Lincolnshire COUNTY COUNCIL

Report Reference: **1.0**

Open report on behalf of Tony McArdle, Director of Adult Social Services

Report to:	Councillor G A Marsh, Executive Councillor for Adult Social Care (including Supporting People)
Date:	25 May 2012
Subject:	Residential and Nursing Care Fee Levels within Adult Social Care
Decision Reference:	01990
Key decision:	Yes

Summary: The Council must 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. When setting its Usual Cost the Council must have regard to guidance and in particular to provider costs, to consultation feedback from providers and to the impact of its decision on residents. It may also take other matters into consideration such as the state of the market, the general economic climate and its budgetary position.

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, learning disability and so forth). It is also proposed that this rate covers 3 financial years 2012/13, 2013/14 and 2014/15.

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 the response given by officers of the Council.

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

The recommendation in this report is that the Usual Cost should be set for 3 years with 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.

Recommendation(s):

That the rates set out in Option 3 at paragraph 2.29 are adopted as the Council's Usual Costs for both new and existing service users backdated to the1 April 2012.

Alternatives Considered:

(i) Option 1 see paragraph 4.1, this would cost the Council £1.5million less than Option 3 but would fail to cover the costs of residential care increasing the risk of residential providers going out of business and or a fall in the quality of care

(ii) Option 2 see paragraph 4.1, this would cost the Council £1.4million less than Option 3 but would see a decrease in the rate paid to nursing care providers increasing the risk of nursing providers going out of business and or a fall in the quality of care

Reasons for Recommendation: Adopting the recommendation will cover providers' costs and see 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 need to vulnerable service users and will help facilitate good quality provision. The cost of implementing the recommendation is significant in the region of £4.3m. However the Council is able to influence this cost by managing the placements it makes through ensuring the availability of alternatives such as prevention, reablement and community care packages. This will require additional investment by the Council which must be done if the service is to be sustainable over time given the increasing demographic pressures. This will become increasingly difficult if more money is made available to the residential sector by increasing the Usual Cost above Option 3.

1 Legal Background

1.1 Under section 21 of the National Assistance Act 1948 the Council is responsible for making arrangements to provide residential accommodation to people who , by reason, of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them. The Council contracts with residential care providers in order to meet its legal obligations. Currently the Council is funding approximately 2700 older people placements out of a total of 3,400 Council care home placements.

1.2 When making placements the Council is under a legal obligation to comply with the National Assistance Act 1948 (Choice of Accommodation) Directions 1992 (“the Choice Directions”). The Choice Directions are intended to ensure that when councils make placements in care homes or care homes providing nursing care, that, within reason, individuals are able to exercise genuine choice over where they live. As a consequence, where an individual expresses a preference for particular accommodation (“preferred accommodation”) within England and Wales, the council must arrange for care in that accommodation, provided;

- The accommodation is suitable in relation to the individual’s assessed need
- To do so would not cost the council more than it would usually expect to pay for accommodation for someone with the individual’s assessed needs (“the Usual Cost”)
- The accommodation is available
- The provider of the accommodation is willing to provide accommodation subject to the council’s usual terms and conditions for such accommodation.

The Guidance

1.3 Guidance, Local Authority Circular (2004) 20 (“the Statutory Guidance”), accompanies the Choice Directions. The Statutory Guidance is statutory and consequently when performing its functions a local authority must “act under” the general guidance this means that whilst the Statutory Guidance is not mandatory it should be given great weight and an authority can only depart from it for considered and cogent reasons, in the absence of considered and cogent reasons it is acting unlawfully. The Statutory Guidance advises that “One of the conditions associated with the provision of preferred accommodation is that such accommodation should not require the council to pay more than they would usually expect to pay, having regard to assessed needs (the “usual cost”). This cost should be set by councils at the start of a financial or other planning period, or in response to significant changes in the cost of providing care, to be sufficient to meet the assessed care needs of supported residents in residential accommodation. A council should set more than one usual cost where the cost of providing residential accommodation to specific groups is different. In setting and reviewing their usual costs, councils should have due regard to the actual costs of providing care and other local factors. Councils should also have due regard to Best Value requirements under the Local Government Act…….Councils should not set arbitrary ceilings on the amount they expect to pay for an individual’s residential care. Residents and third parties should not routinely be required to make up the difference between what the council will pay and the actual fees of a home. Councils have a statutory duty to provide residents with the level of service they could expect if the possibility of resident and third party contributions did not exist.”

1.4 As well as the formal Statutory Guidance, the Department of Health in October 2001 issued an Agreement between the statutory and independent social care, health care and housing sectors entitled “Building

Capacity and Partnership in Care" ("the Agreement") which the Council should also have regard to. The Agreement includes the following provisions of relevance:

(a) Commissioners should ensure that they have in place a clear information strategy and that providers should ensure that they are prepared to take the initiative to help commissioners address information issues.

(b) Commissioners should ensure that they have in place (among other things) "clear systems for consultation with all (and potential) providers".

(c) In a section headed "Building capacity, confidence and reducing instability", it is stated:

(i) "Providers have become increasingly concerned that some commissioners have used their dominant position to drive down or hold down fees to a level that recognise neither the costs to 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 current and future costs faced by providers as well as the factors that affect those costs, and the potential for improved performance and more cost effective ways of working. Contract prices should not be set mechanically but should have regard to providers' costs and efficiencies, and planned outcomes for people using services, including patients"

(ii) Commissioners should ensure that they have in place

"Fee negotiation arrangements that recognise providers' costs and what factors affect them (as well as any scope for improved performance) and ensure that appropriate fees are paid".

Providers should ensure that they:

-- "Are able to provide a full breakdown of the costs of services provided …..

-- Undertake prompt and timely communication with commissioners"

(d) In a section entitled "Joint Working", it is stated:

(i) "Joint working will mean providers grasping the opportunity to work collaboratively with commissioners …"

(ii) Commissioners and providers should ensure (among other things) that they “recognise the financial and other constraints faced by partners”.

Recent Legal Challenges

1.5 A number of local authorities have faced legal challenges from care home providers who have successfully argued that the local authority is in breach of the Statutory Guidance were not mindful of the real costs of care when setting their fee rates and failed to consult with the sector.

1.6 The first challenge was the Pembrokeshire County Council case in December 2010. The Council’s decision on rates was found to be unlawful because ;

- The Council’s methodology in calculating capital costs which failed to provide for a 12% return as per the JRF toolkit, see paragraph 1.13 below, by its own admission was flawed
- The Council failed to use appropriate local data on the average number of care hours spent on each resident per week
- It only took into account data from larger homes
- The decision was based on data collected from 2008-09, failed to take into account inflation or the Working Hours Regulations of April 2010.

1.7 The next successful challenge was against Sefton Council in November 2011 which had decided not to increase its Usual Costs in 2011/12. They did this without carrying out any calculation of the actual cost of care and without consulting with providers. The judge found that this was in breach of the Statutory Guidance and the Agreement which required consultation and found that due regard had to be had to actual costs. The decision was therefore unlawful. The judge went on to say that in his view the “Statutory Guidance and the Agreement do not contemplate that there will be any significant imbalance between the usual cost of care and the actual cost.”

1.8 In December 2011 there was a further successful challenge against Leicestershire County Council which like Sefton had decided not to increase its Usual Costs in 2011/12. Again like Sefton the decision was found to be unlawful because of a failure to properly consult and to take into account actual costs. The judge in this case however did recognise that there were many other considerations that the Council were able to have regard to such as its budgetary position, the absence of evidence that in spite of successive freezes, the quality of care had declined or care homes were going out of business. The difficulty in the Leicestershire County Council case was that a legally relevant consideration namely the actual costs of care had not been taken into account. Interestingly the judge also suggested that it might be legally possible for a council to set its Usual Costs below providers’ actual costs.

1.9 Pembrokeshire County Council was in the courts losing for a second time in December 2011. The principal challenge was to Pembrokeshire’s conclusion that when calculating actual costs the appropriate rate of return on capital was 6% rather than the 12% used in the JRF toolkit. The Council had said they would use the JRF toolkit when determining their rates and the judge found they were not therefore free to depart from it without taking great care to ensure that the departure was supported by sound reasoning. In this case the court did not accept that there was sufficient evidence to support substituting 6% into the toolkit. It was accepted however that the JRF toolkit was not the only way of determining the rate of return on capital. In that case for whatever reason the council had chosen not to take its resources into account in coming to a decision.

1.10 Judgement was delivered on the most recent case on the 17 February 2012 when Neath Port Talbot County Borough Council successfully defended a decision to increase its Usual Cost by 5.7% for 2011/12 and enter into a 4 year agreement with providers for a minimum guaranteed increase of 4% each year. In that case a principal ground of challenge was the Council's failure to use the JRF toolkit 12% return on capital in the absence of an alternative methodology or rationale which it did not have.

1.11 The judge observed that it was not appropriate in judicial review cases for the courts to get involved in a detailed analysis of the merits of the decision; that decision makers must be advised of all matters that are legally relevant but otherwise it is permissible for the information presented to be sifted and provided the decision maker has regard to a factor that is legally relevant for it to take into account, the weight given to it is a matter for the decision maker; a judicial review court will be particularly circumspect in relation to complex economic and technical questions

1.12 Finding for the Council the judge went on to hold that as the Council had not committed itself to using the JRF toolkit to determine its Usual Costs it was not bound by the 12% return on capital and did not need an alternative methodology or rationale in order to depart from it. Furthermore the judge was clear that the Statutory Guidance's requirement for councils to have due regard to the actual costs of providing care does not require the Council to set a fee which fully reimburse providers for their costs. It is of note that in the Neath Port Talbot case the Council set the Usual Cost (at the lowest end of the range) £34 less than the Council's own calculation of the providers' actual costs.

JRF toolkit

1.13 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. The 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.” Within Lincolnshire it is not right to assume that new/and or replacement home capacity is required now or in the foreseeable future. As indicated in the Laing and Buisson Lincolnshire survey as adapted using Lincolnshire data in the medium term there is excess capacity in the market and by 2015/16 170 places will need to go in order to support a fairly conservative 90% occupancy rate see paragraph 3.5. Consequently the essential tenet underpinning the JRF toolkit does not apply in Lincolnshire as no new or replacement care capacity is required.

1.14 To address point (a) there is an excess of capacity and whilst upgrading physical assets might be beneficial it is not essential as what matters is the overall quality of care received and in Lincolnshire this is already very high see paragraph 6.3 below and given the financial circumstances of the Council encouraging providers to upgrade their provision cannot be a priority over the next few years. In respect of (b) the prediction of spare capacity at paragraph 3.5 below takes into account the Lincolnshire specific demographic and in relation to (c) the Council is able to compete effectively with self funders as it is able to place at its Usual Costs and see paragraph 3.10 below.

1.15 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.

The Council’s Usual Costs 2011/12

1.16 The Council last set Usual Costs on the 9th May 2011. The Usual Costs per resident per week for new placements during 2011/12 are set out in Table A below. The 2011/12 Usual Costs were on average 1% less than the Usual Costs for 2010/11. The new rates were applied to new placements. Existing placements continue to be paid in accordance with the 2010/11 rates with no inflation uplift where those rates are higher than the 2011/12 rates. The High Dependency Rate 2 was also removed for new placements but not for existing placements. As a consequence service users places prior to 9 May 2011 are paid in accordance with the 2010/11 Usual Costs rather than the 2011/12 Usual Costs. The Council last reviewed provider actual costs in detail in 2003. This resulted in an substantial increase in the Usual Costs which were then inflated by an agreed index until 2007/8 when the Council substituted a 1% increase for the contractual rate. The Council then introduced a Quality Assessment Framework in 2008/09 and 2009/10 differentiating payment in accordance with quality before the Council readopted the single rate per category of service user approach.

Table A

Category of Care	New Placements £
Older people Residential	365
Older People High Dependency	414
Older People Nursing	414
Mental Health Residential	380
Mental Health Nursing	415
Learning Disability Residential/Nursing	427
Physical Disability Residential/Nursing	470

1.17 In June 2011 lawyers instructed on behalf of the Lincolnshire Care Association which represents some but not all providers within the market, wrote to the Council formally threatening to take judicial review action on the basis that no account had been taken of providers costs or the Statutory Guidance and the Agreement; there had been no consultation with the sector and the Council had acted oppressively in abusing its dominant position in the market. In the end the Lincolnshire Care Association agreed not to pursue the judicial review on the understanding that the Council agreed to review its Usual Costs in April 2012. It was made clear that the Council gave no commitment that the rates coming out of any review by the Council would be adopted. The Council agreed to work in collaboration with the Lincolnshire Care Association so that the Council's review was informed through discussion on matters such as providers' costs and efficiencies.

Engagement of Laing and Buisson to collect Lincolnshire Data

1.18 To assist with this the Council has worked with 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. To this end Laing and Buisson were retained to undertake an assessment of the residential care market based in large part on responses to a survey sent to all care homes in Lincolnshire. 129 completed surveys were received out of the 264 homes which could have responded, a 53% return. The instruction agreed with the Lincolnshire Care Association was to appraise residential costs and market conditions. "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.

- 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.

- A compilation of good practice examples of efficiencies and innovations introduced by Residential Care providers both locally and nationally.

- An appraisal of opportunities for providers to diversify and broaden their offer in the light of personalisation."

1.19 Laing and Buisson's report "An Independent Evaluation of the Residential Care Market for People across Lincolnshire" was completed on the 9 January 2012 and is attached at Appendix A. Headlines from the report are as follows;

- No indication of significant home closures- eight had closed but 5 of these were Council homes.
- Occupancy rates at 88% based on a snapshot in time compared to the 90% level of occupancy put forward in the JRF tool kit-it may be that some providers are saying they have vacancies even if they do not as they want to encourage on-going referrals for admissions.
- 45% of placements based on a snapshot in time are supported by the Council with the remaining 3,290 placements being self funders or NHS funded.
- A significant reduction in Council residential care placements was noted.
- Premium paid by self funders is 35% for frail older people and 50% nursing for older people.
- More care hours are spent on Lincolnshire residents in residential care than suggested by the JRF toolkit 22.2 median hours per resident per week compared to 18.5 hours.
- Matters raised by providers include the fact that new admissions are increasingly dependent; occupancy is down; reduced Council fees have led to raising private fees and increasing top ups; poor communications with LCC and slow administration; food and utility costs going up.
- LCC's rates in 2011/12 compare reasonably well with neighbouring authorities paying probably above average and probably about average with its CIPFA family with Lincolnshire having more care home places per head of population than most of its CIPFA family but comparison is not easy see paragraph 6.6 below.

1.20 The Laing and Buisson 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.

1.21 Laing and Buisson 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 2012/13 rates. Rather it wished to better understand the local market, including local costs and pressures and then take a decision in the round balancing other factors such as the Council's financial pressures as appropriate see below. As it became clearer that the Council had to have regard to providers' actual costs the Council preferred instead to build its own cost model. It also asked Laing and Buisson if they could provide an estimate of the costs of care in Lincolnshire from the work they had done but Laing and Buisson were unable to do so because of an insufficiency of information with regard to capital costs. Essentially to maximise the response from providers Laing and Buisson had used a shorter survey form than the one they use for actual cost surveys.

The Actual Cost Modelling Process

2.1 The Council's cost model including the assumptions made for Options 1 and 2 and 3 are attached at Appendix B. This has been used to form a view on the actual costs of care in Lincolnshire using much of the information collected in the Laing and Buisson Lincolnshire Survey and using a separate survey carried out by Lincolnshire County Council attached at Appendix C to help inform a suitable rate of return on capital based again upon Lincolnshire specific data. At the same time the Lincolnshire County Council survey took the opportunity to confirm occupancy rates.

2.2 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 B with the Lincolnshire data collected by Laing and Buisson using median data for increased reliability. Following the consultation changes have been made to the cost model to reflect some of the provider comments for example an increase has been made to reflect the cost of capital maintenance. Where changes have been made they are included in the cost model at Appendix B and referred to in the consultation response at Appendix E.

2.3 An adjustment was made to the Laing and Buisson Lincolnshire data to increase the occupancy rate from 88% to 90%. This reflects the figure obtained in the Lincolnshire County Council survey which looked at average occupancy over a 12 month period rather than a single point in time the approach taken by Laing and Buisson. The 90% also accords with the occupancy figure for efficient homes put forward in the JRF toolkit. An occupancy rate of less than this may result in the Council subsidising less popular homes.

2.4 Prior to the consultation the costs model was populated with the hours coming out of the Laing and Buisson Lincolnshire Survey with 22.2 hours care hours per resident per week for residential care placements, 21 care hours for nursing care placements and 24.2 hours for HD placements. Consultation responses indicated that the cost of providing care in Lincolnshire was not as similar between the categories of service users as suggested by the Laing and Buisson Lincolnshire Survey with providers saying that it was necessary to expend more hours on nursing and HD placements. As a consequence rather than use the hours in the Laing and Buisson Lincolnshire Survey which may not properly reflect the differential costs of care the Council has re-run the financial model using the national hours in the JRF toolkit using a figure of 18.5 hours per resident per week for care homes only; 20.5 hours per resident per week for nursing homes and 22.9 hours per resident per week for HD (representing a mixture of frail older residents 42% and people with dementia 58%).

2.5 The Council's obligation is 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.

2.6 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 (£42,000 see paragraph 2.22 below) 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. It can be calculated in a number of different ways.

2.7 The JRF toolkit uses a "profit purchase multiple" (a technique used to measure the fair market value of a company) that investors are willing to invest in good quality care homes it involves looking at what individual care homes are bought and sold for. The current edition of the JRF toolkit is based on a profit purchase multiple of 8.5 which was being achieved on sales by several of the large national providers in May 2008.

2.8 The multiple is derived by dividing the Enterprise Value (similar to share valuation) of a company by its earnings before interest, taxation, depreciation and amortisation (EBITDA) to come up with a multiple that is divided by 100 to produce an estimated return on capital.

2.9 As the profit purchase multiple falls the return on capital increases and vice versa. So as the market value of homes falls and the profit purchase multiple falls correspondingly, the rate of return on capital automatically increases. The logic of the Laing and Buisson methodology would seem to be that this increased rate of return on capital would encourage reluctant investors back into the sector and feed into the next update of the JRF toolkit. For example in 2002 the profit purchase multiple was 6-6.5 and the rate of return on capital in the JRF toolkit was 16%. This makes some sort of sense when the purpose of the financial modelling is to ascertain a fair price for new investors/operators - as the profit purchase multiple falls the sector appears to be higher risk/lower reward and so higher returns are sought but the approach is not helpful in determining the actual cost to existing providers of providing care. It is manifest that the actual cost of providing care to Lincolnshire residents does not vary inversely with the value of the buildings from which the care is provided. The cost does not increase simply because the national notional value of care homes (in common with much other property) might be less in 2012 than it was in 2008.

2.10 For the reasons outlined above the JRF toolkit is of limited value. Therefore the Council has surveyed Lincolnshire providers and asked for their profit and loss account (from which it is possible to calculate operating profit) and balance sheet which shows net current assets and the statement of accounts. Dividing the operating profit by the net current assets and then multiplying by 100 gives the annual return providers made from assets invested in the business that year and is a recognised way of expressing the return on capital for a business which continues to trade. It is a very common ratio used to measure performance. The higher the percentage, the greater the return and performance of the organisation.

2.11 The survey was emailed to all 296 care homes on 23rd January 2012 with a reminder issued on 8th February 2012. Letters were sent to those homes that were not contactable by email on both occasions.

2.12 Where the survey asked for data for both 2008/09 and 2010/11, the decision to ask for two non consecutive years was to allow the authority to clearly show the impact on providers of previous decisions around rates.

2.13 In all 34 responses were received of which 3 declined to provide any information, 26 organisations sent completed returns and/or statement of accounts and 5 provided alternative analysis of costs.

2.14 The 26 organisations that sent returns represented 79 homes in total, representing 27% of all homes within Lincolnshire and the results of the survey were able to determine the following:

- Average occupancy increased between the two periods from 87% in 2008/09 to 90% in 2010/11

- The average number of beds had decreased from 34 in 2008/09 to 33 in 2010/11.
- The proportion of beds funded by the local authority had remained constant at 57% over the two periods
- Average operating profit (i.e. the profit earned from a firms normal core business operations before the effects of tax and interest are taken into account) had increased by 3% over the period from an average of 11% in 2008/09 to 14% by 2010/11. Analysis of the data submitted by providers suggests that income over the same period has increased on average by 13% with total operating costs increasing by the same amount. This suggests that providers have been able to maintain and increase income by utilising demand in the private sector over and above what the local authority commissions. Further analysis reveals that the proportion of "Costs of Sales" to turnover has reduced slightly by 1% to 62% of total turnover with the proportion of "Other Operating Expenditure" remaining static at 25% of turnover. The fact that overall operating profit has increased by more than this suggests that there has been scope for and some efforts are being made by the sector to become more efficient within their operations
- The average return on capital (i.e. the ratio that indicates the efficiency and profitability of a company's capital investment) remained constant at 11% over the same period.

2.15 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

2.16 Current market indicators as published by property advisors CBRE suggest that the rate of return for what it describes as Prime Healthcare is currently 6% with Good Secondary Healthcare at 7%. (A provider has indicated this is not a good comparison see Appendix E paragraph 11 (i)). This compares to UK 10 year Interest Rate Swaps at 3.42% and 20 Year Interest Rate Swaps at 3.93% and current London Inter-Banking Offered Rates (LIBOR) at 1.07%. Interest Rate Swaps and Libor represent low risk investments.

2.17 As the Council buys a substantial amount of placements (57% based on the Lincolnshire County Council Survey measured across 2010/11 or 45% based on the Laing and Buisson Lincolnshire survey based on a greater market response but in relation to a particular point in time) 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, with a good balance between Council and self funders and with the predicted demand for care home places remaining buoyant. Whilst Council demand is likely to fall over time this should be manageable for the sector given the minimal impact it is likely to have in terms of bed losses (approximately 170 by 2015/16) and because it will be done over time and with market awareness so the market is able to take advantage of other market opportunities as set out in paragraph 6.4 below. Therefore whilst there is some fall off in Council demand this is not the same as other types of risk that other businesses can be exposed to such as a risk of falls in income or extra costs because of unpredictable changes in the market, or a risk of a major customer not being able to pay, or of any smaller customers not being able to pay. It is fair to point out that there have been administrative difficulties in the Council which have added to the burden on care homes see paragraph 6 of Appendix E but the Council is addressing them and they do not relate significantly to commercial risk. In the event that providers' feel the self funding element of their business is more high risk providers can manage this through the higher rate it is able to set for self funders.

2.18 In addition to the position on risk set out above, incorporating the providers' actual rate of return of 11% 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% return on the Prime Healthcare market.

2.19 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).

2.20 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; are not purpose built and do not necessarily meet the criteria set out in the aforementioned standard. Consequently the approach more closely reflects local factors in Lincolnshire.

2.21 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 February 2012 using the following property websites:

- BusinessesForSale.com
- CareHome.co.uk
- DaltonsBusiness.com

2.22 The survey identified fifteen care homes within Lincolnshire with the average value per room of £42,000 and it is this figure which has been used in the Lincolnshire Cost Model. It is fair to say that 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. However the figure is supported by figures elsewhere for example by Terra Firma's acquisition of Four Seasons, announced on or around the 28 April 2012, for £825m relating to 445 care homes, with 22,364 beds, and 61 specialist care centres, with 1,601 beds amounting to an average value per bed of £34, 500 (the cost of each care home bed will be less than this as the specialist care centre beds will be more expensive). Further a Lincolnshire group home as part of this consultation has provided information which states that for 2011 it has valued each of its rooms as a going concern at approximately £30,000.

2.23 Multiplying the value of a room at £42,000 by the nominal 6% rate of return provides a payment of £53 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.

2.24 In a 30 bed home it amounts to a payment to cover the cost of the accommodation of approximately £83,000 (£53x 30x 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.

2.25 This represents an annual payment per room of £2,763. Given the assumption above of the capital cost per room of £42,000 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 Lincolnshire County Council survey which indicated that the average period in business up to the date of the survey of the 21 respondents (representing 17% of the market) was 17.3 years and continuing.

2.26 As a consequence the County Council can be reasonably confidant that the £53 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. The figure also compares generously to the £42.72 being put to the Leicestershire County Council fee review panel on the 24 May 2012 to cover the cost of the providers' use of assets in Leicestershire. The Leicestershire figure is helpful as it is reasonably local and unlike the Lincolnshire figure (which is derived from multiplying 6% by £42,000) would appear to be based on empirical data collected from a representative cross-section of the sector on the actual cost of making the assets available in terms of rent or mortgage interest. Consequently it provides added support that the £53 is more than sufficient.

2.27 The recommendation is that the Usual Cost should be set for 3 years 2012/13, 2013/14 and 2014/15. To achieve this work has been done to anticipate how providers' costs are likely to increase in 2013/14 and 2014/15 Increases in 2013/14 & 2014/15 rates are 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 March 2012 and increases as a result of legislative changes to employers pension obligations. This equates to a 1.7 % increase in both years for standard residential and HD and a 2.2% increase in both years for nursing.

2.28 It is fair to say that much of the work done and in particular the cost data collected in the Laing and Buisson Lincolnshire survey enabling a detailed understanding of the providers' costs has centred on older people. It is the Council's intention in collaboration with providers, in the near future to extend that work to enable a detailed understanding of providers' costs for mental health, learning disability and physical disability where in some cases placements are more bespoke given the wider variety of need as between individual service users. However it is recognised that many of the more specialist placements are made at the Council's Usual Cost and where this is the case the Usual Cost will increase. However where the cost of the placement exceeds the Usual Cost no increase will be made and the rate will be frozen until such time as the new Usual Cost catches up with it. The position will be reviewed once the Council has completed the additional work referred to above.

2.29 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 Option 3 are adopted as the Council's Usual Costs for both new and existing services users backdated to the1 April 2012. The cost of implementing Option 3 over the 3 years is in the region of £4.3 million a very significant increase on the Council's earlier proposals.

	Care Group	2011/12	2012/13	2013/14	2014/15
Option 3 (Rates)	OP Std Res	£365.00	£391.00	£398.00	£404.00
	OP Nursing	£414.00	£416.00	£426.00	£435.00
	OP HD	£414.00	£432.00	£439.00	£447.00
	LD Std	£427.00	£457.00	£465.00	£473.00
	PD Std	£470.00	£503.00	£512.00	£521.00
	MH Std	£380.00	£407.00	£414.00	£421.00
	MH Nursing	£415.00	£417.00	£426.00	£435.00

Other Factors for the Council to Consider when setting its Usual Costs

3 The Council's Commissioning Obligations

3.1 As has been discussed above the Usual Costs set in accordance with the Choice Directions secure choice for individuals but in addition to that they set the contract rates which the Council pays to providers for providing the accommodation. The Council and commercial providers share an interest in securing good quality care for residents but commercial providers also have an interest in maximising their revenue and increasing their attractiveness to private funders whilst the Council has reduced budgets as well as many other pressing needs to address. The Council's Usual Cost is the rate that it would usually expect to pay to meet assessed need. If providers are unhappy with the rates set then they do not have to contract with the Council. Instead the Council will have to secure alternative accommodation elsewhere at its Usual Cost, in sufficient quantities so as to discharge its legal obligations to meet assessed need and to offer service users a reasonable degree of choice.

3.2 If it is unable to do so then the Council will have to buy capacity at the market rate even where the cost of doing is significantly above Usual Cost as its legal obligation to meet assessed need is a constant and does not vary as the cost of meeting that need increases. With this in mind it is of interest that self- funders within Lincolnshire pay a premium for their care homes. The median self pay rate for frail older people is £502 compared to the average Council rate of £371 a premium of some 35%. The premium for nursing for frail old people with dementia is 52% with self- funders paying £640 compared to the average Council rate of £421. It follows that the Usual Cost is a key commissioning tool for managing the market and ensuring a sufficiency of sustainable and affordable provision to meet the Council's legal obligations.

3.3 The Laing and Buisson Lincolnshire work demonstrates that there are currently 6,803 places for older people and dementia within the County. The Council supports approximately 2,700 of these placements. The Council made 917 new placements of older people and 990 in total to March 2011. It stated that it would try and reduce new placements of older people for 2011/12 to 532. That target has been considerably exceeded and there were 790 new elderly placements in 2011/12. The target/projection for 2012/13 is for 691 new elderly placements reducing to 463 by 2015/16. The Council's target of 691 for new placements for 2012/13 appears overly optimistic as evidenced by the number of new placements in 2011/12; the quantum of placements over recent years; observations that individuals are already increasingly frail on placement; the unproven impact of reablement and prevention and the need always to meet assessed need.

3.4 Further, when considering the extent of its commissioning obligations the Council must also take into account the changing demographic. A useful tool which assists is the Laing and Buisson age standardised demand. It projects demand more accurately than simply examining the size of the general older population. It projects the demand for care home places for older people by applying the probability of being in a care home in the age bands 65-74, 75-84 and over 85 in the UK to the resident population of an area. For Lincolnshire the prediction is that the demand for care home places for older people will be 18 per cent higher in five years time.

3.5 Looking to the future, using the total supported placement figure of 2,697 used by Laing and Buisson (Table 22 page 25 Appendix A) as the starting point and on the assumption that the Council makes 790 new elderly placements in 2011/12 and continues to make new placements at the rate of 790 annually thereafter on the assumption that prevention, reablement and care in the community will deal with the increasing demographic trend ; and using the 27% discharge rate experienced by the Council in 2010/11 it is possible to calculate that by 2015/16 in order to maintain long term sustainable occupancy rates of 90% approximately 170 places will need to go. The Council's market share in 2012/13 will be 43%; in 2013/14 41%; in 2014/15 40% and in 2015/16 38%. This is at variance with the Laing and Buisson predictions of the Council share falling to 18% by 2015/16 and for there to be a need to close 1,590 places to maintain 90% occupancy rates. This is because Laing and Buisson assume new placements of 550 per year and take an unclear approach to discharges which is difficult to follow and for existing supported residents shows no apparent pattern. Discharges for future supported residents suggest a discharge rate of 50% in the first year and 25% in the second but there is no evident rationale for this approach and it is not therefore preferred.

3.6 However it does not follow that simply because there are places available in the market that there are sufficient providers prepared to contract with the Council to meet the Council's demand for services at its Usual Costs.

3.7 The Statutory Guidance makes it clear that if an individual requests it, the council must also arrange for care in accommodation more expensive than it would usually fund provided a third party, or in certain unusual circumstances the resident, is willing to pay the difference between the cost the council would usually expect to pay and the actual cost of the accommodation (to "top up").

3.8 As a consequence homes are able and do charge top ups on Council placements. However the Statutory Guidance makes it clear that Usual Costs must be sufficient to meet assessed care needs without individuals having to pay top ups "Individual residents should not be asked to pay more towards their accommodation because of market inadequacies or commissioning failures. Where an individual has not expressed a preference for more expensive accommodation, but there are not, for whatever reason, sufficient places available at a given time at the council's usual costs to meet the assessed care needs of supported residents, the council should make a placement in more expensive accommodation. In these circumstances neither the resident nor a third party should be asked to contribute more than the resident would normally be expected to contribute and councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees."

3.9 In the Laing and Buisson Lincolnshire survey care homes reported that in response to the Council's reduction on fees for new placements in 2011/12 they have raised private fees and have introduced or have increased top-ups for supported residents. The data is not complete as 30 % of the homes who responded to the survey did not answer this question; of those that did 44% said they did charge top-ups and 26% said they did not. There is further information on top ups from the Lincolnshire County Council survey which showed minimal change between 2008/09 and 2010/11. Of the 26 organisations that responded 6 said they charged top ups in 2010/11. Of these 4 were already charging top ups in 2008/09 and of these 4, 3 of the organisations had increased their average top ups by reasonably small amounts perhaps reflecting inflation whilst the other had dropped its top ups significantly. Only 2 of the 26 organisations were now charging top ups in 2010/11 when they hadn't done so in 2008/09.

3.10 Further information on top ups is available from the pricing schedules signed by providers as part of the contract. That indicates that 3273 beds have top ups and 3896 do not. There is a small element of double counting as there are 90 beds suitable for either standard or HD placements where top ups only apply to standard placements. There are a further 700 beds where top ups are indicated but where the provider has indicated that it may waive top ups or where it has waived top ups in the past. Consequently there are up to 4,596 placements available to the Council at Usual Cost to meet the Council's total requirements for placements which is currently in the region of 3,400. For elderly placements there are 3067 beds available without top ups plus a further 700 beds where top ups are indicated but where the provider has indicated that it may waive top ups or where it has waived top ups in the past. Consequently there are up to 3,767 placements available to the Council at Usual Cost to meet the Council's requirements for elderly placements which is currently in the region of 2,697. It is of interest that some providers have been removing top ups over recent months.

4 Consultation

4.1 As indicated above the Council has worked closely with the Lincolnshire Care Association on the engagement of Laing and Buisson to carry out the market assessment of Lincolnshire. All care homes were invited to participate in that work and the completed survey was sent to all homes.

4.2 A meeting was held at Lincolnshire County Council on the 18th January 2012 to feedback the findings from the Laing & Buisson report and to discuss the next steps in relation to residential care fees. The draft report proposed two different approaches to the rates Option 1 and Option 2 and was released to providers for their comments

Option 1	***2011/12 (current rates)***	***2012/13***	***2013/14***	***2014/15***
Residential	£365.00	£377.00	£389.00	£401.00
Nursing	£414.00	£414.00	£414.00	£414.00
HD	£414.00	£420.00	£426.00	£432.00

Option 2	***2011/12 (current rates)***	***2012/13***	***2013/14***	***2014/15***
Residential	£365.00	£395.00	£401.00	£407.00
Nursing	£414.00	£396.00	£402.00	£408.00
HD	£414.00	£416.00	£422.00	£428.00

4.3 It was recognised that Option 1 would not immediately cover the costs of residential care taking until the third year before it did so whereas Option 2 would see a significant drop in the rate for nursing placements which might be difficult for the nursing market to cope with and could create instability. The financial impact of the proposed option 1 would increase the base budget cost to the authority by an estimated £1.8m in the three year period for residential, nursing and HD placements, increasing to £2.8 million when mental health, learning disability and physical disability placements at Usual Cost are taken into account. The financial impact of the proposed option 2 would increase the base budget cost to the authority by an estimated £2.2million in the three year period for residential, nursing and HD placements, increasing to £2.9 million when mental health, learning disability and physical disability placements at Usual Costs are taken into account. An analysis of the financial costs of the proposed options is shown in Appendix D.

4.4 When reaching a decision on the Usual Costs the Council must conscientiously read and take into account what the providers are saying as set out in Appendix E.

5. Financial Context

5.1 The Council is able to take into account its resources when setting a fee to be paid to providers. When doing so it will want to ensure that the rates are sustainable and not such that they would have an unacceptable impact on the Council's ability to fund ongoing placements as necessary to meet assessed need to the detriment of services users and providers alike. In this context the Council should reflect on the very difficult and unprecedented financial circumstances it finds itself in.

5.2 Lincolnshire's grant funding was reduced by £26.7m (11.2%) in 2011/12 and a further £16.1m (7.6%) in 2012/13 with further substantial reductions anticipated in the following years.

5.3 At the same time the Council faces pressures due to increased costs such as the county's increasing population and in particular, the impact on the Council's social care budgets of the increasing numbers of older people. Price increases, including energy price increases and landfill tax will increase costs as will new responsibilities including concessionary fares and acting as the lead flood management authority for Lincolnshire.

5.4 Council tax was frozen for 2011/12 and a 2.5% increase has been built into the budget for 2012/13 and beyond. The Council was compensated for the 2011/12 freeze through a Government grant. Council tax was frozen for 2012/13 and the Council again received a Government grant to compensate for the freeze but only for 2012/13. Any increase in council tax above 3.5% would require a referendum. Consequently the Council's ability to raise additional revenue is limited. Taking into account grant reductions and unavoidable cost pressures total annual savings of £125m over a four year period, or 25% of the base budget have to be made.

5.5 The average reduction in service budgets was 25% over the four years 2011/12 to 2014/15 compared to 2010/11. Over the same period the average overall net saving in service budgets once costs pressures had been built back in was 12%.

5.6 Adult Social Care is the Council's largest budget taking up 28% of the Council's budget (excluding schools) it is not possible to make savings on the scale required without making significant reductions in Adult Social Care spending and the gross budget saving has been set at 28% equating to a net saving of 11%.

5.7 As a result in Adult Social Care the budget for 2012/13 is £10.9m less than it was in 2010/11, in 2011/12 it was £9.4m less than 2010/11 and over the 4 years the budget is £15.6m less than 2010/11. The real savings taking into account the need to fund cost pressures in the service are £18.7m in 2012/13 (14.5% of the budget) and over the 4 years £39m (27.9% of the budget).

5.8 The priorities for Adult Social Care are:

- Personalisation
- Alignment with health
- Integrity of operational processes
- Balanced budget

5.9 The rationale for these priorities is that they allow the Council to protect the most vulnerable i.e. those with critical and substantial need whilst making the service more sustainable.

5.10 The key saving in 2011/12 was on staffing with a saving of £8.558m required. This represents 48.9% of the required year 1 savings. Other savings have been delivered from an increase in income from charging, reducing numbers of service users in residential care, closure of eight Council owned care homes, reshaping home support services, savings from market development work, general efficiencies and a change to the eligibility criteria.

6 Other factors

6.1 The evidence most recently from the Laing and Buisson Lincolnshire survey is that there is already ample provision within Lincolnshire to meet the demand of the Council and self funders. In fact the evidence referred to above at paragraphs 3.5 and 3.10 in more detail, indicates that there is a degree of over capacity.

6.2 Under the Statutory Guidance the Council is under an obligation to take into account its Best Value obligations when setting its Usual Costs. This requires it to take into account its fiduciary duty to those who provide public funds and indicates that Usual Costs should not be set at a rate which rewards inefficient providers or supports excess capacity within the market.

6.3 Providers' concerns/comments are discussed in Appendix E. However in spite of the concerns raised the evidence suggests that providers have continued to manage sustainable high quality businesses. The Lincolnshire County Council survey indicates providers have become more efficient increasing operating profit by 3% to 14% from 2008/09 to 2010/11. Further, the Laing and Buisson Lincolnshire survey notes that a new care home is being developed in Louth with 65 places for nursing and dementia care; that there is a planned expansion of a dementia home in West Ashby and a recently opened 60 place care home in Gainsborough. The only homes to close have been the Council owned homes and one other, whilst there are 3 homes in Administration all owned by the same company a buyer has been found and the company is being taken over as a going concern, there is another home which has gone into administration very recently and again it is continuing to trade until a buyer is found. Furthermore Lincolnshire providers deliver high quality services. In September 2010 (the last time this information was available) 90.7% off care homes in the county met the care Quality Commission's ratings for good and excellent. This made Lincolnshire the best performer for both existing and new placements in the CIPFA comparator group, 16 authorities grouped on similar characteristics and demographics.

6.4 Providers may decline to contract with the Council at its Usual Costs. The Council occupies an important position in the market, supporting about half the placements within the County on average, although in some areas the Council will be the “dominant purchaser”. Over time the Council’s placements are likely to reduce. However, providers have other commercial opportunities available to them from self –funders, the NHS and from Council services users around the personalisation agenda examples include NHS continuing care, for early discharge, for admission avoidance, for end of life care, the growth of personal assistants, prevention services, re-ablement and carer support. With the closure of Council homes there are also more opportunities to deliver Day Services, Respite and Intermediate Care.

6.5 The Council is working in the context of financial constraint and an anticipated increase in the number of elderly people needing care in the county. In this regard the Laing and Buisson Lincolnshire report indicates that the demand for care home places for older people will be 18 per cent higher in five years time. As a consequence to facilitate sustainability the Council recognises that there must be a rebalancing of resources to provide a greater element of support for domiciliary and community and preventative services to support people in their own homes and communities. Nationally it is suggested in Department of Health publication: “Use of Resources in Adult Social Care - A guide for local authorities”. October 2009 “Within the context of the use of their resources, an excellent local authority will: have a balance of services available, with not more than 40% of its overall adult social care budget being spent on residential care (or a plan to reach this target)”.

Currently 48% of the budget is spent on residential services in Lincolnshire.

6.6 Comparing fees is not easy as local authorities do not all take the same approach. For example some authorities price on a geographical basis, some have additional bands or rates and some pay more than the rate in some cases. That said the Laing and Buisson survey suggest that Lincolnshire County Council’s 2011/12 rates compare reasonably well with neighbouring authorities paying probably above average and probably about average with its CIPFA family with Lincolnshire having more care home places per head of population than most of its CIPFA family.

7 Equality Act 2010

7.1 The Council's duty under the Equality Act 2010 needs to be taken into account when coming to a decision. It is important that the Executive Councillor is aware of the special duties the Council owes to persons who have a protected characteristic as the duty cannot be delegated and must be discharged by the decision maker. The duty is for the Council, in the exercise of its functions, to have due (that is proportionate) regard to the need to:

(1) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;

(2) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(3) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it: Equality Act 2010 s 149(1). The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation: s 149(7).

Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to:

(1) Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(2) 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;

(3) 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.

(4) 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.

(5) 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.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others.

(7) The relevant protected characteristics are:
Age
Disability
Gender reassignment
Pregnancy and maternity
Race
Religion or belief
Sex
Sexual orientation

(8) A reference to conduct that is prohibited by or under this Act includes a reference to:
(a) A breach of an equality clause or rule
(b) A breach of a non-discrimination rule

7.2 If the Usual Cost is set at an arbitrary 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.

7.3 An Initial Equality Impact Analysis was carried out in March 2012 and a Full Equality Impact Analysis in April 2012 following consultation with providers. They are attached at Appendix F 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 determined by the costs model. Initially the Council consulted on the two Options set out in paragraphs 4.2 above. Option 1 meant that in the first two years the residential rate did not cover cost and Option 2 resulted in a decrease to the nursing rate. However following consultation with providers adoption of Option 3 as set out in paragraph 2.29 is the recommended way forward albeit at significantly increased cost to the Council.

7.4 Option 3 does maintain or increase all Usual Costs and does cover the providers' costs. However it should be noted that the cost model used the JRF toolkit care hours which were less per resident per week rather than the hours referred to in the Laing and Buisson Lincolnshire Survey which failed to recognise the differential care costs between residential and nursing/HD. As a consequence if the Laing and Buisson Lincolnshire Survey does accurately reflect the hours there is a risk that the number of hours spent with each resident per week is not being fully remunerated and hours may fall to be more in line with the national average with the possibility that quality could also fall. The risk arising out of a fall in quality in these circumstances is not however considered to be high. The proposed rate is above that that residential care providers are currently paid and therefore there should be little economic need for providers to cut the number of hours currently provided. Furthermore it is clear that providers are providing an excellent quality of service and an incremental fall in quality should be manageable with the quality of care remaining consistent with the Council's statutory duty.

7.5 Similarly, Homes in Lincolnshire are not failing at the current Usual Costs level even though there is excess capacity within the system. Consequently the increase in all rates and to a level where the providers' costs are covered should mean that the providers financial position is stronger and the risk of Home closure falls.

7.6 Overall implementation of Option 3 is likely to have a positive impact on providers and residents. In the event that Options 1 or 2 are preferred each option offers the possibility for simultaneous positive and adverse impact depending on which discrete part of the sector is being considered. Option 1 prefers the nursing care sector over the residential care sector and vice versa. Option 3 undoubtedly offers less risk of adverse impact than Options 1 and 2. In Option 1 the risk that any residential homes will go out of business as a result of the change in Usual Costs or that the standard of care will fall is greater than Option 3 and the same is true of nursing homes under Option 2. However the nature of the risk needs to be understood. The analysis of the market set out in this Report shows levels of quality to be very high. Taking into account the specific Lincolnshire facts underlying a reasonable rate of return on capital it is believed the rates proposed support viable businesses particularly if providers are to continue to become more efficient (as suggested by the increasing average operating profit) and if they exceed the relatively conservative 90% occupancy rate.

7.7 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.

7.8 As far as Home closures are concerned, the risk of a home closing will be monitored during contract management meetings and the Council would expect Homes starting to find themselves in difficulties to raise this with the

Council: the Council will remind Homes to do so. In the unusual and unlikely event that a home was to close rather than be sold as a going concern then there is sufficient market capacity to find alternative provision for residents. The adverse impact therefore relates to the way in which a closure is managed and the quality of support that residents receive in moving from one placement to another. In this respect the Council would receive early notification from CQC, each resident would then be allocated a case worker to assess their needs both in terms of an alternative placement and the transition to that new placement. Specialist medical advice would be taken as necessary to minimise disruption and upset to the resident. The resident and their family/carers would be fully informed and involved and the residents preferred choice of alternative accommodation would be respected in the context set out above. In the Council's experience of managing Home closures, where closure takes place for a variety of reasons, it has been able to transfer residents safely and in ways that ensure that their needs continue to be met. If it appears possible that a particular Home risks having to close, the Council will assess the risks to residents as early as possible and take appropriate action.

7.9 The equality duty referred to above requires the Council to consider whether the risks just mentioned ought to be accepted, in the interests of providing cost-effective care home placements and in the light of the Council's financial position or whether a different course should be taken, for example paying care homes higher fees to reduce or remove such risks by accepting the recommended Option 3 instead of Options 1 or 2; whether the risks can be reduced or mitigated in any additional ways other than just described; and whether monitoring of the risks is adequate

8 Relevant Considerations

8.1 When coming to a decision the Council must have due regard to the providers' actual costs as discussed in section 2 and other local factors which it considers to be relevant. These other local factors may include overcapacity in the market; the Council's support of significant numbers of placements; the lack of evidence that quality has declined or that homes are going out of business as a result of the Council's Usual Costs and the other commercial opportunities open to the providers.

8.2 The Council must also be conscious that the Usual Costs should be set at a level which, are sufficient to meet the assessed care needs of supported residents and the Council should not set an arbitrary ceiling on the amount it expects to pay for residential care.

8.3 The Council must also take into account its Best Value obligations and when coming to a decision must carefully consider feedback from the providers as set out in Appendix E and have due regard to the risk of any adverse impact on residents as set out in section 7.

8.4 Furthermore, the decision is necessarily taken in a particular and difficult financial context as set out in section 5. Closely allied to this is the need for the service to be sustainable so that the Council can meet its legal obligations to provide residential care over time. Consequently the Council may wish to take into account the need to re-profile the budget so that more money can be invested in preventative services.

8.5 So long as the decision maker has regard to a factor which is legally relevant for him to take into account (as indicated by use of the word “must” above) the weight given to it is a matter for the decision maker.

9 The Way Forward

9.1 The Council has spent time establishing the local costs of providing care in Lincolnshire and in making a recommendation for the 2012/13 Usual Costs. It has been hugely supported in that work by providers and is grateful for the time spent by them. The work has been valuable and it has become clear that the Council’s increased investment in robust market and relationship management would be of benefit to all.

9.2 The Council also recognises that its ongoing £150,000 per annum investment in supporting external workforce development covering Prevention , Personalisation, Protection, Leadership and Management priorities and involving the Sector in determining priorities and on co-delivery of the activities is valued by the sector and should continue. This partnership offers the Sector a wide range of training opportunities heavily subsidised by LCC; Leadership and Management programmes for Senior Carers; free e-learning ; access to funding from Skills For Care Workforce Development Fund; access to specific workforce development funded via SHA / EM Region DH for example End Of Life Care and Dementia.

9.3 The current work has reminded the Council that it is fortunate in the very high quality of care available in Lincolnshire and the importance of maintaining and recognising that. Whilst quality of the building/environment is one factor most people recognise that quality is more about soft skills. A welcome initiative might be for the Council to explore the feasibility of acknowledging an accreditation scheme, which ranks the homes against a set of soft criteria, and which leads to participating homes being awarded one of four standards for example Excellent, Very Good, Good, Adequate. No premium would be paid to Excellent Homes but such a scheme would help providers differentiate themselves in the market place and support service users in their choice of homes as such it may be welcomed by providers and incentivise the continuation of high quality care.

Conclusion

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 Options 1 and 2. Following that consultation further work has been done and another option –Option 3 has been developed. For the reasons outlined in the report, Option 3 is the recommended option. Whatever option is adopted where there is an increase in rates the Council has advised the sector that, that increase will be backdated to the 1 April 2012.

Legal Comments:

Under section 21 of the National Assistance Act 1948 the Council is responsible for making arrangements to provide residential accommodation to people who, by reason, of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.

The Council meets its statutory obligation through contracting with providers. When making placements the Council is under a legal obligation to comply with the National Assistance Act 1948 (Choice of Accommodation) Directions 1992 ("the Choice Directions") which anticipate the Council setting a rate it would usually expect to pay for accommodation for someone with the individual's assessed need-the Usual Cost.

There have been a number of legal challenges over recent months where authorities have been successfully challenged by providers. In general terms this has been because authorities failed to consult with providers, or failed to do what they said they would or because they failed to take into account matters which are legally relevant.

When setting the Usual Cost the decision maker must have regard to matters which are legally relevant and section 8 of the report sets out what the relevant considerations are.

The recommendation is lawful and within the remit of the Executive Councillor.

Resources Comments:

The Council must 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 the options available to the Council in approving a number of rates with varying degrees of cost to the authority over a three year period.

Consultation

Has The Local Member Been Consulted?

N/a

Has The Executive Councillor Been Consulted?

N/a

Scrutiny Comments

The report in draft was presented to Adults Scrutiny Committee on the 16 May 2012. The Committee supported the recommendation that the rates set out in option 3 are adopted as the Council's Usual Costs for both new and existing service users backdated to the 1 April 2012 with three abstentions.

The Committee had the following comments for the Executive Councillor;

- The Council should seek to engage with Clinical Commissioning Groups and the NHS Commissioning Board in the future, to look at collaborative working between health and social care, including residential and nursing care home provision.
- Payments should be made to residential and nursing care home providers in a timely manner, in accordance with Council policies.
- Adult Social Care should aim to ensure the timely assessment and review of new and existing care home residents.

Policy Proofing Actions Required

N/a

Appendices

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

Appendix A "An Independent Evaluation of the Residential Care Market for People across Lincolnshire" Laing and Buisson January 2012

Appendix B Lincolnshire County Council's Cost Model Options 1 and 2 and 3

Appendix C Lincolnshire County Council Survey

Appendix D Analysis of the Financial Cost of Options 1 and 2 and 3

Appendix E Consultation response including letters received and minutes of consultation meetings.

Appendix F Initial and Full Equality Impact Analysis

Background Papers

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

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