

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

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

Summary:

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

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

Recommendation(s):

That the Executive Councillor:-

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

2 Decides between the following options:-

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

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

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

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

Alternatives Considered:

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

Reasons for Recommendation:

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

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

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

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

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

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

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

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

Background

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

Context of the Decision

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

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

The Ombudsman's Decision

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

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

Options Analysis

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

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

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

Changing the existing arrangements

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

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

Modified payment arrangements

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

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

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

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

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

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

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

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

Legal Issues:

Equality Act 2010

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

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

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

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

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

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

Crime and Disorder

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

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

Conclusion

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

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

Legal Comments:

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

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

Resource Comments:

The resource implications of each option are as follows:-

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

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

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

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

N/A

Has The Executive Councillor Been Consulted?

Yes

Scrutiny Comments

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

Has a Risks and Impact Analysis been carried out?

Yes

Risks and Impact Analysis

See the body of the Report.

Appendices

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

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

Background Papers

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

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

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