

Open Report on behalf of Glen Garrod, Executive Director for Adult Care and Community Wellbeing and Richard Wills, Monitoring Officer

Report to:	Executive
Date:	06 March 2018
Subject:	Report by the Local Government and Social Care Ombudsman
Decision Reference:	I015221
Key decision?	No

Summary:

To report to the Executive the Report and outcome of an investigation by the Local Government and Social Care Ombudsman ("the Ombudsman") into allegations of maladministration and for the Executive to receive the Ombudsman's Report on behalf of the Council and consider the recommendations of the Ombudsman and the actions taken and proposed to be taken by the Council under the Local Government Act 1974.

In addition this Report fulfils the Monitoring Officer's statutory responsibility under section 5A of the Local Government and Housing Act 1989 to report to the full Executive instances of maladministration in the exercise of executive functions identified as a result of an Ombudsman's investigation. On receipt of the Monitoring Officer's Report the Executive must consider the Report and determine (a) what action (if any) the executive has taken or proposes to take in response to the report, (b) when it will take any proposed action and (c) the reasons for taking the action or, as the case may be, for taking no action.

Recommendation(s):

That the Executive:-

1 Receives and considers this Report and the Report of the Ombudsman attached at Appendix A

2 Notes and affirms the actions already taken to address the concerns set out in the Ombudsman's Report as set out in this Report

3 Accepts the recommendations of the Ombudsman at paragraph 59 of the Ombudsman's Report as set out in paragraph 1.38 of this Report

4 Approves the carrying out of a full review of the legal, financial and operational implications of the recommendations at paragraph 60 of the

Ombudsman's Report with a view to a decision being taken on the Council's future approach to payment arrangements for residential care prior to the expiry of the 6 month period specified by the Ombudsman.

5 Considers what if any further action the Council should take

6 Delegates to the Executive Councillor for Adult Care, Health and Children's Services the taking of the final decision in respect of the recommendations in paragraph 60 of the Ombudsman's Report

Alternatives Considered:

1 Not to accept the recommendations of the Ombudsman in relation to issuing an apology to and compensating the complainants

2 Not to review the legal, financial and operational implications of changing the way in which payments are administered.

Reasons for Recommendation:

The Council accepts the findings set out in the Ombudsman's Report.

The Council has already reimbursed to the complainants the amount of £65.00 in September 2017 being the full amount of the Third Party Contribution they were required to pay.

The Council has offered its apologies to the complainants but will follow this up again with a formal apology as part of this process.

It is right in these circumstances that the Council accepts the Ombudsman's recommendation to pay compensation to Ms B of £300 for distress and £300 for her time and trouble in pursuing the complaint. Therefore the total amount of compensation would be £600.00.

The extent to which there is a statutory and contractual basis for the recommendations at paragraph 60 of the Ombudsman's Report is complex. The recommended changes are wide-ranging with potentially significant financial and operational implications. It is important that the various options are identified and their financial and operational consequences fully understood. This would be the purpose of the proposed review.

Background

1.1 The Local Government Ombudsman has power under the Local Government Act 1974 to investigate and issue Reports concerning allegations of maladministration or service failure.

1.2 The Ombudsman has issued the Report attached at Appendix A following an allegation of maladministration by the Council in the exercise of its adult

social care functions. The Ombudsman has concluded that the Council was guilty of maladministration and that this caused injustice to the complainant. The Ombudsman has issued a public report and included recommendations that he considers would be necessary to remedy the injustice in this particular case and more widely.

- 1.3 The Report is issued under section 31 of the 1974 Act. As a result the Report must be made public by the Council and placed before the Council so that it can consider the report and notify the Ombudsman of any action taken or proposed to be taken by the Council in response.
- 1.4 At its meeting on 15th December 2017 the full Council approved an amendment to the Constitution under which responding to an Ombudsman's report would be an executive function where the finding of maladministration was in respect of an executive function. The findings of the Ombudsman in this case relate to an executive function. Paragraph 61 of the Ombudsman's Report makes it clear that the Report should be considered by Full Council or cabinet – i.e the full Executive. Accordingly the Executive has the authority to determine the response to the Ombudsman's findings, the functions in question falling within its area of responsibility.
- 1.5 In addition the Monitoring Officer is under a separate statutory responsibility under section 5A of the Local Government and Housing Act 1989 to report to the full Executive instances of maladministration in the exercise of executive functions identified as a result of an Ombudsman's investigation. On receipt of the Monitoring Officer's Report the Executive must consider the Report and determine (a) what action (if any) the executive has taken or proposes to take in response to the report, (b) when it will take any proposed action and (c) the reasons for taking the action or, as the case may be, for taking no action.
- 1.6 This Report therefore enables the Executive to comply with the Council's obligation under section 31 of the 1974 Act and its obligations under section 5A of the 1989 Act.

Context of the Report

- 1.7 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. The range of rates were last determined in 2015. The Council is currently consulting with the market with a view to determining revised Usual Costs in March of this year.
- 1.8 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.

- 1.9 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 associated Guidance. Under those Regulations and that 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. Where the Council is unable to or does not offer a person a place at Usual Costs and has instead to place a person in more expensive accommodation, the Council is liable for the full amount of the cost and a top-up cannot be required.
- 1.10 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 Service User Contribution
- 1.11 Where a placement is made involving a Service User Contribution and/or a Third Party Contribution the Council's contract provides that the Council will make payment to the Provider of the full amount of the cost of care including the Service User Contribution and the Third Party Contribution. However, before this occurs, the contract requires the Provider to make attempts to recover the Service User Contribution from the service user and the Third Party Contribution from the third party and where this does not succeed the Council pays the full amount of the cost and recovers the amount of the contributions from the service user and the third party respectively.
- 1.12 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.
- 1.13 In what follows the findings of the Ombudsman are addressed in two stages. The first stage deals with the placement including the identification of the placement and the consequential responsibilities of the Council in relation to making payment for the placement. The second stage deals with the contractual mechanisms under which the Council administers Third Party Contributions where they apply.

Stage 1 of the Ombudsman's Decision – The Placement

- 1.14 The Ombudsman's decisions in this respect are set out in the section of the Report headed "Decision" – paragraph 58. There are several elements.

1.15 *The Council failed to offer a care home within Mr C's personal budget (i.e without a top-up fee)*

The Ombudsman's findings on this point are more fully described at paragraphs 39 and 40 of the Ombudsman's Report.

The Council accepts that it did not identify at least one placement which at its Usual Costs which would not have required a third party top-up payment.

1.16 *The Council failed to pay the full fee the care home charged when no care home within the personal budget was identified*

Again this is referred to in paragraphs 39 and 40 of the Ombudsman's Report.

The Council accepts that, not having identified a placement at its Usual Costs, the Council should have met the full amount of the care home fees and no third party top-up should have been required.

In September 2017, the Council reimbursed to the third party the top up fee paid of £65.00 .

1.17 *The Council failed to explain a person's rights and the Council's duties under the Care Act*

This is referred to in paragraphs 41 to 45 inclusive of the Ombudsman's Report.

This point is accepted by the Council as there is no detailed case record of the information given. Nor were the existing information sources explicit on this point. The Council has updated the information and advice relating to all aspects of financial support and this is now live on the website (as stated in the Ombudsman's Report at paragraph 44). Assessment staff have been instructed that this information is also to be given at the point of first visit. In addition an agreement is in place with LinCA to develop a joint information leaflet to assist and support people. Finance Training has been provided to all staff within Adult Frailty and Long Term Conditions to ensure all are clear.

The above information and training includes the Council's responsibilities to offer placements at Usual Cost or meet the full cost of care.

1.18 *The Council failed to offer Mr C a personal budget.*

This is referred to in paragraphs 46 and 47 of the Ombudsman's Report.

This point is accepted. Guidance has been issued to all staff regarding Personal Budgets and letters are now issued through the Mosaic workflow to ensure people are aware and informed of their personal budget amount.

1.19 *The Council failed to intervene when Mr C was threatened with eviction from the care home. The Council failed to properly address the threatening and intimidating language used by the care home.*

This is referred to in paragraphs 53 to 56 inclusive of the Ombudsman's Report.

The commercial team and area team colleagues did liaise directly with the home both verbally and via email. The Council accepts that some of the Provider's communication was not of a standard which we would expect. Learning has been taken from this to ensure a more robust response would be available if this was to occur again.

1.20 Although, as can be seen, the Council does not accept all of the statements made in the Ombudsman's Report, the Council does accept and has accepted the overall finding that the Council was at fault. It is recommended that the Council apologise for the faults identified in paragraphs 1.15 to 1.19 inclusive. A number of actions have been taken, prior to the report being published, to ensure that the risk of this happening again are minimised:

- Staff guidance has been issued to ALL frontline staff across Adult Care incl. Specialist Services and EDT – issued on 19 September 2017
- A comprehensive Action Plan has been developed and shared with all teams across Adult Care on 20 October 2017. A copy of the Action Plan is attached at Appendix B to this Report
- Corporate and Adult Care Complaints Process and Procedure has been altered for a clear pathway of complaints handling and who is responsible for responses as from 27 September 2017
- A Finance training pack has been developed and delivered to all AFLTC teams between 3 November 2017 and 6 December 2017
- Finance Information Packs relating to all areas of care support were updated and reissued on the website. Frontline staff also issue these at the point of assessment. Date issued 5 May 2017
- The Financial Information Pack information was also Included in a Practice Bulletin issued 17 May 2017
- Relevant legal advice and support has been part of the process to ensure full compliance with statutory requirements.

Stage 2 of the Ombudsman's Decision – Payment Arrangements

1.21 As set out above, the Council pays providers of residential and nursing fees based on the Council's Usual Costs or a price bid by the Providers. The Council's Framework Agreement provides for the Council to be responsible, ultimately, for the full amount of the cost. However the Framework

Agreement does provide for the Provider to seek to recover payment from the service user and third party before being entitled to payment from the Council. The Third Party Agreement does require the third party to make payment to the Provider as part of this arrangement with the Provider.

- 1.22 The Ombudsman's views of this arrangement are set out in a further decision within paragraph 58 of the Ombudsman's Report as follows:-

The Council failed to offer the option to pay the top-up fee to the Council

This is referred to in paragraphs 48 to 52 of the Ombudsman's Report.

- 1.23 In this respect, the Council accepts that it should not have told Ms B that it did not become involved in third party agreements and should not have left Ms B to make the arrangements with the care home. As referred to above the Third Party Agreement is between the Council, the third party and the Provider so the Council is always involved in top-up agreements. Social Workers have been reminded of this and the need for them to have responsibility in the signing of the Agreement to which the Council is in fact a party.

- 1.24 The Council also accepts that there was a failure in this case to explain the nature and effect of the Council's Framework Agreement and Third Party Agreement. In particular there was no explanation of the fact that the third party would be contracting with the Council and while the Council required the care home to seek payment of the Third Party Contribution, if this was not paid the Council would pay it and seek contribution from the third party.

- 1.25 It is recommended that the Council apologises for the faults identified in paragraphs 1.23 and 1.24.

- 1.26 In addition to this, the Ombudsman has made a finding that the Council's whole Third Party Contribution payment arrangements amount to a breach of the Council's responsibilities under the Care and Support Statutory Guidance. The Ombudsman's argument is set out in paragraphs 50 to 52. In essence the Ombudsman has found that the Council's payment arrangements under which, as the Ombudsman puts it, the Council did not offer the third party an option of making payment to the Council, departed from Guidance without sufficient reason and that this amounted to fault.

- 1.27 On the basis of this the Ombudsman has 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.
- 1.28 Before moving on to address these recommendations it is worth pointing out that the Council engaged in lengthy closely reasoned correspondence with the Ombudsman setting out in detail the Council's payment arrangements (including copies of the relevant contracts) and the Council's own interpretation of the Statutory Guidance. In particular, the Council argued strongly that the Council's Third Party Agreement already provides for the payment of the Third Party Contribution to the Council and insofar as the third party does make payments to the Provider that is part of a purely administrative arrangement which is not contrary to the Guidance.
- 1.29 It is unfortunate that the Ombudsman did not see fit to reflect any of the Council's arguments in the final Ombudsman's Report or acknowledge any of the complexities or uncertainties of the Ombudsman's own interpretation. This has led to an inappropriately simplified and negative characterisation of the Council's position. The Council does not accept, for instance that it has ignored the guidance (see paragraphs 51 and 52 of the Ombudsman's Report).
- 1.30 However, the Ombudsman did not agree with the Council and the Council must now accept the Ombudsman's conclusion. The Council must also accept the Ombudsman's judgment that the Council departed from Guidance without a sufficient reason. It must therefore now put its mind to the Ombudsman's recommendations in paragraph 59 (insofar as they relate to the payment issue) and paragraph 60 of the Ombudsman's Report.
- 1.31 In order to come to a conclusion on this element of the Report it is necessary to carry out a full review of the options available to the Council. If the Ombudsman's analysis is correct the Council could be looking at a fundamental change to the way in which the Council administers Third Party Contributions with potentially significant legal, financial and operational implications. Although the Ombudsman's Report relates to the payment arrangements for Third Party Contributions a proper review would need also to take into account not just Third Party Contributions but also Service User Contributions.
- 1.32 Current data from November 2017 confirmed that across all service groups 428 residential and nursing providers receive payments relating to 3,200 service users in long term and short term care. The current Residential & Nursing Care Budget totals £103.8m, with residential income budgeted to receive £25.3m over the same period. The value of third party top ups is estimated to be in the region of £0.375m in 2017/18.
- 1.33 In general terms there are a number of options which could involve the Council treating the payment of Service User 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.

1.34 However, such options have obvious drawbacks for the Council and indeed for Providers in terms of having to manage a number of different payment arrangements depending on the type of payment and even potentially the identity of the third party. These will need to be subject of a financial and legal analysis but they are not a preferred way of proceeding at this stage.

1.35 In terms of preferred options at this stage there are two:-

- Maintain the status quo. This will require a full review of the legal basis of the Ombudsman's finding but in principle it appears to leave open the potential to justify the current arrangements as being a departure from the guidance but for sufficient reason. Unless and until a full review has been undertaken of the financial and operational impacts of the options it will not be known if such an option can legally be pursued;
- Change the payment arrangements for both the Service User 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.

As referred to above, there are likely to be significant legal, financial and operational implications of a change to a different process.

1.36 Potential impacts include:-

- a) The financial functions of Mosaic will not be implemented until the summer of 2018 at the earliest. At this point it is unknown if the present system, Abacus, can switch to a different payment arrangement without substantial investment, this is currently being investigated by the system provider Servelec.
- b) Direct effects on Serco's organisational structure both within their Adult Care Financial Assessment and Credit Control teams, income and existing adult care payment functions including additional resources and overheads.
- c) Additional separate billing runs per 4 weekly cycle with additional customers to be managed through Agresso is likely to produce around 8,000 additional items to be issued and chased through credit control and income processes (including payment systems).
- d) A change control notice to be negotiated with Serco with a likely knock-on increase in the price under the Serco contract. Those conversations have not yet taken place.
- e) Increased 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.

- f) A risk of additional demands upon assessment and care management teams capacity but at this time it is not possible to quantify the possible impact.
- g) A requirement to ensure that fieldworkers are aware of any changes which will require additional training resources.
- h) Transfers the risk of non-payment to the Council.
- i) An increased legal resource requirement in order to process claims for non-payment that progress to the courts
- j) Potential impact on council cash flow through the payment of additional fees to providers

1.37 The review will assess and seek to quantify as much as possible all of these potential impacts and any others through discussion with partners and learning from the experience of other authorities.

Ombudsman's Recommendations

1.38 The Ombudsman has recommended at paragraph 59 of the Ombudsman's Report that the Council

- a) Acknowledge the faults and apologise to Ms B, Mr C and Mrs C

It is recommended that the Council acknowledges the faults identified in the Ombudsman's Report and apologises as set out in paragraphs 1.20 and 1.25.

- b) Reimburse the top-up fee of £65.00.

This action was completed and reimbursed in September 2017

- c) Pay £300 to reflect the complainant's distress.

It is recommended that the Council accept this recommendation

- d) Pay the complainant £300 for her time and trouble pursuing the complaint.

It is recommended that the Council accept this recommendation

1.39 In relation to the recommendations in paragraph 60 of the Ombudsman's Report it is recommended that the Executive approves the carrying out of a full review of the legal, financial and operational implications of those recommendations with a view to a decision being taken on the Council's

future approach to payment arrangements for residential care prior to the expiry of the 6 month period specified by the Ombudsman.

Legal Issues:

Equality Act 2010

- 1.40 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.
- 1.41 The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation
- 1.42 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
- 1.43 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
- 1.44 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
- 1.45 Compliance with the duties in section 149 may involve treating some persons more favourably than others
- 1.46 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 characteristic will receive an improved service as a result of the remedial steps identified in the Report.

Any implications of different payment arrangements for people with a protected characteristic will be assessed as part of the proposed review.

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

1.47 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

1.48 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

This Report places before the Executive the findings of an investigation by the Local Government and Social Care Ombudsman which identified injustice caused by maladministration in the conduct of executive functions in the area of Adult Care.

The Executive is invited to consider and accept the Ombudsman's recommendations as set out in the Report. Further work is required to assess the impacts of the Ombudsman's findings in relation to its payment arrangements for third party top-ups and a detailed review is proposed followed by a further report to the Executive Councillor for Adult Care, Health and Children's Services.

Legal Comments:

The Local Government Act 1974 requires an Ombudsman's Report under section 31 of that Act to be placed before the Council. Under the Council's Constitution that is an executive function where the maladministration is identified is in relation

to the exercise of an executive function. The Ombudsman requires the Report to be placed before the full Executive. The Executive must consider the recommendations of the Ombudsman and the actions taken and proposed to be taken by the Council.

In addition under section 5A of the Local Government and Housing Act 1989 the Monitoring Officer has a statutory responsibility to report to the full Executive instances of maladministration in the exercise of executive functions identified as a result of an Ombudsman's investigation. On receipt of the Monitoring Officer's Report the Executive must consider the Report and determine (a) what action (if any) the executive has taken or proposes to take in response to the report, (b) when it will take any proposed action and (c) the reasons for taking the action or, as the case may be, for taking no action.

In the absence of challenging the findings of the Ombudsman by way of Judicial Review the Council must accept the findings of maladministration that are made. The Council is not obliged to accept the Ombudsman's recommendations as long as it has reason for not doing so.

The decision is within the remit of the Executive.

Resource Comments:

The outcome of the investigation by the Local Government and Social Care Ombudsman into allegations of maladministration by Lincolnshire County Council has resulted in a £600 payment to the service user in question. The report also has potential implications on the way in which providers of Residential and Nursing Care are paid. To that end further work will be required to ascertain the financial impact of those implications over the coming months.

Consultation

Has The Local Member Been Consulted?

N/A

Has The Executive Councillor Been Consulted?

Yes

Scrutiny Comments

The Adults and Community Wellbeing Scrutiny Committee considered this report on 14 February 2018 and agreed to support the six recommendations to the Executive. The Committee requests that it considers the full review of the legal, financial and operational implications of the recommendations in paragraph 60 of the Local Government and Social Care Ombudsman's report.

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
Appendix B	Action Plan

Background Papers

No Background Papers within the meaning of 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 and David Coleman, Chief Legal Officer who can be contacted on 01522 552134 or David.Coleman@lincolnshire.gov.uk .