

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

Report to:	<b>Executive Councillor for Adult Care, Health and Children's Services.</b>
Date:	<b>22 February 2018</b>
Subject:	<b>Residential and Nursing Care Fee Levels within Adult Social Care</b>
Decision Reference:	<b>I015038</b>
Key decision?	<b>Yes</b>

**Summary:**

On 27 February 2015 the Executive Councillor approved the setting of a number of usual costs for residential accommodation for the three year period to 6 April 2018.

This previous exercise, carried out in 2014/15, failed to provide sufficient clarity on the cost of Learning Disability (LD) placements and therefore the Usual Cost had to be based upon the baseline costs for Adult Frailty and Long Term Conditions. This stemmed from a lack of response from Lincolnshire LD residential providers when engaged by LaingBuisson to the point it was not possible to establish a sound basis to develop a specific LD rate. A separate programme of activity has been carried out to specifically address the LD provider market and to ensure sufficient engagement on costs. This exercise has been successful and has led to the creation of a proposed new cost model as well as a distinct set of Usual Costs for LD services.

In this context this report makes a recommendation which will set a Usual Cost for 3 levels of service: residential, nursing and high dependency across all types of need (older people, physical disability, learning disability and mental health). It is also proposed that a rate is set for each of the three 3 financial years 2018/19, 2019/20 and 2020/21.

It is important to bear in mind that the Council must ensure two things. The first is due process the second is the reasonableness and logic underpinning the Usual Cost. The detail in the report should reassure the Executive Councillor that the process employed has been progressed having full regard to what is considered best practice. The report details what that process was, who was involved and the full details of consultation responses alongside views given by officers of the Council to address and respond to these.

In informing a Usual Cost, a model has been constructed which draws on both national and local (to Lincolnshire) data which provides a sophisticated approach to understanding costs to providers.

The recommendation in this report is that a Usual Cost should be set for each of the next 3 years incorporating an inflationary allowance in each year which anticipates the likely effect of changes to providers costs such as minimum wages or food prices. In part this is to help ensure the level of risk to the residential market is reduced by providing assurance about future income from the largest single purchaser of such care in Lincolnshire (the Council). At the moment residential providers can expect almost half of their beds to be filled by Council funded residents. Such an approach also allows the Council to understand cost pressures over a 3 year cycle and to budget accordingly.

Market conditions have changed considerably since the last Usual Cost exercise in 2015 and as such there are important changes proposed to the cost models and contracts which must be properly considered. This is most apparent with regard to LD residential services due to local growth in demand for high complexity placements linked to the National Transforming Care agenda and decreasing available capacity of high complexity care at, or close to, usual cost. Further to this there is increasing complexity of needs of existing services users, growing transitions from Children's Services but also with service users with Learning Disability living for longer often with multiple long term conditions.

**Recommendation(s):**

That the Executive Councillor

1. Approves the rates set out in the tables at paragraph 3.15 of the Report as the Council's Usual Costs for both new and existing Learning Disability service users in respect of residential and nursing care with effect from 2 April 2018 for the years 2018/19, 2019/20 and 2020/21
2. Approves the rates set out in the first table at paragraph 4.10 of the Report as the Council's Usual Costs for both new and existing Older People service users in respect of residential, nursing and high dependency care with effect from 2 April 2018 for the years 2018/19, 2019/20 and 2020/21
3. Approves the rates set out in the table at paragraph 4.13 of the Report as the Council's Usual Costs for both new and existing Physical Disability service users with effect from 2 April 2018 for the years 2018/19, 2019/20 and 2020/21
4. Approves the rates set out in the table at paragraph 5.3 of the Report as the Council's Usual Costs for both new and existing Mental Health service users in respect of residential and nursing care with effect from 2 April 2018 for the years 2018/19, 2019/20 and 2020/21
5. Notes the proposed contractual updates set out in section 6 of the Report.

**Alternatives Considered:**

1. Continuing with the existing cost model for LD services. This would not allow the Council sufficient assurance that existing service provision will continue without potential disruption for the next three year cycle or allow the Council to move forward in developing new initiatives for LD services.
2. The Council has also given consideration that no increases in Usual Costs are applied in April 2018 and that usual costs remain at their current level. This option would cost the council £16.3 million less than the recommended options over three years and would allow the authority to reinvest this funding in alternative services. However, failure to increase usual costs would result in a failure of the organisation to recognise its obligations under the Care Act which, primarily relate to the obligation to ensure a supply of service to meet eligible need, to facilitate market shaping and to promote quality services including through workforce development and remuneration and ensuring appropriately resourced care and support. It would greatly increase the risk of providers going out of business, a fall in the overall quality of care in the county and increase the risk of a potential judicial review challenge by the market.
3. Increasing the Usual Costs by more than is set out in the Report. Some of the feedback called for this and suggested that rates be established by reference to the 'national' LaingBuisson model or by taking an average of the rates among the Council and its neighbouring authorities. However, those methodologies are not consistent with the establishment of Usual Costs based on the actual costs of care for Lincolnshire. The Council has taken steps to establish costs within Lincolnshire, has engaged with and consulted the market on its model and believes that the proposed Usual Costs accord with the cost of providing care within Lincolnshire. The feedback from providers also suggested that the hours of care being expended to meet the requirements of the Council's contract are higher than those used by the Council in establishing the rates. The Council has carefully considered this but is mindful that it has not changed the nature of its contractual requirements. It is strongly arguable in those circumstances that there should not need to be an increase in the hours provided. However, the Council has accepted that some increase is appropriate and has determined a reasonable increase of 2.5 hours for Standard Residential placements to 21.5 hours per person per week (PPPW) and 2.3 hours for nursing placements to 24 hours PPPW on the basis of the information provided in the Kingsbury Hill Fox report. The number of hours provided for HD placements remains the same at 24 PPPW.

**Reasons for Recommendation:**

Adopting the recommendation will cover providers' costs and see an increase in the rates paid whilst taking into account many of the points raised by providers in the consultation. It will provide assurance that the Council will be able to continue to meet its statutory obligation to meet assessed eligible need to

vulnerable service users and will help facilitate the provision of care that meets the necessary CQC standards. The market for Adult Care services continues to face significant challenges in meeting both rising demand and complexity and without proper recognition of the real costs of delivering care as well as consideration of the escalating challenges within the Health and Social Care system the Council would be at risk of facing severe disruption to critically important services.

## **1. Background**

1.1. Residential and Nursing services represent one of the Council's highest spend and highest risk areas with an annual total of approx. £114m spent. As such any change to the rates paid for services will have a material impact on the effectiveness for services both in the short term and for the future. Another critically important factor in carrying out this work is ensuring there is sufficient regard that the process in reaching such decision is correct.

1.2. The ultimate aim is to establish a new set of contracts for Residential services that is both affordable to the Council, meets the Council's legal duties, and sets a 'fair' rate to the market along with the necessary changes and improvements that will allow for successful operation of services over the next contract duration.

1.3. In order to reach this point a number of key activities have been undertaken by officers of the Council

- (a) Completion of a dedicated cost assessment exercise to engage with Learning Disability providers due to the lack of sufficient responses in the previous Usual Cost review.
- (b) Commissioning and completing an independent review of the Residential market in Lincolnshire resulting in a set of reports to be issued to the Council for its consideration.
- (c) Analysis of these reports to inform the decision making process for establishing what the new Usual Costs may be.
- (d) Consideration of any changes identified as necessary or beneficial to the current Usual Cost model.
- (e) To review and propose any changes to contract that is necessary or an improvement.
- (f) Consideration of possibility the Adult Frailty and Long Term Conditions residential market may have geographic variances in

cost and demand which may in turn necessitate different usual costs within Lincolnshire.

- (g) Developing a new LD cost model that offers sufficient transparency and control of the cost of service complexity.
- (h) Development of a proposal for the new Usual Costs for each service based upon the analysis undertaken and the required changes to manage emerging market conditions.
- (i) Engagement with the market throughout the process but specifically to share the proposed model, receive feedback and take this into consideration as is necessary.

1.4. The work undertaken has addressed the following services separately and distinctly

- Older People (Residential, Nursing, High Dependency)
- Learning Disabilities (Residential & Nursing) –
- Physical Disabilities (Residential & Nursing)
- Mental Health (18 to 65) (Residential & Nursing)

1.5. The work undertaken via the market review phase has produced three reports, one for Care Home Costs relating to Older Persons, Physical Disabilities and Mental Health, a summary report on LD Care Home costs based on information gathered by the Council in conjunction with providers and a wider review of the residential market within Lincolnshire. Each of these reports has been considered and analysed to help produce a set of Usual Costs that share many fundamental similarities but will also be distinct for each service.

1.6. The review and changes to any contract terms of the Residential Framework agreement have been taken as a whole and applicable to all service streams.

1.7. There are no fundamental changes to the Specification or Contract which would result in a change of service or a restriction of service user choice. In fact it is anticipated that through the changes to the contract the provision for Residential Care in Lincolnshire will improve and will also be in a stronger position to manage challenges in the future.

1.8. The proposed set of Usual Costs have been shared with the market via a series of engagement events and also made available via a web portal on the Council's website. This engagement activity has included LinCA, to inform them of the proposed changes. This has allowed for feedback from providers which has then been taken into consideration for the purposes of the Council in

making its final determination of Usual Costs. Comments from the market have been recorded, considered and can be found in Appendix E

## 2. THE COUNCIL'S USUAL COST MODEL PROCESS

2.1. The Council last set Usual Costs in March 2015 for a period of three years from 2015/16 to 2017/18. The Usual Costs per resident per week for new placements during this period are set out in Table A below. It should be noted that since the rates were set in March 2015 there have been in year increases due to increases to the National Living Wage. Table A represents these uplifted rates:

**TABLE A**

<b>Category of Care</b>	<b>2015/16</b>	<b>2016/17 Rate</b>	<b>2017/18 Rate</b>
Older People Standard Residential	£411	£432	£456
Older People Higher Dependency	£460	£480	£497
Older People Nursing	£450	£469	£485
Learning Disability	£481	£506	£534
Physical Disability	£530	£557	£588
Mental Health Standard	£428	£450	£475
Mental Health Nursing	£450	£469	£485

### **Fee Setting Methodology**

2.2. Laing and Buisson healthcare consultancy created an economic model in 2002, 'Calculating a Fair Price for Care: A Toolkit for Residential and Nursing Care Costs', for the Joseph Rowntree Foundation ("the JRF toolkit") based on the operating costs of efficient care homes for older people in England. The JRF toolkit identified 4 main components of care home costs; (i) staffing; (ii) repairs and maintenance; (iii) other non-staffing current costs and (iv) capital costs.

2.3. The Council, whilst using data gathered by Kingsbury Hill Fox on its behalf has not used the Laing and Buisson model for reasons that are set out later. The Laing and Buisson model uses a 12% return on capital set by reference to the opportunity costs of not utilising the capital in other ways measured by what Laing and Buisson considered at the time could have reasonably been expected by selling out. The JRF toolkit suggests that "an adequate return on capital is the key to achieving a stable independent sector of sufficient size and appropriate quality to meet the commissioning needs of councils and their NHS partners. On the assumption that new and/or replacement care home capacity is required councils throughout the country need to set fee rates such as to (a) incentivise existing operators to continue to offer services and to upgrade the physical assets where they are below NMS for newly registered homes; (b) attract investment in new care home capacity to meet increasing underlying demand driven by the ageing population; and (c) compete with private payers

and residents funded by other public sector agencies for available home care places.”

2.4. Within Lincolnshire it is not right to assume that new/and or replacement home capacity is required now or in the foreseeable future. Indeed it is well documented that demand and supply can be well balanced and sustainable using occupancy rate of 90 percent as a benchmark. With supply of "all beds" in Lincolnshire quoted at 90% in the report, the essential tenet underpinning the JRF toolkit does not apply in Lincolnshire as no new or replacement care capacity is necessarily required.

2.5. The JRF toolkit was updated in 2004 and in 2008. The foreword to the 2008 edition states that it “allows its users to vary the data entered according to local circumstances and conditions, and is simply intended to inform negotiation from a transparent basis”. It made provision for local rather than national baseline costs and fees because pay rates and land prices, the two main determinants of care home costs vary significantly according to locality.

### **Engagement of Kingsbury Hill Fox to collect and analyse Lincolnshire Data**

2.6. To assist with the engagement of residential and nursing care providers for the purposes of collecting Lincolnshire specific data, the Council has worked with local market and the Lincolnshire Care Association, which represents some of the providers, to ensure a better shared understanding of costs, cost pressures, opportunities and market conditions within the market. In addition to the broader market engagement the Council also commissioned Kingsbury Hill Fox Ltd to undertake an independent assessment of the residential care market. This took the form of an assessment of revenue costs of care home places for older people and young disabled adults in Lincolnshire, based in large part on responses to a survey sent to all care homes in Lincolnshire. 216 homes were surveyed with a 48% return. The instruction to Kingsbury Hill Fox was to appraise residential costs and market conditions, with the following specific areas of focus:

- Overall appraisal of Residential Care Market showing a profile of providers, by number, type, scale, bed capacity and use, costs and charges. This should include cost pressures on providers as a result of market conditions, legislation, inspection and registration requirements.
- Separate and distinct analysis was requested for all service user groups including
  - (a) Older People (Residential, Nursing, High Dependency)
  - (b) Physical Disabilities (Residential & Nursing)
  - (c) Mental Health 18 to 65 (Residential & Nursing)

- Trends in Residential Care provision and demand such as growth or contraction.
- Benchmarking local provision with regional and national provision as well as costs and funding levels.

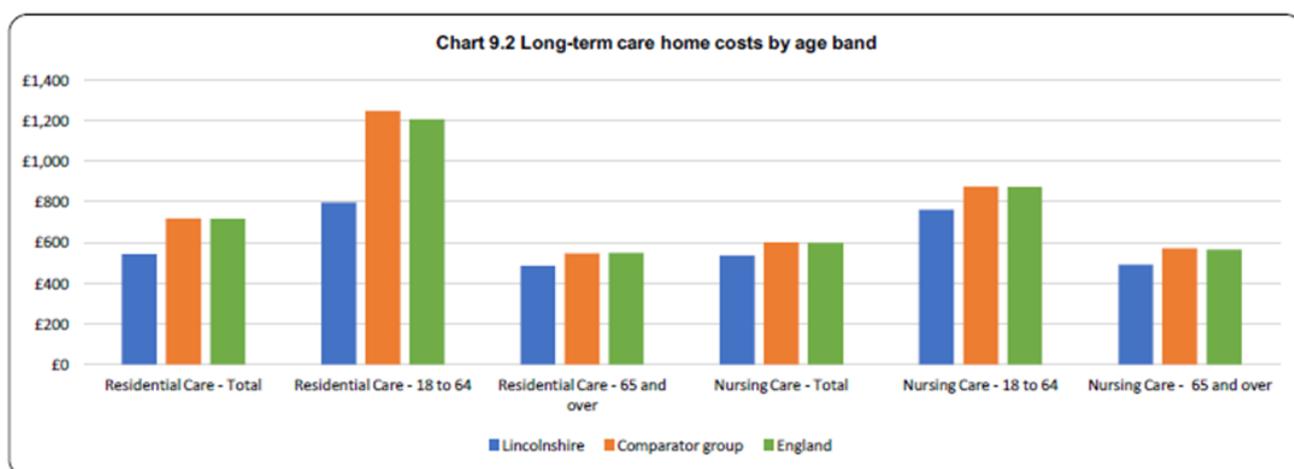
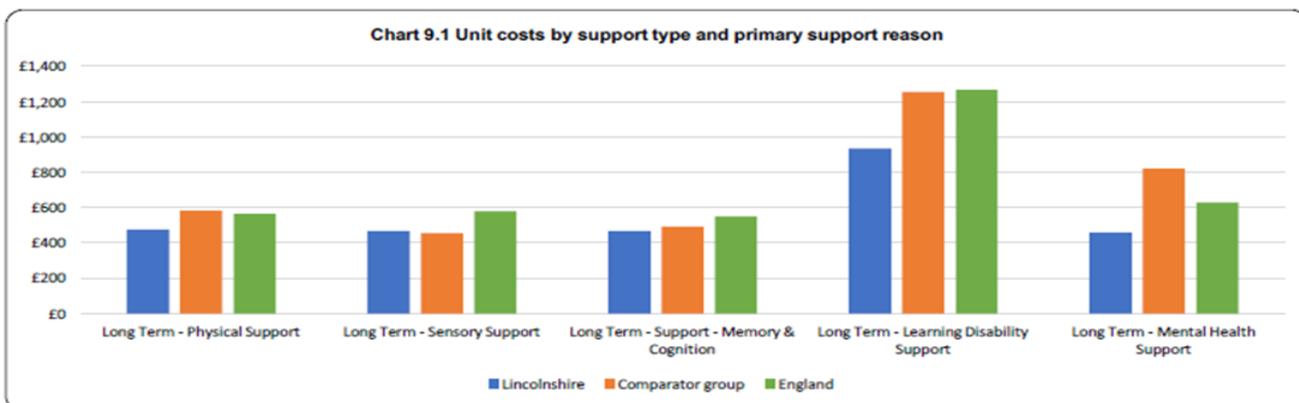
2.7. It should be noted that due to the previous exercise carried out by LaingBuisson in 2015 failing to receive sufficient returns for Learning Disability care homes a separate exercise has been undertaken by the Council to directly engage with its LD providers. Kingsbury Hill Fox Ltd were commissioned to analyse this data and produce a report.

2.8. Kingsbury Hill Fox Ltd. reports "Review of Residential Care Market in Lincolnshire" completed on the 25th September 2017, "Revenue Costs of Care Home Places for Learning Disabilities in Lincolnshire" completed on 3rd October, and "Report on Indicative Revenue Costs of Care Home Places in Lincolnshire" completed on 18th September 2017 are attached at Appendix A, Appendix B, and Appendix C. Highlights from the reports are as follows:

- For OP residential services occupancy rates are at 92% based on a snapshot in time compared to the industry standard 90% level of occupancy indicating that demand and supply are generally well balanced for a sustainable occupancy rate.
- However as part of this exercise KHF were asked to break their analysis down into the twelve economic zones of Lincolnshire which in turn showed differences based on geography as well as the relative capacity across Lincolnshire
- The analysis of the majority of Lincolnshire districts shows a surplus of supply of beds set against Age Standardised Demand. However there are notable exceptions to this with South Holland, South Kesteven and North Kesteven all showing a lower number of beds available than the expected levels for Age Standardised Demand.
- The Council funded approximately 48% (down from 50%) of placements based on a snapshot in time with 41% private self-funding residents up from 38%, 6.3% (down from 7.6%) funded by the NHS and the remainder funded by other local authorities.
- The majority of self-funding residents pay more than Local Authority residents.
- On average Lincolnshire care homes reported that they spend 21.4 care hours per resident per week on average (median). An increase of 0.6 hours compared to 2015.
- LD occupancy is found to be at almost 98% and full capacity however the KHF report acknowledged the role of supported living in capacity management and that with that taken into consideration there actually

may be a lower number of residential beds necessary in total in the future.

- LCC's rates are lower than its CIPFA family group and England in all areas.



2.9. The Kingsbury Hill Fox Ltd. report for Lincolnshire also collected costs data on staffing; repairs and maintenance and other non-staffing current costs. It did not collect data on capital costs. Using the information supplied by the homes the report provides minimum, median, mean and maximum costs figures.

2.10. Kingsbury Hill Fox were not asked to collect data on capital costs at the outset as the Council had not decided to adopt the JRF toolkit to determine the 2015/16 rates. Instead it carried out its own survey (see paragraph 2.12). The Council has to have regard to providers' actual costs, therefore the Council preferred instead to utilise its own cost model, developed for this exercise in 2012, used again in 2015 and updated to reflect the conditions in 2017.

2.11. Building on the existing cost model for the calculation of fair and sustainable residential and nursing care fees, the Council's Adult Care Finance Team have factored inflationary pressures, including key areas like the National Minimum Wage and Living Wage and food prices, in the development of the proposed rates for the period 2018 to 2021.

## **The Actual Cost Modelling Process**

- 2.12. The Council's cost model including the assumptions made for the recommended proposal are attached at Appendices F and G. This has been used to form a view on the actual costs of care in Lincolnshire using much of the information collected in the Kingsbury Hill Fox Lincolnshire Survey and using a separate property survey carried out by Lincolnshire County Council attached at Appendix H to help inform a suitable rate of return on capital based again upon Lincolnshire specific data.
- 2.13. In general terms regarding 3 of the 4 components of care home costs (i) staffing; (ii) repairs and maintenance and (iii) other non-staffing current costs, the Council populated its cost model at Appendix F with the Lincolnshire data collected by Kingsbury Hill Fox using median data for increased reliability.
- 2.14. It is necessary for the Council to settle on a figure (the Usual Cost) that takes into account Provider cost. Part of that cost relates to the Provider's use of assets (primarily property in this case) the 4th component of care home costs. Both the Laing and Buisson model and the Council's methodology use rate of return on capital to reflect this cost. That is a useful device because it allows a common approach to be taken with all providers and avoids the need for a hopelessly complex exercise trying to understand different capital funding structures for the assets used. Whilst adopting a rate of return on capital assists with the calculation of the Usual Cost, the Council is not required to ensure that the Provider achieves any or any given return on capital. The calculation of the use of assets cost element of the Usual Cost may begin with the rate of return but what matters is the figure which is derived from it. That figure needs to reasonably recognise the Provider's costs in making assets available but not over compensate the Provider.
- 2.15. In this case the main asset deployed is the building used to deliver the service. Therefore the number to feed into the calculation of Usual Cost will be the capital cost of a room in Lincolnshire (£46,000 (see paragraph 2.23) multiplied by the chosen rate of return. The chosen rate of return should provide for recoupment of investment over a reasonable period. Rate of return on capital is a generic term describing the return providers derive from capital assets invested in the business.
- 2.16. In establishing what cost should be attributed to the Provider's use of assets the rate of return used should reflect the relative risk of the investment. Risk relates to the likelihood that an investor will lose their investment in a business or venture and there is a direct link between the risk of the investment and the return that it will yield (e.g. Premium Bonds historically pay a low rate of return as the initial investment is guaranteed by the government as opposed to an investment in shares which are influenced by external market forces which may reduce the value of the initial investment). The following was taken into consideration;

- Published Market Indicators
- Average Return on Capital
- Proportion of beds currently funded by the local authority

2.17. Current market indicators as published by property advisors Knight Frank suggest that the rate of return for care homes is currently 6.3%. This compares to UK 10 year Interest Rate Swaps at 1.45% and 30 Year Interest Rate Swaps at 1.90% and current London Inter-Banking Offered Rates (LIBOR) at 0.79% over 12 months. Interest Rate Swaps and Libor represent low risk investments

2.18. As the Council buys a substantial amount of placements (48% based on the 2017 Kingsbury Hill Fox Lincolnshire survey) which it has the resources to pay for, this significantly reduces the risk to providers businesses and the beneficial impact of this should be reflected through a return which reflects a low/medium business risk for providers. Further evidence that the sector is not high risk is the lack of providers falling into financial distress (in the last year one provider has been placed into administration and another undertook a Company Voluntary Arrangement), with a good balance between Council and self-funded and with the predicted demand for care home places remaining buoyant.

2.19. In addition to the position on risk set out above, incorporating the rate of return of 12% as quoted in the JRF model into the costs model, risks building into the rate inefficiency as there is no incentive on providers to manage cost efficiently. It also incorporates pure profit, as distinct from cost which is what the Council is obliged to have regard to, into the model as the operating profit figure used in the calculation includes this. The return on capital should reflect all these factors making 6% an appropriate rate. This is consistent with some returns elsewhere should the providers choose to sell up and invest elsewhere in particular the 6.3% return on the Secondary Healthcare market.

2.20. Analysis was also conducted to establish the average value per bed of care homes within Lincolnshire. The JRF toolkit establishes a value of a bed based on the cost of building a new care home that meets basic specifications around size and building cost, with the cost of land also taken into account. The value is £59,000 per room per year. The model uses this information to help establish a “floor” (minimum) and “ceiling” (maximum) weekly rate which is influenced both by rate of return and on an assessment of how many homes meet specific physical and environmental standards for “new” homes as defined in the Department of Health publication Care Homes for Older People (DH, 2003).

2.21. The Lincolnshire County Council model does not seek to establish “floor” or “ceiling” rate but rather a single rate based upon the average room value within Lincolnshire, recognising that the majority of homes within Lincolnshire are based within buildings that were built prior to 2003 and are not purpose built. Consequently the approach more closely reflects local factors in Lincolnshire.

2.22. The analysis was prepared by conducting a survey of care homes currently for sale on the open market on a freehold basis as advertised in three web based property agents, taking the advertised valuation of the home and the quoted number of registered places to establish an average value per room. The survey was carried out on 14th September 2014 using the following property websites:

- Buyacarehome.com
- CareHome.co.uk
- DaltonsBusiness.com

2.23. The survey identified four care homes within Lincolnshire with the average value per room of £41,857, however it was decided that such a low number of homes did not constitute a statistically significant proportion of the total number of homes surveyed (39 in total). As such a decision was made to use the calculation based on the average of homes for sale on the open market within the whole of the East Midlands. The survey identified seventeen care homes in the East Midlands with the average value per room of £46,397 and it is this figure which has been used in the Lincolnshire Cost Model (rounded to £46,000).

2.24. The Council cannot provide any details of the homes for example whether they are nursing or residential, modernised or un-modernised or large and small.

2.25. Following concerns raised by the Lincolnshire Care Association, further research was carried out into the compliance levels of homes currently up for sale in the East Midlands. However due to the confidential nature of the information on the websites, it was not possible to confirm the identities of the homes and therefore we were unable to confirm the current levels of CQC compliance. From the Laing Buisson Survey we do know that there were 12 homes that deregistered between October 2012 and October 2014. Of those 12 homes, only 2 were non-compliant with CQC at the time of deregistration. Therefore it does not necessarily follow that providers leaving the market do so because they are failing to meet CQC requirements.

2.26. Multiplying the value of a room at £46,000 by the nominal 6% rate of return provides a payment of £58.82 per person per week. It is this figure that is important rather than the route by which it is arrived at and the figure needs to be tested against its projected financial effect to ensure that it continues to bear a reasonable relation to the cost of providing Council care.

2.27. In a 30 bed home it amounts to a payment to cover the cost of the accommodation of approximately £92,006 ( $£58.82 \times 30 \times 52.14$ ) per annum to the Provider. The money can be used to pay existing mortgages/business loans or where the cost of the capital asset has already been defrayed to reinvest in the business or elsewhere or to take out as profit.

- 2.28. This represents an annual payment per room of £3,067. Given the assumption above of the capital cost per room of £46,000 this means that the initial investment would be recouped over a 15 year period. This is a reasonable timescale for a long term business such as adult social care and accords with the findings of the 2012 Lincolnshire County Council survey which indicated that the average period in business up to the date of the survey was 17.3 years, and although it could be argued that this position will have changed as a result of changes to the market, with the number of leavers and new entrants to the market it is reasonable to assume that new entrants to the market do so with the intention of staying for a similarly considerable length of time.
- 2.29. As a consequence the County Council can be reasonably confident that the £58.82 is sufficient to compensate providers for making the accommodation available as it enables the provider to recover the capital cost of the asset within 15 years whilst thereafter retaining an asset with a useful residual life which can continue to generate returns for the provider.
- 2.30. The recommendation is that the Usual Cost should be set for 3 years 2018/19, 2019/20 and 2020/21. To achieve this work has been done to anticipate how providers' costs are likely to increase in those years as a result of inflationary increases based upon the predicted inflation targets as published by the Office of Budget Responsibility in their report entitled "Economic & fiscal Outlook" dated November 2017 and increases as a result of legislative changes to employers pension obligations and changes to National Living Wage. This equates to a 3.87% increase in 2019/20 for standard residential and 3.78% in 2020/21. For Nursing Homes this results in a 3.91% and 3.81% increase in 2019/20 and 2020/21 respectively. For HD this is 4.11% and 3.80%.
- 2.31. As a result of the work carried out to date and following feedback in the consultation the recommendation is that the rates set out in in the tables at paragraphs 3.15, 4.10, 4.13 and 5.3 are adopted as the Council's Usual Costs for both new and existing service users as of 2 April 2018. The cost of implementing this proposal over the 3 years is in the region of £16.6 million.

### **3. LEARNING DISABILITY SERVICES**

- 3.1. Prior to 2013-14 Learning Disability placements were commissioned directly via the Assessment and Care management teams. Whilst there was a notional Usual Cost in place to use as a benchmark in reality the majority of placements were procured above the usual cost based on the specific needs of service users. This approach did overall still provide Value for Money (VFM) when comparing the costs of care in Lincolnshire to other Local Authorities.
- 3.2. In 2013-14 improvements were made to the process of commissioning new Residential and Nursing Placements with these being secured through a process of mini-tender with the support of the commercial team. This process

has improved VFM further with evidence of cost avoidance. However there was acknowledgement at the point of implementing these changes that the usual costs in place were in need of review and needed to be more flexible to the complex needs of some service users. The majority of placements were not in line with the usual cost benchmark which re-confirmed the need for it to be reviewed.

- 3.3. Whilst efforts were made in 2014-15 to review the Usual Costs for Learning Disability placements as part of the LaingBuisson exercise unfortunately providers did not engage in the process and therefore it was not possible to establish a more robust usual cost mechanism for Learning Disability Placements. A result of not having a comprehensive cost model for the specific needs of LD care has been a consolidation of the market and the balance of power shifting to those Providers who offer high cost and high complexity care As a result the Council made a commitment to complete further work directly with Learning Disability providers and over the last year and a half lead commissioners and the commercial team have met with providers to gather information and intelligence from the market to inform the Usual Costs process and revised rates for 2018-19.
- 3.4. Over the last 18 months commissioners supported by the commercial team have identified a national and local growth in demand for high complexity placements linked to the National Transforming Care agenda and linked to this some increased difficulty in being able to source care regardless of the price commissioners are willing to pay. The complexity of needs of existing services users is also increasing with transitions from Children's Services but also with service users with Learning Disability living for longer often with multiple long term conditions. Added to this there are some providers who are experiencing difficulties in recruiting and retaining care professionals.
- 3.5. In order to ensure sufficient engagement and acknowledgement of provider cost data the Council set out to meet with its strategic providers of LD care based on the majority of spend and number of placements.
- 3.6. These top twelve providers represented 368 service users out of 565 and £17.3 out of £24.4m. All providers committed to completing the exercise however three providers did not ultimately make a submission in spite of continued prompting. This level of engagement was nevertheless much greater than the previous exercise.
- 3.7. Submission data quality and completeness varied from provider to provider and throughout the process the Commercial Team sought clarifications where necessary.
- 3.8. Some assumptions in interpreting the data were necessary given different Provider approaches to this exercise and their business models
- 3.9. The foremost objective has been the need to progress the Usual Cost model. Each provider was asked to review and complete a cost assessment form which allowed for businesses to set out the costs related to providing care.

The data requested was similar in scope to that which would have been asked by a third party such as LaingBuisson or Kingsbury Hill Fox Ltd.

- 3.10. Following this it was then possible to develop a new Usual Cost model proposal for LD services that takes into account the specific characteristics of LD care. A key difference to care provision for Adult Frailty and Long Term Conditions is the greater degree and variability of complexity in the needs of Service Users.
- 3.11. The resulting proposal is to establish three core categories of LD care based on the needs of the Service User and the size of the Provider organisation.

### Summary of Proposed LD Model

- 3.12. Currently placements to LD residential care are brokered on a case by case basis with the current Usual Cost being used as a default position. However due to the inherent complexity of LD Service Users a single price point is not feasible nor does it represent the majority of existing care packages
- 3.13. Consequently the majority of placements are made at a cost higher than the Council's Usual Cost and are determined primarily based upon the increased number of care hours a Service User may require based upon their needs. This model has allowed the Council to be able to make placements effectively and meet the needs of Service Users but is fundamentally not fit for purpose as it does not provide sufficient clarity and control of the costs of care. This has led to the current position wherein high cost placements are increasingly consolidated to a smaller proportion of providers and a restriction in the available short term options for high complexity LD care.
- 3.14. The proposed model seeks to reflect both the fundamental costs in delivering LD care within Lincolnshire but also to provide a mechanism in which to better address the varying degrees of complexity within LD.
- 3.15. Following extensive engagement with providers, and other Local Authorities the proposed model establishes three 'Bands' based upon the required ratio of care staff required for the Service User in question as well as the size of the Care Home as this factor also directly affects the costs of the overall care package.

	<b>Band 3</b>	<b>Band 2</b>	<b>Band 1</b>
<b>Staffing Ratio</b>	Very intensive , high levels of care, very complex needs by exception	Medium for substantial needs	Moderate for appreciable needs:
<b>Total Number of Hours</b>			
<b>1:7</b>			21
<b>1:5</b>		29	
<b>1:3</b>	45		

Unit Rates		Band 3	Band 2	Band 1
2018/19	<b>Standard</b> 13+ beds	£859	£686	£599
	<b>Smaller</b> 7-12 beds	£902	£729	£642
	<b>Smallest</b> 1-6 beds	£945	£773	£686

Unit Rates		Band 3	Band 2	Band 1
2019/20	<b>Standard</b> 13+ beds	£893	£711	£619
	<b>Smaller</b> 7-12 beds	£937	£755	£663
	<b>Smallest</b> 1-6 beds	£980	£799	£707

Unit Rates		Band 3	Band 2	Band 1
2020/21	<b>Standard</b> 13+ beds	£924	£733	£637
	<b>Smaller</b> 7-12 beds	£969	£778	£682
	<b>Smallest</b> 1-6 beds	£1,013	£823	£727

3.16. Each placement under the proposed model would be made in one of the three bands based upon the assessed needs of the Service User.

3.17. The size of the care home is also a factor in the specific Usual Cost as it is recognised smaller homes will have greater overheads in comparison to larger establishments with greater economies of scale.

3.18. Even with greater distinction on the relative levels of complexity there must also be the ability to add in additional one-to-one hours on any of the care packages, again, based on the specific need of the Service User. This will allow for sufficient flexibility to make placements wherein a Service User doesn't precisely fit into one of the bands.

3.19. Work has been carried out to analyse all existing Service Users in order to assess their current level of needs and ascribe them to one of the proposed bands. Providers have also been able to review and analyse the expected application of the cost model to their service users.

## Potential Impact and Transition to the Proposed Model

- 3.20. Moving to this model will mean a significant shift in how the Council commissions LD residential services and also how providers will be funded. The potential impact to some providers may be considerable with the result that increased funding will be available to stimulate an increase of capacity at medium to high levels.
- 3.21. One of the results of the historic LD Usual Cost model has been that there is increasingly less affordable provision at the high cost & high complexity end of the market with a need to help the broader market to develop new schemes and capacity.
- 3.22. While it is the case that no providers are projected to suffer any financial loss, in fact all providers will receive an increase, some may receive a greater degree of benefit relative to others.
- 3.23. A key factor in implementing the new model and securing buy-in from providers, over and above the anticipated increasing of funding, will be the longer term approach to how the Council wishes to develop the market. In being able to establish a robust and fit-for-purpose cost model for LD services it will facilitate new opportunities to work with the market on initiatives such as block purchasing or new risk sharing arrangements.
- 3.24. As the model will result in costs being more tightly controlled it is highly likely that currently existing capacity at the high complexity end of the market may well more limited in the short to mid-term. Therefore it will be necessary to engage with Providers who may not currently deliver at that level and to develop their capacity to do so. Initial conversations with providers through the process indicates that there is appetite and resources within certain providers to do so. It is hoped that with the clarity and structure the proposed model affords this will further encourage the market to adapt to the Council's requirements and also that internal commissioning processes help ensure placements are made effectively.
- 3.25. There are a number of measures that should help to address the impact of the transition to the proposed model as well as to develop the market as a whole:
- Diversification of current providers – by working with existing providers to develop and enhance their existing provision to increase the availability of high cost and complex care
  - Consideration of undertaking new commercial arrangements such as Block Contracting agreements with providers to help fix required capacity as well as to give additional financial incentive for providers to undertake new developments and take commercial risk.

- Consideration of directly stimulating the creation of new LD residential schemes in line with the Council's longer term demands and property strategy.

3.26. Taking this into consideration alongside the response from our current providers the following financial scenarios set out the potential financial impact of implementing the model as currently understood when applied to our current Service Users

3.27. All packages of care that are currently less than the proposed rates (including any 1:1 hours) are placed on the new rate and where those costs are in excess of the new rates would also have their fees increased by a nominal 2% increase This would lead to an in year cost increase of:

- £2,279,977.98 in 2018/19
- £726,326.17 in 2019/20
- £684,548.27 in 2020/21

3.28. While these scenarios set out the potential impacts of applying the new Usual Cost model there will also be opportunity for the Council to optimise the application of existing and new placements following the engagement process with providers with the stated aim of developing greater capacity for high complexity cases.

## **4. ADULT FRAILTY AND LONG TERM CONDITIONS**

### **Geography and Usual Cost Capacity**

- 4.1. Over the last two years there has been increased pressure to find capacity for OP/PD placements in the South of the County. Previous analysis has shown strong evidence that there is a lower proportion of beds available in southern areas at Usual Cost.
- 4.2. New initiatives have been delivered to help address this, primarily through the procurement of block beds under the Transitional Care and Reablement contract.
- 4.3. Given the sustained and pronounced differential in Usual Cost capacity it was anticipated that the Usual Cost analysis for OP/PD could show underlying increased cost pressures to businesses in these areas which in turn would account for their higher costs. When commissioning the analysis from Kingsbury Hill Fox Ltd they were asked to breakdown specific cost elements, i.e. staff rates, by the 12 local economic areas. However this has not proven

to be the case with no clear geographic differential in terms of the costs of delivering care.

- 4.4. Therefore as the relative increased costs in the South of the county cannot clearly be ascribed to higher costs the cause could stem from higher demand from other authorities, Health, and / or Self Funders. With a fixed and limited supply of care this would naturally result in Providers being able to charge higher costs.
- 4.5. This is further supported via the findings in the "Review of Residential Care Market in Lincolnshire" report showing that in South Holland, South Kesteven, and North Kesteven there is a relative lack of supply of beds when set against Age Standardised Demand in those areas
- 4.6. Without there being an evidence base to justify a Usual Cost model that includes geographic variation it follows that any measure to address the relative lack of capacity in the South must be via separate initiatives. Recent exercises for the block purchasing of Transitional Care and Reablement Beds with Health have helped manage the risk of any potential lack of provision in the South and further exercises may be carried out as required. The potential of Joint Commissioning work that is underway with Health will also offer a genuine opportunity to better manage supply and demand within Lincolnshire. Further options around directly increasing available capacity should also be seriously considered as a primary method in managing the market in the South of the county.
- 4.7. Broadly speaking the increases in costs are in line with commonly understood developments i.e. the increased National Minimum Wage, inflation, etc. However the stated increased number of required care workers in each home that is necessary to deliver care safely has increased at perhaps a greater rate than anticipated.
- 4.8. This increase clearly places additional pressure on budgets and therefore a decision should be taken on the correct approach to addressing this matter.
- 4.9. The proposed increase is based on a number of factors, including inflationary pressures, increased registration costs and the primary cost driver being to apply a standardised approach to the staffing ratio for each category of care and resulting number of care hours delivered per person per week based on the feedback from the market.
- 4.10. As part of the Council's market engagement process feedback from Providers indicated highlighted a potential inconsistency with the application of Nursing and HD rates based upon the support costs for Service Users. Taking this into consideration the Council has determined that the feedback has merit and as such has revised its initial position on OP rates which is reflected in the table below.

### Proposed Rates

Care Group	2017/18	2018/19	2019/20	2020/21
OP Std. Res	£456.00	£483.00	£502.00	£521.00
OP Nursing	£485.00	£531.00	£552.00	£573.00
OP HD	£497.00	£531.00	£553.00	£574.00

### Projected Budgetary Increase (each year)

Care Group	2018/19	2019/20	2020/21
OP Std. Res	£1,711,248.43	£1,204,211.86	£1,204,211.86
OP Nursing	£1,746,528.00	£797,328.00	£797,328.00
OP HD	£1,631,456.00	£1,055,648.00	£1,007,664.00
Total	£5,089,232.43	£3,057,187.86	£3,009,203.86

## Physical Disability

- 4.11. With regard to any necessary increases to the Usual Cost for Physical Disability placements, both Standard and Nursing, the proposal is to apply the same methodology that supports the increases to OP rates.
- 4.12. This then requires the same decision with regard to the approach taken on increasing the required hours of care for each package in line with the reported returns.
- 4.13. The proposed increase is based on a number of factors, including inflationary pressures, increased registration costs and the primary cost driver being to apply a standardised approach to the staffing ratio for each category of care and resulting number of care hours delivered per person per week. The total financial impact including inflation is estimated to be £224,840 2018/19, £180,831 in 2019/20, £182,616 in 2020/21

Care Group	Current Rate 2017/18	2018/19	2019/20	2020/21
Physical Disability.	£557.00	£623	£647	£671

## 5. MENTAL HEALTH

- 5.1. With regard to any necessary increases to the Usual Cost for Mental Health placements, both Standard and Nursing, the proposal is to apply the same methodology that supports the increases to Adult Frailty and Long Term Conditions.

- 5.2. This then requires the same decision with regard to the approach taken on increasing the required hours of care for each package in line with the reported returns.
- 5.3. The proposed increase is based on a number of factors, including inflationary pressures, increased registration costs and the primary cost driver being to apply a standardised approach to the staffing ratio for each category of care and resulting number of care hours delivered per person per week. The total financial impact including inflation is estimated to be £308,000 in 2018/19, £167,581 in 2019/20, £169,625 in 2020/21

Care Group	Current Rate 2017/18	2018/19	2019/20	2020/21
MH Std	£475.00	£503.00	£522.00	£542.00
MH Nursing.	£485.00	£531.00	£552.00	£573.00

## 6. CONTRACTUAL UPDATES

- 6.1. In addition to the fundamental matter of establishing new Usual Costs for services it is the correct time to review and update the Terms and Conditions of the Residential Framework Contracts.
- 6.2. These proposed changes stem from lessons learned and practical experience in the normal operation of the contract over the last three years, and seek to improve the consistency and fairness of the agreement.
- 6.3. Aspects of the proposed changes to the specification have been discussed with a LinCA representative who has, indicated agreement that these are fit for inclusion in the future contract..
- 6.4. The table below sets out the full range of proposed changes to the contract

<b>PROPOSED CHANGE TO THE CONTRACT TERMS AND CONDITIONS AND SCHEDULES</b>	
1	<p>To fix the available 'Top Up' price that providers' can charge to third parties over and above the Usual cost that the Council funds for the duration of the contract.</p> <p>Current practice allows for Providers to change this annually to any rate they wish.</p> <p>While this affords them a great deal of flexibility in pricing their service it can often mean that Service Users in a setting with a Top Up may find the price</p>

	<p>increases yearly and at a rate unaffordable to them. This then means the Service User may have to find an alternative bed.</p> <p>Fixing Top Up prices for the three year term will allow for much greater clarity and assurance to Service Users when they agree to stay in a Care Home with a Top Up.</p> <p>For the next three years they can feel confident that their financial position in relation to residential care costs will remain unchanged, and as a consequence there will be much less risk of them having to find alternative care arrangements.</p> <p>However, it should be noted that this may mean some Providers choose to increase their Top Up charges at a higher rate for the introduction of the new contract. The Council will also commit to review this position in the event of any significant change to funding or the National Minimum Wage.</p>
2	<p>Clarification of the Third Party Agreement with specific regard to notification, record keeping and compliance with the contract.</p> <p>This will allow the Council to improve our ability to track payments where third party agreements are in place and ensure the process is in line with the Care Act 2014.</p>
3	<p>Clarify drafting of the terms relating to the provision of care equipment.</p> <p>Specifically that any equipment provided must only be used for the Service User it was prescribed to as well as greater clarity on ownership and management of equipment.</p>
4	<p>A new schedule setting out responsibilities and actions to be taken with the Commercial Team's forthcoming Contract Management System (CMS). This will primarily mean clearer and easier processes in submitting performance data</p> <p>Similar updates will be made with regard to MOSAIC</p>
5	<p>The provision of the ability to suspend, in part or full, services that have a CQC inadequate rating</p> <p>This proposal will formalise in the contract drafting and operational practice that is already established (i.e. suspension of new placements for any provider who receives an inadequate CQC rating).</p> <p>There is potential for such a suspension to be challenged by an affected provider and formalising this right within the contract will enable the action to be undertaken with reduced legal risk.</p>
6	<p>Additional 'automatic' provisions within the contract on a change of a providers CQC rating to 'Requires Improvement' which would enable the Council to recommend and require enhanced support, additional required training, and other measures.</p>

	In line with the reasons for recommendation 8, this would formalise in the contract drafting desirable operational practice making it easier to implement and enforce.
7	<p>Requirement for accounts and management accounts to be provided on request</p> <p>This is a key data source to enable the assessment of financial risk associated with individual providers.</p> <p>The contract already enables us to request 'relevant' information from providers, but adding explicit reference to this more commonly required information will improve accessibility and enable enhanced financial oversight of providers particularly those which the Council consider to be struggling or in distress.</p>
8	<p>Strengthened Rights of Entry particularly in instances of Safeguarding, concerns of quality and trigger points like suspension</p> <p>To ensure the contract drafting is in line with the revised LCC safeguarding protocols e.g. investigations under S.42 of the Care Act 2014.</p>
9	<p>Duty to inform of loss of manager or imminent loss of any key staff</p> <p>In conjunction with previous measures this will allow the Council to identify providers in distress or at risk of deteriorating. This will directly support and inform the risk matrix, a critical contract management tool, and enables a trigger for targeted support to providers to be received in a consistent and timely manner.</p>
10	<p>Duty to inform of putting up for sale</p> <p>The sale of a residential establishment is an indicator of the potential loss of a provider. This duty will help in managing this risk through early warning.</p>
11	<p>Development of the contracts default clause with specific regard to being able to recover any costs relating to step-in or provision of additional support where that has been provided e.g. Strategic Market Support Partner</p> <p>Where homes are inadequate or require improvement, the Council wishes to be able to take more direct action to reduce associated risks such as putting in additional staff.</p> <p>This amendment will enable us to mitigate the financial risk associated with such actions.</p>
12	<p>Update Safeguarding Clause</p> <p>To ensure the contract drafting is in line with the revised LCC safeguarding protocols e.g. investigations under S.42 of the Care Act 2014.</p>

13	<p>Updated and improved Medicines management protocol</p> <p>Following the results of a specific working group established to review Medicines Management, there will be a new 'toolkit' of processes, instructions and guidance for Care Providers that will align closely to CQC standards and this will need to be included within the contract schedules.</p>
14	<p>The ability to move to paying gross of service user contributions rather than the current practice of net of Service User contributions.</p> <p>This change would represent a major change to Council business processes and is the subject of a separate decision making process. Depending on the outcome of this decision the contract will be able to make any such change. Provider feedback in Appendix E references this issue.</p>
15	<p>Consideration of improving and clarifying the dispute resolution process with defined levels of escalation and a third party e.g. ACAS.</p> <p>Current drafting of this clause gives only one option with no scope for escalation.</p> <p>Revised drafting is being progressed and will include more than one option to improve proportionality and flexibility. It is intended a specific third party arbitrator will not be mandated but there will be agreement that in specific circumstances a third party must be agreed by both parties.</p>
16	<p>The structure of the Contract has been reformatted to provide greater focus on key quality issues, improve clarity and specificity for each service type.</p> <p>The intention being to produce a clearer and more user friendly contract.</p>
17	<p>Pricing schedule</p> <p>Proposals have been developed based on market intelligence as described in this report.</p>

## 7. Market Consultation

7.1. As indicated above the Council has worked closely with the market to support this process. Several market engagement events have taken place with three events carried out in December 2017, to share the proposed changes to the Usual Cost model and Contract with the Adult Frailty and Long Term Conditions market. These were;

13.12.2017 AM Stanhope Hall, 1 Boston Rd, Horncastle LN9 6EY  
13.12.2017 PM Wilsford Village Hall, School Lane, Wilsford, Grantham, NG32 3PE

- 7.2. Specialist Adults Services engagement and consultation has been carried out differently with individual meetings with the Council's strategic providers individually over December and January alongside a group session for the other providers or for those who weren't able to attend one to one sessions.
- 7.3. The Kingsbury Hill Fox Ltd Reports, the proposed cost models, the revised residential framework and supporting documents have also been released to all providers for their feedback and comments at the start of the engagement period. A web portal has also been created to house all the relevant materials with instructions on how to engage with providers
- 7.4. Following these events Providers have had an opportunity to present feedback and commentary on the proposed changes
- 7.5. Comments were received from thirteen individual providers and one coordinated response from the Lincolnshire Care Association which represents over 130 Care Providers in the county (Appendix E). Detailed feedback can be seen in appendix E however key highlights are:
  - Providers are concerned about the sufficiency of planned for inflationary increases and uncertainty of the future
  - Strong positive feedback on the proposed new model for Learning Disability
  - Positive feedback from a key national provider that the proposed increases to Adult Frailty and Long Term Conditions rates are acceptable
  - Increased focus on the need for a comprehensive solution for funding Nursing care.

## **8. Legal Issues:**

### Legal Background

- 8.1 The legal framework governing Care and Support in England is provided for by the Care Act 2014 (the Act), detailed secondary legislation by means of Regulations and the Care and Support Statutory Guidance to the Care Act 2014 ("the Guidance").
- 8.2 Under the Care Act the Council has a primary obligation to assess the needs of those that appear to have needs for care and support and to meet those needs where they meet eligibility criteria. One of the main ways that the Council meets need is through the provision of residential care and residential care with nursing across a range of needs.
- 8.3 The Care and Support and After Care (Choice of Accommodation) Regulations 2014 enable a person to have the right to choose a particular

provider subject to certain conditions. Where the accommodation is of the same type as specified in the adult's care and support plan, the preferred accommodation is suitable and available and where the provider agrees to provide the accommodation on the local authority's terms, the local authority must provide or arrange the accommodation. The preferred accommodation must not cost the local authority more than the amount specified in the personal budget of the adult.

8.4 The Guidance provides that:-

- The Council must have regard to the actual cost of good quality care in deciding the personal budget to ensure that the amount is one that reflects local market conditions (para 11)
- The Council should not set arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care (para 11)
- A person must not be asked to pay a top up because of market inadequacies or commissioning failures and must ensure there is a genuine choice (para 12)
- The Council must ensure that at least one option is available that is affordable within a person's personal budget and should ensure that there is more than one (para 12)
- If no suitable accommodation is available and no preference expressed the Council must arrange care in a more expensive home and adjust the budget accordingly (para 12)
- The Council has a duty to shape and facilitate the market including ensuring sufficient supply (para 13)
- Where choice cannot be met the individual must give the individual an explanation in writing. (para 17)

8.5 The setting of the Council's Usual Costs is central to its compliance with these obligations. In particular the rate that the Council establishes as its Usual Cost will contribute significantly to the viability and sustainability of a market which provides sufficient places capable of meeting need. The Usual Cost will also determine in many cases the personal budget against which the choice of accommodation provisions will be assessed.

8.6 In addition, the Council has general obligations under the Care Act. The most important of these in the current context is section 5 which states:-

"s.5(1) A local authority must promote the efficient and effective operation of a market in services for meeting care and support needs with a view to ensuring that any person in its area wishing to access services in the market

- (a) has a variety of providers to choose from who (taken together) provide a variety of services
- (b) has a variety of high quality services to choose from
- (c) has sufficient information to make an informed decision about how to meet the needs in question

8.7 Under section 5(2), when the council is considering the duty set out above, the Council must have regard to:-

- The need to ensure information is made available about the providers and the types of services they provide
- The current and likely future demand and how providers might meet that demand
- The importance of enabling, those that wish to do so, to participate in work, education or training
- The importance of ensuring sustainability of the market (in circumstances where it is effective as well as in circumstances where it is not)
- The importance of fostering continuous improvement in the quality, efficiency and effectiveness of the services and the encouragement of innovation
- The importance of fostering a workforce who are able to deliver high quality services (relevant skills and appropriate working conditions)

8.8 The Council must, when considering current and likely future demand ensure that there are sufficient services available to meet need and have regard to the importance of promoting wellbeing.

8.9 The background to the section 5 provisions includes the following statement in paragraph 6.2. of "Building Capacity and Partnership in Care: An agreement between the statutory and independent social care, health care and housing sectors" which was published by the Department of Health in October 2001:-

"Providers have become increasingly concerned that some commissioners have used their dominant position to drive down or hold down fees to a level that recognises neither the costs to the providers nor the inevitable reduction in the quality of service provision that follows. This is short sighted and may put individuals at risk. It is in conflict with the Government's Best Value Policy. And it can destabilise the system, causing unplanned exits from the market. Fee setting must take into account the legitimate and current and future costs faced by providers as well as factors that affect those costs, and the potential for improved performance and more cost effective ways of working..."

8.10 Chapter 4 of the Guidance (Market Shaping) provides guidance on s.5 of the Act in particular in the following paragraphs:-

"4.11 This statutory guidance describes, at a high level, the themes and Issues that local authorities should have regard to when carrying out duties to shape their local markets and commission services Market shaping, commissioning, procurement and contracting are inter-related activities and the themes of this guidance will apply to each to a greater or lesser extent depending on the specific activity..."

"4.27 Local authorities should commission services having regard to the cost effectiveness and value for money that the services offer for public funds. The

Local Government Association Adult Social Care Efficiency Programme(...) has advice on these issues and may be helpful ..."

"4.31 When commissioning services local authorities should assure themselves and have evidence that contract terms, conditions and fee levels for care and support services are appropriate to provide the delivery of the agreed care packages with agreed quality of care. This should support and promote the wellbeing of people who receive care and support, and allow for the service provider ability to meet statutory obligations to pay at least the national minimum wage and provide effective training and development of staff. It should also allow retention of staff commensurate with delivering services to the agreed quality and encourage innovation and improvement. Local authorities should have regard to guidance on minimum fee levels necessary, taking account of the local economic environment. This assurance should understand that reasonable fee levels allow for a reasonable rate of return by independent providers that is sufficient to allow the overall pool of efficient providers to remain sustainable in the long term..."

8.11 Prior to the implementation of the Care Act on 1<sup>st</sup> April 2015 there had been a succession of cases in which local authorities faced a legal challenge from care home providers who had successfully argued that the Council had been in breach of the law in setting its Usual Costs. In general the grounds on which those challenges succeeded were a combination of the Council:-

- Erring in its methodology including saying it would apply the JRF toolkit model and then diverging from it
- not establishing the actual cost of care and not having regard to the real costs of care when setting their fee rates
- failing to consult with the sector
- Not providing good reasons for the assumptions made in the model or the way the model was populated
- Failure to give due regard to equalities implications
- Mathematical errors

8.12 These cases all were prior to the implementation of the Care Act 2014 but the general principles still have relevance to the new statutory framework. More recently there has been a challenge brought following the implementation of the Care Act – i.e Care England, (R on the application of) v Essex County Council

8.13 Care England considered the fee increases made by Essex County Council were too small. It argued that that the fees were on average £163.57 per person per week below the cost of care in the case of residential care and £108.56 below for nursing care. It claimed that:-

- Essex was in breach of its market shaping duties under s,5(1) and (2) of the Care Act. In particular it considered that the Council had breached the duty to have regard to "the importance of ensuring the

sustainability of the market (in circumstances where it is operating effectively as well as in circumstances where it is not)"

- The Council has failed to follow relevant guidance issued by the Government
- The Council's decision was *Wednesbury* unreasonable

Essex Council successfully defended this judicial review challenge.

8.14 The judge rejected breach of duty under section 5(1) and (2). Consideration as to sustainability was found within the pricing report and was also confirmed by evidence from the then Cabinet Member. Information about the care home market in the county was also evident in the pricing report, and its appendices and the Cabinet Member's statement. The Judge was not persuaded that Essex did so little to inform itself about the market that it could not say it had regard to the sustainability factor.

8.15 The claimant contended that the defendant breached Guidance in 5 respects.

- That Essex did not have "evidence that fee levels for care and support services are appropriate to provide the delivery of the agreed quality of care."
- That Essex set and/or decided to maintain "fee levels below an amount which is not sustainable to the providers in the long term"
- That Essex set or maintained "arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care".
- That the fees were not set at an "amount sufficient to meet the person's care and support needs".
- That Essex failed to comply with guidance that the "fees are set at a level which was significantly below the actual costs of providing care".

8.16 These challenges were rejected by the judge on the basis of the evidence available to the Council.

8.17 Finally the claimant contended that the Council's decision was *Wednesbury* unreasonable. The Judge took into account that the decision was to increase the fees paid to care home providers (despite the absence of any contractual obligation to do so). The level of increases decided upon by the Council was not a judgement which the court could easily make on an application for judicial review and certainly not on the evidence before it.

8.18 The judge said in relation to section 5 of the Care Act:-

"The section 5 duty cannot be viewed in isolation. The defendant faced other competing pressures and duties, including the limits on its resources and the duty to obtain value for money, indeed as I have said, the section 5 duty itself

could be seen as requiring a council not to increase fees by too much. ....the promotion of competition is inherent in the duty to promote an efficient and effective market. It was the defendant's responsibility to strike a balance between these different considerations. The matters identified by Councillor Madden were all relevant to that exercise. The weight to be given to different factors was a matter for the defendant".

8.19 The issues in the pre-Care Act cases have been addressed by the Council in the way in which the Council has engaged with the market in detail through Kingsbury Hill Fox Limited to establish the actual costs of providing residential care in Lincolnshire. The Council has also undertaken its own assessment of the capital costs of providing such care.

8.20 The Council has used this information to populate its own cost model for deriving its Usual Costs. This is a tried and tested model, used successfully in 2011 and 2015 and reviewed in the light of the current market position. The Council has been open and transparent about the model it has used and the assumptions underlying it. Key assumptions within the model relating in particular to capital costs, rate of return on capital and indexation have been fully justified within this Report.

8.21 The Council has consulted with the market on the proposed changes and the feedback has been taken into account in setting the Usual Costs. In the case of the rates for Older People, these were amended in light of feedback as set out in paragraph 4.10 of this Report.

8.22 The proposed Usual Costs are based on an assumption concerning the numbers of hours of care to be provided per person per week which reflects the information obtained from the Council's survey of the market and which represents a reasonable level of hours for provision of the levels of service required under the Council's contract.

8.23 The Council has had due regard to its duty under section 5 of the Care Act 2014 and has had regard to the Guidance both on section 5 and on Choice of Accommodation. In particular:-

- The importance of enabling those that wish to do so to participate in work, education or training is recognised in taking into account staffing costs including the National Living Wage within the Usual Costs
- Regard has been had to the importance of ensuring sustainability of the market (in circumstances where it is effective as well as in circumstances where it is not). Although, occupancy rates and the low incidences of financial distress suggest there is not a significant issue with the sustainability of the market within Lincolnshire setting a Usual Cost for three years with increases between years that recognise and reflect the main cost pressures for the market will ensure that the market remains sustainable
- The importance of fostering continuous improvement in the quality, efficiency and effectiveness of the services and the encouragement of

innovation is reflected in the Council's rationale for the rate of return on investment used in the model. The Usual Costs for Learning Disability services will, as set out in the Report, create an environment in which the Council can, working with the market, encourage greater innovation and the provision of new service models

- The importance of fostering a workforce who are able to deliver high quality services (relevant skills and appropriate working conditions) has been recognised again in the degree to which staffing costs have been reflected. Overall the Usual Costs provide for the continued provision of quality care within Lincolnshire.
- The Council has had regard to the actual cost of good quality care in deciding the Usual Costs to ensure that the amount is one that reflects local market conditions
- The Council has not set arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care. The exercise evidenced in this Report shows the seriousness with which the Council has addressed the actual conditions within the Lincolnshire care market and produced Usual Costs which reflect them.

8.24 The Usual Costs in this Report will continue to support a market within Lincolnshire that provides a choice of good quality care for Lincolnshire service users in a way which is sustainable both in terms of the businesses themselves but also in terms of a skilled workforce.

### Equality Act 2010

8.25 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.

8.26 The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation

8.27 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

8.28 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

8.29 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

8.30 Compliance with the duties in section 149 may involve treating some persons more favourably than others

8.31 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

If the Usual Cost is set at a level which is too low to cover costs then it is possible that there would be an adverse impact on people in residential care who are particularly vulnerable either by way of age or disability or both. This could happen because the rate paid by the Council was too low to maintain quality at current levels and as a consequence for example the number of activities available to residents could fall along with the catering standards or the amount of care hours available to individuals. In the event that rates were so low that providers could not maintain their business and homes closed residents would have to move. This could cause distress and upheaval particularly for those well settled residents with friends amongst the staff and other residents. Unless well managed it could also be injurious to health for the most vulnerable and cause confusion to dementia sufferers.

An Impact Analysis has been completed for Residential and Nursing Care rates for Adult Care 2018-21 which addresses the risk of adverse impact on service users which can be found as Appendix D and should be carefully considered along with the statutory duty itself as set out above. Two potential types of adverse impacts are identified. Firstly that the quality of service may be reduced and secondly that more Homes may close. The extent of each risk depends principally on a consideration as to whether or not the Council's Usual Costs are at or above the actual costs of care. The work the Council has done to get data from the market and model the actual costs means that in the view of the Council the Usual Cost is at or above the actual cost of care

The recommended proposal does increase all Usual Costs and does cover the providers' costs. The risk arising out of a fall in quality in these circumstances is therefore considered to be low. The proposed rate is above that residential care providers are currently paid and therefore there should be little economic need for

providers to reduce the quality currently provided.

In any event the Council has procedures in place so that it can monitor the situation, so as to be able to manage both risks if they arise and thereby mitigate the risk of adverse impact arising out of either circumstance. In relation to quality the Council will specify the minimum quality requirements in its contracts which Homes will be required to sign. This will be monitored through contract management meetings with all providers to discuss performance; issues raised by the homes; workforce development; commissioning plans; operational quality assurance and other matters as appropriate. The meetings will take place in the homes and will vary in frequency, large providers will have monthly meetings with the smaller providers having less but they will take place at least annually. The Council works closely with the Care Quality Commission and has a structured approach to quality data maintaining a current history on each home. This enables any quality issues to be quickly recognised. Where Safeguarding issues are raised a multi-party investigation is undertaken and the Assistant Director or Head of Strategic Safeguarding will suspend all new placements where appropriate. In those cases the Council will then work with the home to develop an improvement plan and will monitor the improvements. The suspension will only be lifted when satisfactory progress has been made.

As far as potential Home closures are concerned, the risk of a home closing will be monitored through contract management meeting and the Contract Risk Matrix. The Council would expect that homes starting to find themselves in difficulty would raise concerns with the Council. In the unusual and unlikely event that a home was going to close, rather than be sold as a going concern, there is sufficient capacity within the market to find alternative provision for residents. The Council has in place a "Loss of Provider Process" which enables action to be taken quickly and efficiently to enable a smooth transition. The Loss of Provider Process requires that a team of practitioners is set up to be dedicated to working with the home, residents and relatives to find suitable alternative placements. This team will work closely with NHS colleagues and the contracts, quality and safeguarding teams in the County Council to manage the transition of arrangements.

In addition to this and as part of the Council's general market shaping work the Council continually monitors capacity in the market and addresses issues through its commissioning methodologies such as the use of block contracting in the south of the county referred to in the report.

It is considered that the adoption of the recommended proposal addresses the risks and adverse effects that might arise if the alternative option was adopted. The remaining potential for adverse effects is considered to be low and can be mitigated and managed as set out above. Adoption of the recommended proposal is therefore considered to be consistent with the Council's obligations under the Equality Act 2010.

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

8.32 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

The JSNA for Lincolnshire is an overarching needs assessment. A wide range of data and information was reviewed to identify key issues for the population to be used in planning, commissioning and providing programmes and services to meet identified needs. This assessment underpins the JHWS which has the following themes:-

- i. Promoting healthier lifestyles
- ii. Improving the health and wellbeing of older people
- iii. Delivering high quality systematic care for major causes of ill health and disability
- iv. Improving health and social outcomes and reducing inequalities for children
- v. Tackling the social determinants of health

Under the strategic theme of improving the health and wellbeing of older people in Lincolnshire there are 3 relevant priorities;

- Spend a greater proportion of our money on helping older people to stay safe and well at home
- Develop a network of services to help older people lead a more healthy and active life and cope with frailty
- Increase respect and support for older people within their communities.

The proposed increases to Residential and Nursing Care Fee Levels will contribute directly to the delivery of these priorities by helping to ensure that services for recipients of Adult's social care services are locally based, cost effective and sustainable.

### Crime and Disorder

8.33 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

Section 17 matters have been taken into account in preparing the Report. The Proposals in this Report do not directly contribute to the furtherance of the section 17 matters and there is no risk of adverse impact identified.

## **9. Conclusion**

9.1 The Council has worked closely with the sector to establish the costs of care within Lincolnshire. As part of that work the Council has consulted and met with the sector on the proposed rates set out in 3.15, 4.10, 4.13 and 5.3 as well as the proposed changes to Terms and Conditions as set out in 6.4.

9.2 For the reasons outlined in the report, the Usual Costs identified above represent an appropriate rate to enable the continued viability of the residential care market in Lincolnshire and the continued provision of choice in good quality care for the residents of Lincolnshire and it is recommended that the Usual Costs are approved.

### **9. Legal Comments:**

The Council has the power to adopt the Usual Costs set out in the Report. The proposed rates are considered to have been arrived at through a lawful process which reflects case law, the Council's obligations under the Care Act and associated Guidance and which has appropriate regard to the all relevant considerations.

Further detailed discussion of the legal implications of the decision are dealt with in the Report.

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

### **10. Resource Comments:**

To ensure compliance with its current and future legal obligations the Council must ensure it has a full understanding of the market provision of residential and nursing care and the cost at which such care can be made available by the market on a sustained basis. This will enable the Council to set a Usual Cost which it expects to pay for residential services in Lincolnshire to ensure a supply of service to meet identified need and to enable choice. This report details a proposed set of rates at which it believes the Council should adopt over the next three years. The cost to the authority of implementing the proposed rates is estimated to be £16.318m over three years. The additional funding requirement for the first two years of agreement (£12.207m) is within the financial envelope identified during the budget setting process in November 2017. In the final year there is some uncertainty around the delivery method for future funding of social care, however whatever the exact nature of the funding mechanism the general recognition of the scale of the adult care funding requirement at both a local and a national level makes it reasonable to adopt the Usual Costs for a three year period which will help the sustainability of the market and the Council's own longer term financial planning.

### **11. Consultation**

**a) Has Local Member Been Consulted?**

N/A

**b) Has Executive Councillor Been Consulted?**

Yes

**c) Scrutiny Comments**

This Report will be considered by the Adult Care and Community Wellbeing Scrutiny Committee at its meeting on 14 February 2018 and the comments of the Committee will be reported to the Executive Councillor

**d) Have Risks and Impact Analysis been carried out??**

Yes

**e) Risks and Impact Analysis**

See the body of the Report

**12. Appendices**

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

Appendix A – Report for LCC on Care Home Costs 2017  
Appendix B – Review of Residential Care Market in Lincolnshire  
Appendix C – Report for LCC on LD Care Home Costs 2017  
Appendix D – Equality Impact Assessment  
Appendix E – Provider Feedback  
Appendix F – Residential Rates Adult Frailty and Long Term Conditions  
Appendix G – Residential Rate Model Specialist Adults Services  
Appendix H – Property Survey

**13. Background Papers**

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

Document title	Where the document can be viewed
Residential and Nursing Care Fee Levels within Adult Care 2015	<a href="http://lincolnshire.moderngov.co.uk/ieDecisionDetails.aspx?ID=202">http://lincolnshire.moderngov.co.uk/ieDecisionDetails.aspx?ID=202</a>

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