on service users and those supporting them in having to deal directly with Providers.

- 1.18 In general terms there are a number of options which could involve the Council treating the payment of Resident Contributions differently from Third Party Contributions or (as the Ombudsman seems to be recommending) offering different payment arrangements either at the option of the third party or depending on whether the third party agrees.
- 1.19 However, such options have drawbacks for the Council in terms of having to manage a number of different payment arrangements depending on the type of payment. The consideration of the impacts of a change to the Council's payment arrangements has therefore been considered on the basis of options of low complexity. If these impacts are considered to be significant it can reasonably be expected that a more complex system mixing different payment approaches would be more significant still.
- 1.20 Therefore an options appraisal has been undertaken on the basis of the following options:-
- (a) changing the payment arrangements for both the Resident Contribution and the Third Party Contribution so that the Council makes the payments to the Provider and recovers both direct from the service user and third party respectively without any involvement of the Provider even in the process of collection; and
  - (b) maintaining the existing arrangement for both Resident Contributions and Third Party Contributions whereby the provider is involved in the payments process.

The appraisal has taken the form of assessing the pros and cons including the estimated impacts of making the change identified in option (a) by way of comparison with the existing arrangements.

#### *Changing the existing arrangements*

- 1.21 Changing the Council's arrangements would accord with the recommendations of the Ombudsman as set out in his Report and the Council must be mindful that it should only determine not to follow those recommendations if has cogent reason to do so. It must also be acknowledged that although it has not conducted any formal market engagement on this issue, informal discussion and previous experience suggests that a change of the kind identified in this option would be welcomed by the provider market. Finally it should also be acknowledged that a change of the nature proposed would probably make the payment process more transparent and easier to operate for service users and third parties.
- 1.22 On the other hand, it may be expected that such a fundamental change to the way in which the Council administers Third Party Contributions and Resident Contributions would have significant financial and operational implications and impacts. The impacts of the steps associated with this change have therefore been assessed and are set out in Appendix B.

- 1.23 The Executive Councillor is referred to Appendix B for the detail of those impacts. It is sufficient to state here that the estimated financial implications are significant – amounting to an estimated increased cost to the Council of approximately £935,000 per year in the form of increased bad debt and costs of increased financial and debt collection activity.
- 1.24 As significant, however, if not more so is the risk associated with the increased volume of transactions to be processed through the Council's computer systems. This decision falls at a time when the financial modules of Mosaic have not yet been tested, the Council is still considering the future of its main financial system Business World On due to difficulties with its implementation and considering the future delivery of its wider IT systems and services in the run up to the expiry of the initial period of a major multi-services outsourcing contract. In these circumstances a change to payment arrangements which places additional burden on the Council's systems and processes carry a significant risk for service users, third parties and providers as well as the Council. It should also be noted that a Green Paper is awaited on the future funding of social care which may further impact on payment arrangements.
- 1.25 The Council has revisited its existing payment arrangements to see what modifications might be made, so that some of the Ombudsman's concerns could be accommodated, whilst taking account of the impacts which accepting the recommendations would have. Such modifications could be made permanently or potentially for a specified period after which the position could be further reviewed when the current period of uncertainty may be expected to have passed. A minimum period of three years would be appropriate given the scale of the computer systems issues and the timelines over which those issues may be expected to stabilise and improve.

#### *Modified payment arrangements*

- 1.26 As discussed in Appendix A the Ombudsman's concern seems to have been that the Council had implemented a payment arrangement that required the third party to make payment to the provider with the remainder being paid by the Council. This is an arrangement which the statutory guidance says was not recommended and it requires the agreement of the third party. On this basis the Ombudsman found that the Council had departed from the Guidance.
- 1.27 In particular, the main contract uses wording based on the recovery of payments by the provider rather than collection implying that the payment is due to the provider. It also does not make clear that the provider is acting on behalf of the Council. Additionally, the Third Party Agreement at Schedule 9 of the contract is insufficiently clear that the payment obligation of the third party is owed to the Council and not to the provider.
- 1.28 Attached at Appendix C, therefore, are proposed amendments to the Council's contract which address these issues. In particular:-

- The amended contract clearly identifies that the provider is collecting money on behalf of the Council not recovering it in its own right; and
- The amended third party agreement is clear that the obligation on the third party to pay the third party contribution is owed to the Council alone, that it is not owed to the provider and that the provider has no right to recover sums from the third party.

1.29 Considering the three models identified in the statutory guidance and described at paragraph 4 of Appendix A, it is not considered that the modified payment arrangements could be described as one in which the third party pays the third party contribution to the provider and the Council pays the remainder. It is considered rather to be a modified version of the third option in which the Council pays the provider and recovers the money from the third party, the modification consisting in the inclusion of a collection arrangement administered by the provider on behalf of the Council as part of the process by which the Council would seek to recover unpaid third party contributions from the third party.

1.30 It could be strongly argued that the modified payment arrangements do not depart from the Guidance. But in any event, if they do depart at all, it is considered that in all the circumstances, the Council could legitimately determine to depart from the Guidance by adopting the proposed modified payment arrangements in that there would be cogent reason to do so. It is considered that, notwithstanding the matters in paras 1.16-1.17 above, the impacts identified in Appendix B in their combination of financial effect and system and operational risk are nevertheless sufficient grounds to justify such a departure.

1.31 If that is the case, then there would also be sufficient grounds on which the Council, having given full account to the matters in paras 1.16-1.17 above, could determine not to follow the Ombudsman's recommendations based as they are to a very considerable extent on findings that the Council has departed from the Guidance for insufficient reason. It is believed that the scale of the impacts and the risks of change are sufficiently good reasons for the Council not to follow the recommendations.

1.32 It should be noted that the modified contractual provisions create an arrangement under which the provider acts on behalf of the Council to collect contributions. Whilst this protects the Council from the effect of the impacts described in Appendix B it does not prevent the Council in exceptional circumstances from releasing the provider from this role and collecting the payments direct itself.

1.33 It is therefore considered that it is lawfully open to the Executive Councillor to pursue the option of adopting the modified payment arrangements set out in that Appendix rather than changing to an arrangement in which the Council makes all payments to the provider and Third Party Contributions and Resident Contributions are paid to the Council without the provider being in any way involved. Accordingly it is considered that the Executive

Councillor could lawfully determine not to accept the recommendations of the Ombudsman referred to at paragraph 1.11 of this Report.

## **Legal Issues:**

### Equality Act 2010

- 1.34 Under section 149 of the Equality Act 2010, the Council must, in the exercise of its functions, have due regard to the need to:
- \* Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act
  - \* Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
  - \* Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 1.35 The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation
- 1.36 Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to:
- \* Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic
  - \* Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it
  - \* Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low
- 1.37 The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities
- 1.38 Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to tackle prejudice, and promote understanding
- 1.39 Compliance with the duties in section 149 may involve treating some persons more favourably than others
- 1.40 The duty cannot be delegated and must be discharged by the decision-maker. To discharge the statutory duty the decision-maker must analyse all the relevant material with the specific statutory obligations in mind. If a risk of adverse impact is identified consideration must be given to measures to avoid that impact as part of the decision making process

The matters set out in this Report relate generally to elderly people and people with a disability. People with those protected characteristics will continue to receive services which are in themselves unaffected by the issues raised in this Report.

To the extent that the Council's existing arrangements place burdens on service users and third parties the modifications to the contract help to reduce those burdens although not to the extent they would be reduced if the Ombudsman's recommendations were followed. As referred to in the Report, because the collection arrangements within the modified arrangements are at the direction of the Council they could in exceptional circumstances be waived including where equality implications would favour it.

### Joint Strategic Needs Analysis (JSNA) and the Joint Health and Wellbeing Strategy (JHWS)

- 1.41 The Council must have regard to the Joint Strategic Needs Assessment (JSNA) and the Joint Health & Well Being Strategy (JHWS) in coming to a decision

There are no direct implications of this Report for the JSNA or the JHWS.

### Crime and Disorder

- 1.42 Under section 17 of the Crime and Disorder Act 1998, the Council must exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment), the misuse of drugs, alcohol and other substances in its area and re-offending in its area

No implications relevant to section 17 of the Crime and Disorder Act 1998 have been identified in respect of this Report.

### **Conclusion**

- 1.43 This Report places before the Executive Councillor the results of a review of the impact of a change to the Council's payment arrangements for residential care and residential care with nursing following on from a report by the Ombudsman.

- 1.44 The Executive Councillor is invited to consider the options and determine whether to accept the Ombudsman's recommendations or not to accept the Ombudsman's recommendations but instead to implement a modified form of the Council's current payment arrangements and amend the Council's contract accordingly. If the Executive Councillor determined to implement the modified arrangements she is further invited to consider whether the modified arrangements should be introduced permanently or for a period of three years before being further reviewed.

**Legal Comments:**

The legal considerations are set out in detail in the Report and Appendix A. This has been considered by Leading Counsel who has advised that the arguments set out in the Report are ones on which the Executive Councillor can properly rely if she is minded not to accept the Ombudsman's recommendations and opt for either of the two options in recommendation 2b) or 2c)

The decision is consistent with the Policy Framework and within the remit of the Executive Councillor.

**Resource Comments:**

The resource implications of each option are as follows:-

Option A – it is anticipated that this would have a cost implication for the Council which is estimated to be in the region of £1.035m in Year 1 of the change reducing to £0.935m in Year 2. These costs are due to the additional administrative burden of changing the payment arrangements for providers of residential care and residential care with nursing and increased levels of bad debt that are likely to occur.

There are no clearly identifiable costs implications of Options B & C over the same period, although it is anticipated that the level of contributions not collected by providers and referred back to the local authority may increase as a result of the clarification of responsibilities detailed in Appendix C.

I can also confirm that the decision is consistent with the Councils Financial Regulations and Scheme of Authorisation.

**Consultation****Has The Local Member Been Consulted?**

N/A

**Has The Executive Councillor Been Consulted?**

Yes

**Scrutiny Comments**

This decision will be considered by the Adults and Community Wellbeing Scrutiny Committee at its meeting on 4 July 2018 and the comments of the Committee will be reported to the Executive Councillor.

**Has a Risks and Impact Analysis been carried out?**

Yes

## Risks and Impact Analysis

See the body of the Report.

## Appendices

These are listed below and attached at the back of the report

Appendix A	Ombudsman's Report including Summary and Analysis of the Ombudsman's Relevant Findings and Recommendations
Appendix B	Impact of Change to the Council's Payment Arrangements
Appendix C	Proposed Contract Amendments to Clause 5 and Schedule 9

## Background Papers

The following Background Papers within the meaning of section 100D of the Local Government Act 1972 were used in the preparation of this Report

Background Paper	Where it can be found
Report to Executive dated 6 March 2018 entitled "Report by the Local Government and Social Care Ombudsman"	Democratic Services

This report was written by Carolyn Nice, Assistant Director (Adult Frailties and Long Term Conditions), who can be contacted on 01522 553762 or [Carolyn.Nice@lincolnshire.gov.uk](mailto:Carolyn.Nice@lincolnshire.gov.uk) and David Coleman, Chief Legal Officer who can be contacted on 01522 552134 or [David.Coleman@lincolnshire.gov.uk](mailto:David.Coleman@lincolnshire.gov.uk) .

**Ombudsman's Report and Summary and Analysis of the Ombudsman's  
Relevant Findings and Recommendations**

1. The Ombudsman investigates whether there has been maladministration and whether a complainant has suffered injustice as a result. In his Report, the Ombudsman made a finding that the Council's Third Party Contribution payment arrangements did not follow the Care and Support Statutory Guidance and that the Council had not given adequate reasons to depart from the Guidance in this way (details below). The Ombudsman said that this was maladministration and impliedly also found that it had caused injustice to the complainants.
2. The Ombudsman's recommendations, set out in paragraph 60 of the Ombudsman's Report, are that the Council:-
  - Review its procedures to ensure that people are offered the option to pay the top-up fee directly to the Council;
  - Review its top-up fee contract to reflect the option to pay the top-up fee directly to the Council;
  - Review existing top-up agreements to bring them into line with the Care Act; and
  - Assess whether staff are aware of the Council's duties under the Care Act and provide further training if necessary.
3. The relevant part of the Ombudsman's decision states:-

*"50 The Ombudsman considers whether a Council's actions are maladministration. Not every departure from guidance is maladministration and if the Council had, for example, chosen to move away from one part of the guidance for well-considered and legitimate reasons, the Ombudsman would not have found fault.*

*51 However that is not the case here. The Council has ignored three fundamental concepts of the guidance which are:*

- *Councils will deter arrangements for top-up payments to be paid directly to a provider.*
- *Any arrangement to make payments directly to the provider will only be by agreement with the person.*
- *Councils should consider the individual circumstances of each case*

*52 It has ignored the guidance without adequately providing reasons apart from administrative convenience. It has adopted a blanket policy of direct*

*payment to the care home which is far from the letter and the spirit of the guidance. This is maladministration.”*

As stated above, the Ombudsman also found that this caused injustice to the complainant. The Council accepts, as it is obliged to do, the findings of maladministration and resultant injustice. It is for the Council to decide whether to accept the recommendations in the light of the findings of maladministration and injustice.

- 4 The Ombudsman’s recommendations are not only that the Council reconsider its Third Party Contribution system in the light of the Guidance, but that, having done so, it adopts a new system whereby the contribution is paid directly to the Council. The Statutory Guidance says:-

*“8.33 Where a local authority is meeting needs by arranging a care home, it is responsible for contracting with the provider. It is also responsible for paying the full amount, including where a ‘top-up’ fee is being paid. However, where all parties are agreed it may choose to allow the person to pay the provider directly for the ‘top-up’ where this is permitted. In doing so it should remember that multiple contracts risk confusion and that the local authority may be unable to assure itself that it is meeting its responsibilities under the additional cost provisions in the Care Act. Local authorities must ensure they read the guidance at Annex A on the use of ‘top-up’ fees.”*

Annex A of the Guidance says:-

*“In terms of securing the funds needed to meet the total cost of the care (including the ‘top-up’ element) a local authority has 3 options ... In choosing which option to take it will need to consider the individual circumstances of the case, and should be able to assure itself of the security of the arrangements and that there is no undue pressure on the person making the ‘top-up’ payment to increase the level of payment. Whichever option it chooses, it remains responsible for the total amount. The 3 options are:*

- treat the ‘top-up’ payment as part of the person’s income and therefore recover the costs from the person concerned through the financial assessment ....*
- agree with the person, the third party paying the ‘top-up’ (if this is not the cared for person) and the provider that payment for the ‘top-up’ element can be made directly to the provider with the local authority paying the remainder. However, as stated earlier, this is not recommended.*
- the person making the ‘top-up’ payments pays the ‘top-up’ amount to the local authority. The local authority then pays the full amount to the provider”*

The Ombudsman has found that the Council’s existing arrangements fall into the second category and that this can only be implemented with the agreement of the third party. As the third party is not offered the third option they cannot be said to have agreed to the second option and so the second option is contrary to the Guidance.

- 5 However, since this is statutory guidance the Council is not obliged to follow it if it has cogent reasons to depart from it. The position of the Council in relation to statutory guidance can be characterised as follows on the basis of the case of *R (on the application of X) v Tower Hamlets London Borough Council*.

*“In summary, therefore, the guidance does not have the binding effect of secondary legislation and a local authority is free to depart from it, even 'substantially' but a departure from the guidance would be unlawful unless there is cogent reason for it, and the greater the departure, the more compelling must that reason be. Conversely a minor departure from the letter of the guidance while remaining true to its spirit may well be easy to justify or may not even be regarded as a departure at all). The court will scrutinise carefully the reason given by the authority for departing from the guidance. Freedom to depart is not necessarily limited to reasons resulting from 'local circumstances' . . ., although if there are particular local circumstances which suggest that some aspect of the guidance ought not to apply, that may constitute a cogent reason for departure. However, except perhaps in the case of a minor departure, it is difficult to envisage circumstances in which mere disagreement with the guidance could amount to a cogent reason for departing from it.”*

- 6 The Ombudsman’s decision seems to accept that the Council can depart from Guidance if it has a cogent reason.
- 7 On the basis of these findings the Council must give consideration to whether it accepts the Ombudsman's recommendations as set out in paragraph 2 of this Appendix. In making that decision the Executive Councillor should note that the Council does not have to accept the recommendations of the Ombudsman if it has cogent reason not to.

This page is intentionally left blank

**Report by the Local Government and  
Social Care Ombudsman**

**Investigation into a complaint against  
Lincolnshire County Council  
(reference number: 16 003 268)**

**17 November 2017**

## The Ombudsman's role

For 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

# Investigation into complaint number 16 003 268 against Lincolnshire County Council

## Contents

Report summary.....	1
Introduction .....	2
Legal and administrative background .....	2
How we considered this complaint.....	4
Investigation .....	4
Conclusions.....	8
Decision .....	11
Recommendations .....	11

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

## Key to names used

Ms B – the complainant

Mr C – Ms B's father

Mrs C – Mr C's wife

## Report summary

### **Failure to carry out duties under the Care Act**

Ms B says the Council failed to offer her father, Mr C, a care home without a top-up fee and did not offer to pay the full fee the care home charged. It did not explain its duties under the Care Act.

### **Finding**

Fault found causing injustice and recommendations made.

### **Recommendations**

To remedy the injustice to Ms B, Mr C and Mrs C, we recommend the Council takes the following actions within three months. The Council should:

- acknowledge the faults and apologise to Ms B, Mr C and Mrs C;
- reimburse the top-up fee of £65;
- pay Ms B and the family £300 to reflect their distress; and
- pay Ms B £300 for her time and trouble pursuing the complaint.

We recommend the Council, within six months, brings its procedures in line with the Care Act by:

- reviewing its procedures to ensure that people are offered the option to pay the top-up fee directly to the Council;
- reviewing its top-up fee contract to reflect the option to pay the top-up fee directly to the Council; and
- reviewing existing top-up agreements to bring them in line with the Care Act.

## Introduction

1. The Council placed Mr C in a care home on an emergency basis. Ms B complains that the Council failed to:
  - offer a care home without a top-up fee;
  - pay the full fee the care home charged when no care home without a top-up fee was identified;
  - explain a person's rights and the Council's duties under the Care Act;
  - offer Mr C a personal budget;
  - offer the option to pay the top-up fee to the Council;
  - intervene when Mr C was threatened with eviction from the care home; and
  - properly address the threatening and intimidating language used by the care home.

## Legal and administrative background

2. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (**Local Government Act 1974, sections 26(1) and 26A(1), as amended**)

### Care Act 2014

3. The Care Act 2014, the Care and Support Statutory Guidance 2014 (updated 2017) and the Care and Support (Charging and Assessment of Resources) Regulations 2014 set out the Council's duties towards adults who require care and support and its powers to charge.
4. The Act says that, if a person needs residential care and their capital falls below the threshold of £23,250, they will be eligible for council funding to pay for this. However, a top-up fee may still need to be paid, in certain circumstances.

### What is a personal budget?

5. The Council has a duty to assess adults who have a need for care and support. If the needs assessment identifies eligible needs, the council will provide a support plan which outlines what services are required to meet the needs and a personal budget which calculates the costs of those services. (**Care Act 2014, section 24**)

### **When is a top-up fee payable?**

6. When it has been decided that a person's needs are best met in a care home, the council must ensure that at least one accommodation option is available within the person's personal budget and it should ensure that there is more than one of those options. The council must ensure that the person has a genuine choice of accommodation. **(Guidance, section 8.37)**
7. However, a person is able to choose alternative options, including a more expensive setting, if a third party or in certain circumstances the resident is willing and able to pay the additional cost (the top-up fee). An additional payment must always be optional and never as a result of commissioning failures leading to a lack of choice. **(Guidance, section 8.37)**
8. If no suitable accommodation is available at the amount identified in the personal budget, the council must arrange accommodation in a more expensive setting. In those circumstances, the council should increase the personal budget to ensure the needs are met.

### **Council's duties when a person chooses to pay a top-up fee.**

9. The Guidance says that, if a person chooses a care home that is more expensive than the amount identified in the personal budget and a top-up fee has to be paid, the council has to **(Guidance, annex A, sections 22 to 24)**:
  - ensure the person paying the top-up understands the full implications of this choice, remembering that this is often at a point of crisis;
  - provide the person with sufficient information and advice so they understand the terms and conditions, including actively considering the provision of independent financial information and advice;
  - ensure the person is willing and able to meet the top-up, recognising that this may be for some time in the future; and
  - ensure the person enters a written agreement with the council, agreeing to meet the cost.

### **Who is the top-up fee paid to?**

10. The Guidance says councils will need to consider the individual circumstances of the case and should deter arrangements for top-up fees to be paid directly to the care home. The Guidance says there are three options **(Guidance, annex A, section 29)**.
  - The council treats the top-up as part of the cared for person's income and recovers the costs from the person. This is on the assumption that the third party pays the top-up to the person in the care home.

- The council agrees with the cared for person, the third party and the provider that the top-up is paid directly to the care home. The guidance says this is not the recommended approach.
- The third party pays the top-up to the council and the council then pays the full amount to the care home.

### **Who is responsible for the costs?**

11. Whatever the option chosen, the council remains responsible for the total cost of that placement. If there is a break down in the arrangement to pay the top-up, the council is liable for the fees until it has either recovered the costs or made other arrangements to meet the person's needs. (**Guidance, annex A, section 28**)

### **What information and advice should the council give?**

12. The council should provide information about the choices open to individuals and should explain a person's rights under the Care Act. This must include information about the different care providers and advice to help people understand the charges so that people can make informed financial decisions.

### **Market shaping and commissioning of adult care and support**

13. Councils must promote the efficient and effective operation of a market in services for meeting care and support needs to ensure that a person has: (**Care Act 2014, section 5**):
  - a variety of providers to choose from who provide a variety of services;
  - a variety of high quality services to choose from; and
  - sufficient information to make an informed decision about how to meet the needs in question.
14. Councils must not undertake any actions which may threaten the sustainability of the market as a whole, for example, by setting the fee levels below an amount which is not sustainable for the provider in the long term. (**Guidance, section 4.35**)

### **How we considered this complaint**

15. We have produced this report following the examination of relevant files and documents and interviews with the complainant and relevant employees of the Council.
16. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

## **Investigation**

## Key facts

17. Mr C is an elderly man who has dementia and physical disabilities. He was living at home with support from his wife. He was eligible for council funding and a care package for care at home was in place.
18. At the end of March 2016 Mr C's condition deteriorated and his needs could no longer be met at home. His daughter, Ms B contacted the Council asking for urgent help. The Council agreed that an emergency residential placement was needed, initially as a respite option.
19. The social worker contacted Ms B and said she had found a care home for Mr C. She explained the Council would pay its usual rate but, as the care home's rate was higher, the family would need to pay a top-up fee. The top-up fee was £60, but the family could negotiate a lower price with the care home if it was not able to pay. Ms B said she thought she had no other option as this was a crisis situation and she therefore agreed.
20. Mr C moved to the care home on 30 March 2016. The care home agreed to a reduced top-up fee of £20 per week.
21. Ms B contacted the Council on 29 April 2016. She had read the Care Act and now understood more about top-up fees. She told the Council that it had a duty to offer Mr C a placement without a top-up fee and this had not happened. The social worker's response was that Ms B would need to ring the care homes herself and ask about top-up fees as a lot of the care homes charged them. Ms B said she may have to move Mr C to another care home as her mother could not afford the top-up fee.
22. In May 2016 the care home contacted the Council as the top-up fee and contribution for Mr C had not been paid. The care home said it wanted to evict Mr C within 7 days. The care home said it had not yet informed the family of this as the family had been 'difficult' last week. The care home was worried that, if it informed the family, the family would not pay at all.
23. Ms B assured the Council she would pay but she wanted to know what she was paying and whether it was legal for the care home and the Council to ask for this top-up fee. It was her understanding that her mother should not have been asked to make this payment. She said she wanted to speak to somebody at the Council about the legalities of the top-up fee and the Council's responsibility to find a care home without them.
24. The care home wrote to Ms B about the top-up fee on 21 April 2016 and said: "*The top-up rate was set in consultation with the council and reflects the fact that the council has been unable to raise the care fees they pay us sufficiently to meet our higher staffing and running costs*".
25. On 10 May 2016, the care home wrote to Ms B giving Mr C 14 days notice to leave the care home. The care home's email dated 12 May 2016 said: "*Third Party contributions were introduced to meet the costs of the Living National Wage and mandatory pensions*".

*for staff implemented by the government and timely payment of these fees is imperative for us to pay the wages of our staff. The families of our council funded residents are understanding of this financial reality and pay the third party contributions four weeks in advance. Unfortunately, your account is 42 days in arrears. You can imagine the financial predicament we would be in and the distress it would cause if all resident accounts were in arrears”.*

26. The care home’s second letter dated 18 May 2016 said: *“Your refusal to sign the contract was duplicitous and unacceptable while you continued to accept a service from the care home. Your behaviour in refusing to make this payment makes the work of the Adult Social Care Services even more difficult at an already challenging time for the social care sector. I am, of course, taking legal advice on the matter and my solicitor will handle any further communication with you”.*
27. Ms B was very upset by the care home’s threats and the language in the letter and contacted the social worker. She tried to speak to somebody at the Council about the legality of top-ups and continued to contact the Council desperate for help. A note on the files records the care home had spoken to the Council and the Council had confirmed the care home could give notice to Mr C as the family were aware of this and were actively looking for another home for Mr C without a top-up fee.
28. Ms B wrote to the care home pointing out how its understanding of the law on the fees was flawed and provided links to the correct law and guidance. The care home said in its email dated 25 May 2016: *‘Many thanks for the information you have provided. I do agree that it would be far simpler were the county council to fund the full cost of care but unfortunately this is not the case and each year the funding we receive falls below the true cost of care’.*
29. A best interest meeting took place on Friday 20 May 2016 and a care home without a top-up was found for Mr C. The plan was to move Mr C to this care home on 24 May 2016 when the eviction deadline ended.
30. However, later that day, the new care home called to say it had given Mr C’s room to somebody else. This meant that Mr C still had no care home to move to and was about to be evicted.
31. The social worker contacted 4 care homes to find a place for Mr C. She found two care homes which had vacancies but they both charged top-ups. The social worker told Ms B to find a care home without a top-up over the weekend.
32. Ms B contacted 23 care homes over the weekend and found only one care home without a top-up. Mr C moved to this care home the following week.

## **Ms B’s complaint**

33. Ms B complained to the Council in June 2016. She pursued her complaint for several months as she tried to clarify different issues. We have summarised her complaint as follows.
- The Council failed to give her appropriate information and advice about her rights under the Care Act at every stage of the process. She said the information had been poor and misleading and she doubted whether the social workers knew the correct process and the Council's duties.
  - The Council never informed her it had a duty to find a care home without a top-up and never told her it had a duty to pay the care home fees if it could not identify a care home without a top-up.
  - The family should never have been asked to pay the top-up as the Council had never offered Mr C a care home without a top-up fee.
  - The Council should have given Mr C a personal budget.
  - The Council should have intervened when the care home was threatening to evict Mr C.

### **The Council's response**

34. The Council said:
- the procedures were all online and in the Council's leaflets;
  - it expected care homes to pursue the family for payment of the top-up fee, but only if the appropriate paperwork had been completed. In this case, the paperwork had not been signed so the care home should not have acted as it did. It later agreed it should have paid the top-up fee;
  - it could not become involved in the choice of care homes as it had to remain neutral;
  - it did not provide personal budgets to residents of care homes as it had agreed rates of payment;
  - the language used by the care home was insensitive and it had recommended that the care home address this directly with Ms B. It monitored correspondence between the care home and service users as part of its contract with them.
35. The Council wrote several emails where it clarified its position.
- *"The choice of care home is an area where the Council would not be involved in directly as we have to remain neutral in terms of the market. If called upon we may be able to give details of which homes have vacancies."*
  - *"In relation to choice of care home, the Council has to be careful to remain neutral; we are not allowed to promote individual homes. There is, at present, pressure on*

*care home beds, which meant that there are times when there are a very limited number available and real choice can be quite difficult in an emergency, especially choice which does not involve a top-up... This is a particularly difficult area at present as there are a very limited number of care homes in the area without top-ups and for obvious reasons these homes are often full.”*

- *“A personal budget does not currently apply to residential or nursing placements in Lincolnshire and there are agreed rates which the County Council develop and consult with the market before publishing.”*

36. The difficulties Ms B and the social worker had in finding a care home without a top-up fee, the Council’s responses to the complaint and the care home’s correspondence suggested that there may be a wider problem of a shortage of care homes without a top-up fee.
37. We therefore contacted the Council to ask further questions about market shaping. The Council’s website has details of the Council’s market position statement, joint strategic needs statement and joint health and wellbeing strategy, in line with the Care Act. The Council asked an outside agency to conduct an independent evaluation of the residential care market in 2015 and this contributed to deciding how much the Council pays to care homes. It is going through a similar exercise at the moment to set the rates for the future.
38. We asked the Council how many care homes there were without a top-up fee on the day we spoke (13 April 2017). The Council said it had 754 vacant beds across the county and 220 did not charge a top-up fee. This could be broken down by area. The area of Lincoln (where Mr C was living) had 30 vacancies without a top-up fee. It explained that, every week, it sends a list to practitioners which shows the available care homes without a top-up fee in the area so they can help people in identifying care homes.

## Conclusions

### Choice of accommodation and charging of the top-up fee

39. There was fault in the Council’s actions in March 2016 when an urgent placement had to be found for Mr C. The Council did not identify a care home without a top-up fee. Therefore it should have paid the entire cost of the care. Instead the Council told the family it had to pay the top-up fee which is fault.
40. When Mr C was facing imminent eviction in May 2016, the Council repeated the same mistake and did not offer a place without a top-up fee or explain to Ms B that it would pay the entire fee if it could not find a place. Instead it expected Ms B to find a placement during the weekend.

## Information and advice

41. The Council failed to explain to Ms B what the Council's duties were. It never told her it had a duty to identify at least one place without a top-up fee. It also did not say that it was responsible for paying for the placement if no place without a top-up fee had been identified.
42. Ms B looked up the advice on the Council's website but this was not clear and there was no clear mention of the fact that the Council had a duty to find a care home without a top-up fee or that it would pay the costs if it could not find one. This was also fault.
43. We were, in addition, concerned about the Council's comments in its written replies to Ms B and us. Ms B repeatedly asked the Council whether, in other cases, it informs people of their right to a care home without a top-up. The Council never clearly answered this question. It said it gave people the general information about the charging and general information about care homes. It said it could not recommend a particular home because it had to remain 'neutral in terms of the market' and said it was not allowed to promote individual homes.
44. We were therefore concerned whether other people had suffered the same problems as Ms B. We spoke to the Council and it acknowledged that the information on its website was previously not as clear it should be. It said it recently changed its online information. We have read the Council's online information on top-up fees and it is clearer than before.
45. The Council said it also changed its process. It says it gives people the directory which includes all the care homes, but does not give information about availability or whether they charge top-up fees. If a person chooses a care home which charges a top-up fee, the Council will explain to the person that they have a right to be offered a care home without a top-up. It will offer an alternative without a top-up fee if this is what the person wants. If no alternative care home without a top-up fee is available, it will offer the lowest cost alternative and pay the top-up fee.

### **Personal budget**

46. The Council did not give Mr C a personal budget and said in the complaints correspondence that it never provided personal budgets to residents in care homes. This is fault as the Care Act says councils have a duty to provide personal budgets.
47. The Council has clarified that this has changed and that residents in care homes now have a personal budget.

### **No option to pay the top-up fee to the Council**

48. The Council told Ms B that it did not become involved in the top-up agreement as this was a matter between the care home and the person paying the top-up fee. This is fault. The council has told us that it has, since then, changed its procedures and the social worker now becomes involved in the signing of the agreement.
49. The Council also failed to offer Mrs C the option to pay the top-up fee to the Council. It says it never does this as it always expects people to pay the fee directly to the care home. It acknowledges that this is not the preferred option under the guidance but says

there is nothing stopping them in law from following that route. It says it has taken this approach because it is cheaper and less of an administrative burden on the Council.

50. The Ombudsman considers whether a Council's actions are maladministration. Not every departure from guidance is maladministration and if the Council had, for example, chosen to move away from one part of the guidance for well-considered and legitimate reasons, the Ombudsman would not have found fault.
51. However that is not the case here. The Council has ignored three fundamental concepts of the guidance which are:
  - Councils will deter arrangements for top-up payments to be paid directly to a provider.
  - Any arrangement to make payments directly to the provider will only be *by agreement* with the person.
  - Councils should consider the individual circumstances of each case.
52. It has ignored the guidance without adequately providing reasons apart from administrative convenience. It has adopted a blanket policy of direct payment to the care home which is far from the letter and the spirit of the guidance. This is maladministration.

### **Failure to intervene when the care home threatened eviction**

53. There was fault by the Council in its response to the threat of eviction by the care home.
54. Firstly, Mr C should not have been put in the position where he was being threatened with eviction because of non-payment of the top-up fee. Ms B was right in questioning the requirement to pay and the Council should have intervened immediately and paid the entire fee.
55. Secondly, the fault was made worse by the fact that the Council did not offer Mrs C the option to pay the top-up fee to the Council. One of the reasons why the legislation says that councils should offer this option is to avoid situations such as this one. Ultimately the Council is responsible for the payment of the top-up fee, not the third party. If the top-up fee is paid to the Council, any failure to pay is dealt with by the Council and should not result in a threat of eviction by the care home.
56. Finally, the language used by the care home in its letters to Ms B was inappropriate and the Council should have intervened sooner and more directly. The Council is responsible for the actions of those who are providing a service on its behalf.

### ***Injustice***

57. Ms B and Mr C suffered weeks of distress as they were worried that Mr C would be evicted. They knew Ms B's mother could not continue to pay the top-up fee and needed help but were not given this help. Instead of assisting Ms B in her search for a suitable care home, the Council put the burden on her to find somewhere suitable.

## Decision

58. The Council did not act in line with the Care Act 2014 or the guidance when it responded to Ms B's request for assistance in support for Mr C. The Council failed to:
- offer a care home within Mr C's personal budget;
  - pay the full fee the care home charged when no care home within the personal budget was identified;
  - explain a person's rights and the Council's duties under the Care Act;
  - offer Mr C a personal budget;
  - offer the option to pay the top-up fee to the Council;
  - intervene when Mr C was threatened with eviction from the care home; and
  - properly address the threatening and intimidating language used by the care home.

## Recommendations

59. To remedy the injustice to Ms B, Mr C and Mrs C, we recommend the Council takes the following actions within three months. The Council should:
- acknowledge the faults and apologise to Ms B, Mr C and Mrs C;
  - reimburse the top-up fee of £65;
  - pay Ms B and the family £300 to reflect their distress; and
  - pay Ms B £300 for her time and trouble pursuing the complaint.
60. We recommend the Council, within six months, brings its procedures in line with the Care Act by:
- reviewing its procedures to ensure that people are offered the option to pay the top-up fee directly to the Council;
  - reviewing its top-up fee contract to reflect the option to pay the top-up fee directly to the Council;
  - reviewing existing top-up agreements to bring them in line with the Care Act; and
  - assessing whether staff are aware of the Council's duties under the Care Act and provide further training if necessary.

61. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council or Cabinet and we will require evidence of this. (***Local Government Act 1974, section 31(2), as amended***)

This page is intentionally left blank

## **Impact of Change to the Council's Payment Arrangements**

This Note sets out the expected impacts of a change from the existing payment arrangements in respect of residential care to one in which the Council pays the full amount of the payment to the Provider and recovers contributions direct from the service user and third party themselves without any involvement of the provider.

The payment arrangement which has been assessed is one in which both Resident Contributions and Third Party Contributions are paid in full to the Provider and contributions are recovered by the Council without involvement of the Provider. An arrangement under which the Resident Contribution continues to be dealt with on the current basis and the Third Party Contribution is dealt with on the changed basis has not been assessed.

It can be expected that if the impacts of making the change for both types of contribution are significant, then the impacts involved in managing two different arrangements for the payment of contributions would be even greater

A change in the arrangement from the current system will change current processes and will create a number of challenges to the Council and will likely lead to a number of consequences both operationally and financially.

### **Operational Impact**

- a) The financial functions of the Mosaic social care information system will not be implemented until March 2019 at the earliest. It is expected that once the financial functions of Mosaic are operational it will be possible technically to change the system to accommodate the changed payment arrangements relatively easily. At this point, however, it is unknown if the present system, Abacus, can switch to the changed payment arrangements without substantial investment and/or significant manual intervention
- b) The change to the payment arrangements effectively transfers the responsibility for the collection of Resident Contributions and Third Party Contributions to Serco. Therefore the collection and administration of overdue charges also transfers from providers to Serco which will require significant additional investment in the Credit Control Team (see the Financial Impacts below).
- c) The impact of the change will directly affect Serco's organisational structure both within their Adult Care Financial Assessment and Credit Control teams, income and existing adult care payment functions and would require additional resources and overheads to be able to meet the principles of the new process.
- d) Serco estimate that the change will require two additional separate billing runs per 4 weekly cycle with around 4,000 invoices on each run (3,400 estimate but around 4,000 monthly transactions required) one for Third Party Contributions and the other for Resident Contributions. These additional customers would need to be managed through the Agresso Finance System,

and is likely to produce around 8,000 additional items to be issued.. Finally the 8,000 items would then need to be chased through the credit control and income processes (including payment systems). The change would involve the management of around 8,000 new customers on Agresso and associated payment allocations (incl. additional Masterdata requirements within the AP team).

- e) As a result Serco will also need to recruit extra resources currently estimated at 11.5 Full Time Equivalents (FTE's) including two additional manager roles. Our experience over the last 3 years is that Serco has struggled to retain and recruit experienced staff in the Adult Care Finance function. There is a real risk therefore that would not be able to recruit sufficient staff.
- f) Serco overhead requirements would also increase to cover the setup, transition and facility overheads required. It is unlikely that this proposal could be delivered from 2nd/3rd floor of Thomas Parker House as it presently stands due to capacity and there are currently no other accommodation proposals.
- g) There is likely to be an increase demand on services delivered by the Adult Care & Community Wellbeing Finance Team in monitoring the impact of changes to process including an increase in bad debt, third party top up and payment queries.
- h) There is also a risk that these changes may also add some additional demands upon assessment and care management teams capacity but at this time it is not possible to quantify the possible impact."
- i) There will be a requirement to ensure that fieldworkers are aware of any changes which will require additional training resources.

### **Financial Impact**

- a) The change of payment arrangements effectively transfers the responsibility for the collection of Resident and Third Party Contributions to the Council and through the Council to Serco; it also increases the risk of non-payment to the Council. This can be assessed by comparing rates of unsuccessful collection of service user contributions for home care, where payment is made gross with those for residential care under the existing payment arrangements.
- b) The current rate of unsuccessful collections of service user contributions for non-residential care is approximately 2.5%.
  - i. A similar rate of failure in residential Resident Contribution collection would result an additional 1500 lines of debt per month with an estimated annual value of £0.634m based on the current income budget
  - ii. The current annual value of Third Party Contributions is £0.317m. Of this half are secured via a Deferred Payment Agreement. Therefore

based on the current rate of unsuccessful collections it is estimated that only £0.004m of this funding would be at risk.

- c) The change may result in an increased legal resource requirement in order to process claims for non-payment that progress to the courts
- d) Potential impact on council cash flow through the payment of additional fees to providers
- e) The increased administrative burden on Serco colleagues will require additional financial contributions from the Council. Serco has provided an estimate of the cost which shows an annual increased staffing cost of £301,199, one-off transition costs of £100,000 and annual increased overhead and non-staffing operational costs of £300,000.
- f) Of the non-staffing operational costs a significant proportion is rental which may be considered to be a consequence only of the position of Serco in relation to their specific building and not a cost of the move to a different payment arrangement in itself. However even taking these costs out entirely means that the increased cost to the Council of moving to a different payment arrangement is assessed at:-

Year 1 - £634,000, £301,199 and £100,000 = £1,035,199

Year 2 onwards £634,000 and £301,199 = £935,199

- g) These are significant sums which would need to be taken from frontline expenditure and at a time of general financial austerity and uncertainty for the Council. The Council said this in the introduction to its budget for 2018/19

"This report sets out a two year financial plan for revenue and capital budgets to take the Council to the end of the four year funding deal from government. This is the first time in four years the Council has been able to develop budget plans for more than the next financial year. The Council continues to face significant reductions in government funding, growing cost pressures from demand led services such as adult and children's social care, waste disposal and the Council's responsibility to pay staff and some contractors the National Living Wage. Uncertainty around government funding beyond the four year funding deal (which runs from 2016/17 to 2019/20) means the Council doesn't consider it practicable, at present, to develop sustainable long term financial plans into the next decade."

- h) The Appendix to this Note identifies some of the assumptions underlying the above financial assessment and therefore some of the risks attached to that assessment. In particular it can be seen that assumptions are made about the technology platform and in particular the ability to generate automatic invoices in Mosaic and to be able to automatically load service user and third party records into Agresso. If either of these assumptions turn out to be incorrect the staffing requirement and therefore the cost of administering a different payment system will increase.

- i) In fact as already indicated the Mosaic financial functionality is not yet operational so this judgment cannot be made with certainty although it is expected that the required automatic invoicing will be available. Agresso is another matter. The Council's implementation of the Agresso system has been fraught with difficulty including major errors in its payments. Whether the system will support the automatic loading of service user and third party records is not clear.
- j) In addition to this the contract with Serco is coming to an end in 2020. Although it is capable of being extended a decision has not yet been made as to whether it will be. The Council could therefore relatively soon be changing the way in which its income receipts and payments are administered. Furthermore it is exploring options to change the way that it accesses the Agresso system with the possibility that it will access a hosted system under the control of a third party. It is not known what impact this may have on the resource requirements for changing the payment arrangements.
- k) The Council also needs to consider the scale of change which it will be undergoing in the next two to three years in relation to the processes, personnel, contractual arrangements and technology which underpin its administration of its payment and income recovery services. To make a change in its payment arrangements at the same time as making changes to those underlying processes is not something that a prudent authority would undertake. If the change to the payment arrangement is to be done at all it should be carried out when the underlying arrangements have achieved a degree of stability and reliability. If not there is a risk of failed services which will impact not just on the Council but also providers, service users and third parties.

## APPENDIX

Risk	Mitigation
Being able to recruit an additional > 12 new members of staff within a small localised job market	Would need a potential job fair and or strategy to be able to build this level of additional head count
Physical space issue within TPH as this would change the current operating delivery model	Potentially working from 1 <sup>st</sup> floor TPH or an alternative LCC site
Figures based on Mosaic being able to auto invoice. If manual invoices are required to be created, we'd need significantly more staff to be able to produce the output required every four weeks	Confirmation that Serco staff won't be required to manually raise each sales order and that the system configuration is correctly built, tested and approved and fully operational.
We have no project resource time available to UAT, build or rollout any new system changes that would be required moving any existing systems to the new arrangement	Any project resource would need to be managed and rolled out by LCC
No resources available to manually create the required number of service users or 3 <sup>rd</sup> party records on Agresso	Auto loaded into Agresso

This page is intentionally left blank

**PROPOSED CONTRACT AMENDMENTS TO  
CLAUSE 5 AND SCHEDULE 9  
(Shown as Tracked Changes)**



**FRAMEWORK AGREEMENT**

**BETWEEN**

**LINCOLNSHIRE COUNTY COUNCIL**

**and**

**(PROVIDER)**

**FOR THE PROVISION OF LONG AND SHORT TERM PERSONAL CARE WITHIN  
A CARE HOME OR CARE HOME WITH NURSING**

<b>SERVICE AGREEMENT TYPE</b>	<b>CALL OFF</b>
<b>SERVICE AGREEMENT REFERENCE No.</b>	<b>F18</b>

**Final**

	<b>TABLE OF CONTENTS</b>
1	DEFINITIONS
2	INTERPRETATION
3	COMMENCEMENT DATE
4	CONTRACT STANDARDS
5	CONTRACT PRICE AND PAYMENT
6	SERVICES AND PEOPLE USING THOSE SERVICES
7	REFERRALS & PLACEMENT
8	RELATIONSHIP BETWEEN THIS CONTRACT AND INDIVIDUAL PLACEMENTS
9	PERFORMANCE DEFAULT
10	TERMINATION
11	NOTICES
12	STAFF
13	HEALTH & SAFETY
14	EQUALITY AND DIVERSITY
15	PROTECTION OF INFORMATION
16	HUMAN RIGHTS
17	INDEMNITY
18	INSURANCE
19	EMERGENCIES & BUSINESS CONTINUITY
20	AMENDMENTS
21	PARTNERSHIP WORKING AND BEST VALUE
22	ASSIGNMENT AND SUBCONTRACTING
23	DISPUTE RESOLUTION
24	PRESS & PUBLICITY
25	FORCE MAJEURE
26	CONTRACTS (RIGHTS OF THIRD PARTIES) ACT
27	WAIVER
28	SEVERENCE
29	PREVENTION OF CORRUPTION & GRATUITIES
30	CARTELS
31	APPLICABLE LAW

## SCHEDULES

1	SERVICE SPECIFICATION
A	NURSING PLACEMENTS
B	LEARNING DISABILITIES
2	PRICE SCHEDULE – NEW PLACEMENTS
3	CONTRACT MANAGEMENT & MONITORING ARRANGEMENTS
4	KEY CONTACTS
5	NOTICES
6	IMPROPER CONDUCT
7	PURCHASE ORDER
8	INTENTION TO TERMINATE FORM
9	THIRD PARTY AGREEMENT
10	THIRD PARTY WAIVER FORM
11	EQUIPMENT SCHEDULE
12	MODEL MEDICATION STANDARDS IN LINCOLNSHIRE

**THIS AGREEMENT** is made on the                      day of

**BETWEEN**

**LINCOLNSHIRE COUNTY COUNCIL** of County Offices, Newland, Lincoln, LN1 1YL  
(the “Purchaser”)

and

**[Provider]** whose registered address is situated at **[ADDRESS]** (the “Provider”)

**BACKGROUND:**

The Provider has agreed to provide the Service from the Commencement Date for the Contract Period subject to the terms and conditions set out in this Contract.

**1. DEFINITIONS**

In this Contract the following words and expressions shall have the meanings hereby assigned to them except where the context otherwise requires:

“Accommodation”	means the Resident’s allotted room within the Resident’s Home as specified on an Individual’s Purchase Order by way of room number or other means of identification as used in the Price Schedule.
“Authorised Officer”	means the Purchaser’s Director of Adult Social Services or such other officer nominated by the Purchaser and as notified to the Provider to act as Authorised Officer for the purposes of this Contract with responsibility for the overall management and control of the Contract or any part thereof on behalf of the Purchaser and for Residents in receipt of Nursing Care, the Relevant Nursing Care Purchaser.
“Care File”	means the document(s) that hold the records about the Resident. This will include personal profiles, assessments, Personal Plans, Provider’s Care Plan, Individual Purchase Order, reviews, correspondence and financial arrangements
“Care & Support Plan”	means a document to be produced by the Purchaser and submitted to the Provider setting out in summary form the agreed outcomes for the Resident and will form the basis of the Individual Purchase Order
“Choice Directions”	The Care and Support and Aftercare (Choice of Accommodation) Regulations 2014.

“Commencement Date”	means the date specified in clause 3.1 for the commencement of this Contract.
“Confidential Information”	means any information which has been designated as confidential by either Party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person, trade secrets, know-how of either Party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1998 and any successor legislation (GDPR).
“Contenance Payment”	means the payment determined by the Relevant Nursing Care Purchaser or otherwise agreed between the Relevant Nursing Care Purchaser and the Provider and notified to the Purchaser and the Provider from time to time as being payable to the Provider in respect of the provision of continence aids.
“Contract”	means this written contract between the Purchaser and the Provider consisting of these clauses and the attached Schedules.
“Contract Period”	means the period of duration of the Contract in accordance with Clause 3
“Contract Standard”	means the standards as laid out under Clause 4
“Contracting Authority”	shall have the meaning specified in the Public Contracts Regulations 2006 or Public Contract Regulations 2015 from the date they come into force.
“CQC Standards”	means “Essential standards of quality and safety – what providers should do to comply with the section 20 regulations of the Health and Social Care Act 2008” issued by the Care Quality Commission in March 2010 as the same may be supplemented, amended or replaced from time to time
“Determination”	means the assessment carried out by a registered nurse of the Nursing Care needs of a Resident
“Disclosure and Barring Service”	means the non-departmental public body bearing that name or any successor body thereto established at any given time to maintain lists of persons barred from undertaking regulated activity with children or adults or otherwise to administer any functions in relation to the safeguarding of

	children and vulnerable adults;
“Eligible Resources”	means the resources from which under the law from time to time an Eligible Resident is entitled to make payments towards the difference between the Expected Cost and the Provider’s Price
“Eligible Resident”	means a Resident permitted under the law from time to time to make a contribution to the cost of Preferred Accommodation to meet the difference between the Expected Cost and the Provider’s Price being at the Commencement Date
“Equality Act”	means the Equality Act 2010
“Equality and Diversity Policy”	means the Provider’s equality and diversity policy setting out the Provider’s aims regarding equality in employment and service delivery including any decisions made under the Sex Discrimination Act Section 7.
“Existing Resident”	means any Resident in receipt of accommodation and personal care and or Nursing Care being purchased from the Provider by the Purchaser immediately prior to the Commencement Date.
"Expected Cost"	means at all times prior to 9 April 2018 the Old Expected Cost and from and including 9 April 2018 the New Expected Cost.
“Force Majeure”	any event or occurrence which is outside the reasonable control of the party concerned and which is not attributable to any act or failure to take preventative action by that party, including fire; flood; violent storm; pestilence; explosion; malicious damage; armed conflict; acts of terrorism; nuclear, biological or chemical warfare; or any other disaster, natural or man-made, but excluding any industrial action occurring within the Purchaser’s or the Provider’s organisation.
“Guidance”	means any regulatory policy, statutory or non-statutory guidance, code of practice or other document which is advisory in nature and with which neither the Purchaser nor the Provider is legally obliged to comply except for the CQC Standards
“Home(s)”	means the Provider’s care home(s) or other establishment set out in the Price Schedule.
“Hospitalisation”	means a Resident is absent from the Home due to being admitted to a hospital and shall include any period of absence immediately following discharge from hospital during which the Resident is in receipt of intermediate care

	otherwise than at the Home for the purpose of enabling the Resident to return to the Home
"Improper Conduct"	means any conduct by the Provider or a member of its staff as defined in Schedule 6
"Individual Placement"	means each individual placement entered into between the Purchaser and the Provider pursuant to Clause 7
"Individual Purchase Order"	means a purchase order sent by the Purchaser to the Provider defining (where applicable) the category of care, start date, end date, Purchaser Contribution, Service User Contribution, Third Party Contribution, Nursing Price, and Contenance Payment applicable to each Individual Placement in the form shown at Schedule 7
"Law"	means but is not limited to any applicable Act of Parliament, statutory legislation, subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, exercise of the Royal Prerogative, enforceable community right within the meaning of Section 2 of the European Communities Act 1972, bylaw, judgment of a relevant court of law, or directives or requirements of any regulatory body with which the Purchaser or Provider is bound to comply.
"Long Term Placement"	means a placement in a Home where there is an intention that the placement shall become the Resident's permanent residence.
"Losses"	means any liabilities, damages, costs, charges, expenses or losses including reasonable legal costs
"New Expected Cost"	means the sum specified as such in the Price Schedule.
"Nursing Care"	means "nursing care by a registered nurse" as defined in section 49(2) of the Health and Social Care Act 2001
"Nursing Care Price"	means the price determined from time to time by the Relevant Care Purchaser applicable to the Nursing Care purchased by the Relevant Nursing Care Purchaser and paid to the Provider on behalf of the Relevant Nursing Care Purchaser by the Purchaser.
"Old Expected Cost"	means the sum specified as such in the Price Schedule.
"Performance Default"	means any failure, either on the Purchaser's or the Provider's part to carry out their respective obligations under this Contract.
"Personal Expenses"	means the amount of allowable income as

Allowance”	provided for under Section 22(4) of the National Assistance Act 1948.
“Personal Plan”	means the document prepared by the Purchaser and submitted to the Provider detailing the Resident’s personal care needs and wishes and required outcomes.
"Preferred Accommodation"	means such accommodation as a Resident shall have requested as their choice.
“Price Schedule”	means the document attached hereto as Schedule 2.
“Provider’s Care Plan”	means a Plan to be maintained by the Provider in accordance with the Service Specification detailing the care to be provided by the Provider to meet the requirements of the Personal Plan.
“Provider’s Price”	means the cost or costs specified as such in respect of the relevant Provider’s Home(s) in the Price Schedule.
“Purchaser Contribution”	means the Expected Cost less the Resident Contribution.
“Registration Certificate”	means a current and valid certificate of registration issued in accordance with the Health & Social Care Act 2008.
“Relevant Nursing Care Purchaser”	means the relevant Clinical Commissioning Group or successor body thereto (under the Health and Social Care Act 2012 or otherwise) responsible for the commissioning of Nursing Care
“Request for Information”	shall have the meaning set out in section 8 of the Freedom of Information Act 2000 in respect of requests under that Act and shall in relation to the Environmental Information Regulations 2004 mean a request made under those Regulations
“Resident”	means an individual who has been assessed by the Purchaser as having an eligible need for residential care and (where applicable) by the Relevant Nursing Care Purchaser as requiring Nursing Care and who is eligible to be accommodated at the Home under the terms of any Registration Certificate .
“Resident Contribution”	means such contribution as a Resident is from time to time assessed by the Purchaser as being required to make to the cost of the Services including the cost of provision of his/her Accommodation.
“Resident’s Home”	means the Provider’s Home or that one of the Provider’s Homes at which the Resident is to be accommodated as specified on the Individual Purchase Order

<p>“Responsible Authority”</p>	<p>Local</p> <p>means the appropriate, Borough, City, County or District Council; metropolitan or unitary authority or any other similar responsible authority.</p>
<p>“Service(s)”</p>	<p>means the Services specified in the Service Specification and schedules thereto.</p>
<p>“Service Specification”</p>	<p>means the specification of the Service to be provided to the Resident as attached hereto at Schedule 1 as the same may be amended from time to time.</p>
<p>“Short Term Placement”</p>	<p>means a period of care where the intention is for the Resident to return to their own home or the community. A Short Term Placement includes respite care which may be required several times per year but which shall not normally exceed 2 weeks’ duration within any single period.</p>
<p>“Staff”</p>	<p>means any person employed or engaged by the Provider on or in connection with the provision of the Service, whether paid or unpaid, including any persons hired through an employment agency.</p>
<p>"Third Party"</p>	<p>means any individual other than either the Resident, Purchaser or Provider.</p>
<p>“Third Party Agreement”</p>	<p>means an agreement between the Purchaser, the Provider and a Third Party or Eligible Resident in the form attached at Schedule 9 providing for the making of a Third Party Contribution by the Third Party or Eligible Resident</p>
<p>"Third Party Contribution"</p>	<p>means the amount specified as such on the Individual Purchase Order being the financial contribution that a Third Party or an Eligible Resident shall have agreed to make towards the cost of provision of the Services (including the cost of Accommodation) for a Resident under a Third Party Agreement.</p>
<p>“Trial Period”</p>	<p>means the period eight weeks from the commencement of the provision of Accommodation to that Resident by the Provider.</p>
<p>"Unjustified Refusals"</p>	<p>means a refusal by the Provider to accept a referral made in accordance with the Contract for some reason other than that there is no vacancy at the Home; or in the reasonable opinion of the Provider either the Resident's assessed needs cannot be met at the proposed Home or the Resident is otherwise unsuitable to be accommodated at the Home.</p>
<p>“Whistleblowing Procedure”</p>	<p>means a procedure to enable the confidential</p>

	raising of concerns about misconduct within an organisation or within an independent structure associated with it.
“Working Day”	means Monday – Thursday between the hours of 9am and 5pm and Friday between 9am and 4.30pm excluding Bank Holidays.
“Year”	means any period 1 April to 31 March

## 2 INTERPRETATION

2.1 The interpretation and construction of this Contract shall be subject to the following provisions:

- (a) words importing the singular meaning include where the context so admits the plural meaning and vice versa;
- (b) words importing the masculine include the feminine and the neuter;
- (c) reference to a clause is a reference to the whole of that clause unless stated otherwise;
- (d) reference to any statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended by any subsequent enactment, modification, order, regulation or instrument as subsequently amended or re-enacted;
- (e) reference to any person shall include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assigns or transferees;
- (f) the words “include”, “includes” and “including” are to be construed as if they were immediately followed by the words “without limitation”; and
- (g) headings are included in the Contract for ease of reference only and shall not affect the interpretation or construction of the Contract.

## 5. CONTRACT PRICE & PAYMENT

### Overall Payment Obligation

5.1 In consideration of the proper performance of the Services (including the provision of the Accommodation) by the Provider in accordance with the terms and conditions of this Contract, the Purchaser shall

5.1.1 pay to the Provider the Purchaser Contribution in accordance with clauses 5.6 to 5.10 inclusive

5.1.2 ~~(subject to clauses 5.15.to 5.19 inclusive) pay to the Provider a sum equivalent to the Resident's Contribution in the circumstances set out in clauses 5.15 to 5.19 inclusive below~~

5.1.3 ~~(subject to clauses 5.15.to 5.19 inclusive) pay to the Provider a sum equivalent to the Third Party Contribution in the circumstances set out in clauses 5.15 to 5.19 inclusive below;~~ and

5.1.4 (as agent for the Relevant Nursing Care Purchaser) payment of the Nursing Care Price and any Contenance Payment in accordance with clause 5.20 below

in each case in respect of any Individual Placement which is in force at the time.

5.2 Where the Purchaser places a Resident with the Provider at a Provider's Price in excess of the Expected Cost in circumstances where, in accordance with the Choice Directions, no Third Party or Eligible Resident can be required to make a Third Party Contribution the Purchaser shall be responsible for

5.2.1 payment to the Provider of the Purchaser's Price less the Resident Contribution in accordance with clauses 5.6 to 5.10 inclusive

5.2.2 ~~(subject to clauses 5.15.to 5.19 inclusive) payment to the Provider of a sum equivalent to the Resident Contribution in the circumstances set out in clauses 5.13 to 5.17 inclusive below;~~ and

5.2.3 (as agent for the Relevant Nursing Care Purchaser) payment of the Nursing Care Price and any Contenance Payment in accordance with clause 5.~~18-20~~ below

5.3 The Expected Cost for each Year or part of a Year covered by this Contract is as specified in the Price Schedule and shall not be varied up or down during the Contract Period save for any variation agreed pursuant to any extension thereof in accordance with clause 3.2.

- 5.4 The Provider's Price shall automatically increase each Year in line with the Purchaser's Usual Costs on the second Monday of April. The Provider shall not be entitled to any other increase in the Provider's Price during the life of the Agreement. For the avoidance of doubt, this means that Third Party Contributions shall be fixed for the duration of the Agreement. The Council commits to review these Usual Costs if there is a material change in government policy that may affect the calculations on which the Usual Costs are based.
- 5.5 The Provider shall not be entitled to any payment in respect of the provision of the Services (including the Accommodation) in excess of the payments specified in clauses 5.1 and 5.2 and the Purchaser, the Resident and any Third Party or Eligible Resident shall not be required to make any payment in excess of the Purchaser Contribution, the Resident Contribution and the Third Party Contribution respectively.

#### **Payments under clauses 5.1.1 and 5.2.1**

- 5.6 Payments by the Purchaser under clauses 5.1.1 or clause 5.2.1 will be made automatically by the Purchaser two weeks in advance and two weeks in arrears and the Provider shall not be required to submit an invoice. The first such payment after the Commencement Date will be made on the basis of the Individual Placements in force on the Commencement Date.
- 5.7 For the avoidance of doubt payment at two weeks in advance and two weeks in arrears means that Providers will receive payment for Services in the middle of any four week period for Services delivered in that four weekly period.
- 5.8 At the time of each payment a detailed remittance advice note (two copies) will be sent to the Provider. One copy of the remittance advice note shall be retained by the Provider and one copy shall be returned to the Adult Social Care Finance Team within 7 days signed and duly annotated by the Provider with any changes (including the date on which any such changes took effect) relating to the circumstances and Accommodation of any Resident which may affect the financial provisions of this Contract including the amount payable by the Purchaser under this Contract. Failure to return the remittance advice note within the required timescale may result in a delay in the next payment due. In the event of any overpayment arising as a result of delay in the return of remittance advices or the provision of inaccurate information therein, the Purchaser shall be entitled to deduct the full amount of such overpayment from the next payment under clause 5.1.1 or clause 5.2.1.
- 5.9 It shall be the responsibility of the Provider to notify the Authorised Officer in writing of any changes to the Provider's nominated bank account.
- 5.10 Changes to the Purchaser Contribution or any amount payable by the Purchaser under clause 5.2.1 caused by any change in the Resident Contribution or any other variation pursuant to this Contract shall be effected

automatically by the Purchaser as from the date of the finalisation of the assessment of the Resident Contribution or finalisation of the effect on the Purchaser Contribution or amount payable by the Purchaser under clause 5.2.1 of any other variation giving rise to the change. The Provider agrees that no additional act on the part of the Purchaser shall be necessary to make such a change a binding variation to this Contract taking effect on the date on which the change in the Purchaser Contribution or amount payable by the Purchaser under clause 5.2.1 was effected by the Purchaser.

### **Resident Contribution**

5.11 The amount of the Resident Contribution applicable at the commencement of any Individual Placement shall be the amount specified in the Individual Purchase Order and the Purchaser shall notify the Provider in writing within 7 Working Days of any change to the Resident Contribution together with the date on which it took effect. From the date specified in the said notice the Resident Contribution to be collected pursuant to this clause 5 shall be the amount specified in the said notice.

### **Third Party Contribution**

5.12 Where a referral or placement is made on the basis that a Third Party Contribution is payable, such Third Party Contribution shall not exceed the difference between the Expected Cost and the Provider's Price and shall be the subject of an agreement between the Purchaser, the Provider and the Third Party or Eligible Resident concerned. A copy of the agreement shall be provided to the Provider in the form attached at Schedule 9.

5.13 The Provider shall not seek or accept any payment towards the cost of the Services from any Third Party and the Provider acknowledges that the only contribution that shall be made towards the cost of the Services shall be other than a Third Party Contribution where secured by a formal Third Party Agreement has been made between the Third Party, the Purchaser and the Provider in accordance with Clause 5.12. Charges made outside the terms of this Clause 5.13 shall be viewed as a Performance Default and without prejudice to the Purchaser's other rights under this Agreement:-

5.13.1 the Provider shall be required to repay any monies to the Third Party immediately; and

5.13.2 the Provider shall not be in compliance with the Purchaser's terms and conditions, the provisions of the Choice Directions will not be complied with and the Purchaser will be under no obligation to place the Resident in the Purchaser's accommodation notwithstanding that it may be the Resident's Preferred Accommodation.

5.14 The Provider shall notify the Authorised Officer immediately if the Provider has any reason to believe that the effect of collecting any Eligible Resident paying or continuing to pay a Third Party Contribution from an Eligible

~~Resident~~ would be to cause that Eligible Resident to make such payment out of any resources other than Eligible Resources.

### Collection by the Provider of Resident Contribution and Third Party Contribution

5.15 The ~~Purchaser and the~~ Provider hereby agrees that it shall ~~be the responsibility of the Provider to~~ for and on behalf of the Purchaser take steps to collect

5.15.1 the amount of the Resident Contribution ~~direct~~ from the Resident or his/her representative as notified by the Purchaser; and

5.15.2 the Third Party Contribution ~~direct~~ from the Third Party or Eligible Resident as the case may be

in each case in accordance with and subject to the provisions of clauses 5.16 to 5.18 inclusive and so that the Resident Contribution or a Third Party Contribution from an Eligible Resident shall not be collected in advance of the Resident receiving their benefits payment. In fulfilling its role as collection agent for and on behalf of the Purchaser under this paragraph 5.15 the Provider shall take the steps set out in clause 5.16. The Provider shall be entitled to retain any sums collected by the Provider pursuant to this clause 5.15

5.16 If ~~the Resident or their representative or a Third Party or Eligible Resident is unable, refuses, or otherwise fails to pay~~ the whole or any part of the Resident Contribution or the Third Party Contribution remains uncollected ~~the Provider shall send a reminder one month after any unpaid contribution~~ it became due to the Purchaser, the Provider shall request payment in writing and shall thereafter ~~pursue the unpaid contribution~~ follow up with reminders in writing at not less than fortnightly intervals.

5.17 If any Resident Contribution or Third Party Contribution remains unpaid uncollected in whole or in part for a period of 60 days after it became due to the Purchaser, the Provider shall forthwith notify the Authorised Officer in writing of the amount outstanding uncollected and the steps taken to collect it and provide copies of any reminders sent in compliance with clause 5.16. ~~If the The~~ Provider ~~fails to~~ shall serve such notice on the Purchaser within 7 days of the expiry of the 60 day period, ~~the Provider shall only be entitled to back payment limited to a period of 60 days irrespective of the period the Resident Contribution or Third Party Contribution has been outstanding.~~

5.18 Subject to clause 5.18A and 5.19 ~~and compliance by the Provider with clause 5.17~~ the Purchaser shall pay to the Provider in fulfilment of its obligations under clauses 5.1.2, 5.1.3 and 5.2.2 the amounts of the Resident Contribution or Third Party Contribution outstanding uncollected at the date of the notification from the Provider under clause 5.17. If, following payment under this clause by the Purchaser of amounts outstanding uncollected, the Provider

subsequently ~~recovers~~ receives any of the ~~unpaid~~ uncollected Resident Contribution or Third Party Contribution from the Resident or the Third Party or their representatives, then to the extent that the amounts subsequently ~~recovered~~ received taken with the payments made by the Purchaser exceed the Provider's entitlement to payment under this Agreement it shall immediately pay the excess without deduction or set off to the Purchaser.

5.18A If the Provider fails to serve notice on the Purchaser under clause 5.17 within the 7 day period specified therein, the Purchaser shall be entitled to deduct from the payment made to the Provider under clause 5.18 any uncollected amounts that arose after the date on which the Provider should have served notice on the Purchaser under clause 5.18.

5.19 The Purchaser shall be entitled to terminate an Individual Placement forthwith in writing upon receipt of notification from the Provider under clause 5.17 of any Third Party Contribution remaining ~~unpaid~~ uncollected in whole or in part for a period of 60 days or if the effect of collecting any Third Party Contribution from an Eligible Resident would be to cause that Eligible Resident to make such payment out of any resources other than Eligible Resources. Notwithstanding termination by the Purchaser of an Individual Placement under this clause 5.19 the Purchaser and Provider shall remain liable to fulfill their obligations under clause 5.18 in respect of outstanding Resident Contributions and Third Party Contributions payable in respect of Services provided prior to termination

### **Nursing Care Price**

5.20 The Purchaser shall at the same time as making payment under clauses 5.1.1 or 5.2.1 pay to the Provider the amount of the Nursing Care Price and any amounts by way of Contenance Payments payable in respect of the period to which the payment under clause 5.1.1 or 5.2.1 relates.

### **Extras**

5.21 The Provider may charge the Resident for any facility not included in the Services such as the provision of hairdressing, dry cleaning services or outings ("Extras") provided that these have been agreed with the Resident. The Provision of Extras shall be charged by the Provider to the Resident at the actual additional cost to the Provider of arranging the provision of, or directly providing Extras to the Resident's cost.

5.22 Where a Resident is required to attend hospital or the General Practitioner in an emergency it is expected that the Provider will ensure that they are accompanied.

5.23 For planned appointments, the Provider shall arrange for appropriate NHS Transport to transport the Resident to and from appointments. If NHS

Transport is unavailable or there is no escort available then the Provider may request that a friend/relative accompanies the Resident. If there is no appropriate escort and the Provider is required to escort a resident to a planned appointment then the Provider may charge the resident.

- 5.24 The Provider shall clearly display these charges within the home and shall include this information in any literature presented to prospective residents prior to admission.
- 5.25 The Resident shall be liable for any charge made for Extras and the Provider shall be responsible for recovering any charges direct from the Resident. The Purchaser shall have no liability for payment or recovery of such charges.
- 5.26 The Resident shall not be charged for anything provided to meet an assessed care need. The provision of continence aids to Residents assessed as needing them shall not under any circumstances whatsoever constitute an Extra.
- 5.27 The provider shall provide day time activities for Residents where these form part of the Resident's Personal Plan. The Resident will not be charged additionally for such day activities provided. Whether or not such activity is included within the Resident's Personal Plan the Provider shall not be entitled to charge Purchaser in respect of the attendance by the Resident at any day services funded by the Purchaser.

#### **Right to set-off**

- 5.28 The Purchaser reserves its right to set-off against its indebtedness to the Provider any money owed to it by the Provider under this Contract.

#### **Interest on Late Payments**

- 5.29 Where any payment or sum of money due from the Provider to the Purchaser or from the Purchaser to the Provider under any provision of this Contract is not paid within 28 days of the date of request for payment it shall bear interest thereon at 4% above Bank of England Base Rate from the due date until actual payment and the Parties hereby agree that such interest amounts to a substantial contractual remedy for late payment for the purposes of the Late Payment of Commercial Debts (Interest) Act 1998.

#### **Payment in case of absence**

- 5.30 In the case of absence from the care of the Provider as set out in section 10 of the Service Specification and until the Resident returns or the Individual Placement is terminated:
- 5.30.1 In the case of Hospitalisation the full amount of payments under clauses 5.1.1 and 5.2.1 shall remain payable for the first 42 days with the Resident and any Third Party or Eligible Resident continuing to be

responsible to pay their full contribution. Thereafter the payments under clauses 5.1.1 and 5.2.1 and any Third Party Contribution will be adjusted to 80% of their former level. At this time the Resident Contribution will be reassessed and notification will be made to the Provider. These adjustments will last for the period of Hospitalisation.

5.30.2 In the case of other absences in excess of 21 days the payments under clauses 5.1.1 and 5.2.1 shall be payable for the first 21 days only and the Resident and any Third Party or Eligible Resident shall continue to be responsible to pay their contribution during that period but not otherwise.

## **VAT**

- 5.31 The Purchaser's payments under clauses 5.1.1 and 5.2.1 and the Nursing Care Price shall be exclusive of VAT and other duties or taxes.
- 5.32 Any VAT payable in respect of the payments referred to in clause 5.31 shall be payable in addition by the Purchaser to the Provider.

## SCHEDULE 9 – THIRD PARTY AGREEMENT

### AGREEMENT FOR THIRD PARTY CONTRIBUTION

THIS AGREEMENT is made on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

BETWEEN:-

1. Lincolnshire County Council of County Offices, Newland, Lincoln, LN1 1BA ('the Council') and
2. \_\_\_\_\_ of \_\_\_\_\_ ('the Third Party')
3. \_\_\_\_\_ of \_\_\_\_\_ (The Provider)

WHEREAS:-

- a) The Council and the Provider' have entered into a contract for the Provider to provide accommodation and services to people who the Council has assessed as requiring long or short term personal care (including where the person has also been assessed as requiring nursing care ('the Framework Agreement')).
- b) \_\_\_\_\_ ('the Resident') has selected room no \_\_\_\_\_ in \_\_\_\_\_ ('the Accommodation') as their preferred accommodation.
- c) The cost of the Accommodation is £ \_\_\_\_\_. The amount specified in the Residents personal budget is £ \_\_\_\_\_.
- d) The Third Party agrees to pay to the Council the sum of £ \_\_\_\_\_ in respect of the difference between the cost of the Accommodation and the amount specified in the Residents personal budget in the manner set out in this Agreement.

IT IS AGREED:-

1. In consideration of the Council agreeing to place the Resident in the Accommodation, the Third Party undertakes to the Council to pay to the Council each week the sum of £ \_\_\_\_\_ with effect from \_\_\_\_\_ until \_\_\_\_\_ in accordance with this Agreement in respect of any and all periods during which the Resident is placed in the Accommodation.
2. The Third Party hereby acknowledges and agrees that:-
  - 2.1 The amount of the Third Party's payment is fixed for the duration of the ~~contract~~ Framework Agreement unless there is a material change to the ~~Contract~~ Framework Agreement. The Council will write to the Third Party to

inform them of any change to the amount they have to pay. The amount payable by the Third Party from time to time is known as "the Payment"; and

- 2.2 The Payment shall be payable by the Third Party at all times that and to the extent that the Purchaser Contribution is payable under the Framework Agreement including periods of hospitalisation or other periods during which the Resident is temporarily absent from the Home
- 2.3 In the event that the cost of the Accommodation increases the Council shall not be obliged to increase the amount specified in the personal budget by the same or any amount. In such circumstances the Council may increase the amount of the Payment by any amount not exceeding the difference between the cost of the accommodation and the amount specified in the Residents personal budget.

3. The Third Party's contractual payment obligation under this Agreement is to make the Payment to the Council and nothing in this Agreement creates or shall be construed so as to create any contractual obligation on the part of the Third Party to make the Payment to the Provider.

3.4. The Third Party acknowledges that the Council has appointed the Provider as its agent to collect the Payment from the Third Party and the Third Party agrees pay the Payment to the Provider as the Council's agent. The Council acknowledges and agrees that payment of the Payment to the Provider is good discharge of the Third Party's payment obligation to the Council under this Agreement shall make payment to the Provider. If any payment is not made such that the Council is liable to the Provider for the payment of such amount then the The Council shall be entitled to recover the any amount of that the Payment which remains unpaid after its due date from the Third Party as a debt.

4.5. The Council will be entitled to terminate the Individual Placement under which the Resident is placed in the Accommodation under the Framework Agreement and move the Resident from the Accommodation if:-

- 4.1 the Third Party fails to make any payment; or
- 4.2 the Third Party terminates this Agreement under clause ~~78~~; or
- 4.3 the Third Party is a Resident who is able to make payments toward their care and Payment would require the Third Party to make payment from resources which cannot be used to make such payments.

5.6. The Council reserves the right:-

- 5.1 to terminate the Contract or any Individual Placement under which the Resident is placed in the Accommodation in any circumstances in which the Council is entitled to do so under the Framework Agreement or the Individual Placement;

5.2 to move the Resident from the Accommodation if the Accommodation is no longer capable of meeting his/her assessed needs.

~~6-7.~~ If the Individual Placement is terminated for any reason this Agreement will automatically terminate and the Council will be entitled to move the Resident from the Accommodation.

~~7-8.~~ The Third Party shall be entitled to terminate this Agreement by giving to the Council not less than 28 days written notice for any reason including changes in the Third Party's financial circumstances or objection to any change in the amount of the Payment.

~~8-9.~~ The Third Party acknowledges that:-

~~89.1~~ an increase in the Resident's income will not necessarily lessen the need for the Third Party to contribute; and

~~89.2~~ a rise in the cost of the Accommodation will not automatically be shared equally between the Council and the Third Party.

~~9-10.~~ This Agreement shall be reviewed not less than annually and shall be reviewed in response to changes in circumstances of the Resident or the financial circumstances of the Third Party.

~~10-11.~~ The Third Party shall inform the Council of any change in his or her financial circumstances.

SIGNED ON BEHALF THE COUNCIL:

Name: ..... Date: .....

Print:..... Designation:.....

SIGNED ON BEHALF OF THE THIRD PARTY:-

Name: ..... Date: .....

Print:..... Designation:.....

SIGNED ON BEHALF OF THE PROVIDER:-

Name: ..... Date: .....

Print:..... Designation:.....

Cc Copies to Third Party, The Provider & Adult Social Care, Contracts