



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

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| Report to: | <b>Adults and Community Wellbeing Scrutiny Committee</b>                          |
| Date:      | <b>14 July 2021</b>   |
| Subject:   | <b>Flat Rate Respite Care (Local Government and Social Care Ombudsman Report)</b> |

**Summary:**

This item invites the Adults and Community Wellbeing Scrutiny Committee to consider a report on Flat Rate Respite Care (Local Government and Social Care Ombudsman Report).

This proposal is due to be considered by the Executive on 7 September 2021. The views of the Scrutiny Committee will be reported to the Executive as part of its consideration of this item.

**Action Requested:**

That the Adults and Community Wellbeing Committee:

- 1) considers the attached report and determines whether the Committee supports the recommendations to the Executive as set out in the report.
- 2) agrees any additional comments to be passed on to the Executive in relation to this item.

## **1. Background**

The Executive is due to consider a report on Flat Rate Respite Care (Local Government and Social Care Ombudsman Report) on 7 September 2021. The full report to the Executive is attached at Appendix 1 to this report.

## **2. Conclusion**

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

### **3. Consultation**

The Committee is being consulted on the proposed decision of the Executive on 7 September 2021.

### **4. Appendices**

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| These are listed below and attached at the back of the report |  |
| Appendix 1  | Report to the Executive on Flat Rate Respite Care (Local Government and Social Care Ombudsman Report) – 7 September 2021 |

### **5. Background Papers**

No background papers within the meaning of section 100D of the Local Government Act 1972 were used in the preparation of this Report.

This report was written by Pam Clipson Head of Finance Adult Care who can be contacted on 07775 003614

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

|                     |   |
|---------------------|---|
| Report to:          | <b>Executive</b>  |
| Date:               | <b>7 September 2021</b>   |
| Subject:            | <b>Flat Rate Respite Care (Local Government and Social Care Ombudsman Report)</b> |
| Decision Reference: | <b>I022489</b>  |
| Key decision?       | <b>No</b>   |

**Summary:**

On the 16 March 2021 the Local Government Ombudsman published a public report following an investigation into how Lincolnshire County Council charged individuals for respite care. It found that the policy of charging a "flat rate" did not accord with the Care Act 2014.

This report informs the Executive of the actions taken by the Council in respect of charging for short term residential care.

It also fulfils the responsibility of the Monitoring Officer under Section 5A of the Local Government and Housing Act 1989 to report to the Executive instances of maladministration found by the Local Government Ombudsman

The Council has changed the way it charges for respite care as detailed in the Adult Care Charging Policy, effective 14 April 2020, and has commenced reimbursing those individuals identified as overcharged.

**Recommendation(s):**

That the Executive:-

1. Receives and considers the report published by the Ombudsman 16 March 2021.
2. Accepts the findings and recommendation of the Ombudsman as set out in the Ombudsman report.
3. Confirms the actions taken both in respect of the Adult Care Charging Policy and the reimbursement of those affected.

**Alternatives Considered:**

No alternatives considered.

**Reasons for Recommendation:**

The Council accepts the findings set out in the Ombudsman's report 16 March 2021. The process with which the Council operated and the charges applied for short term residential care have changed since the initial complaint and individuals are now requested to complete a financial assessment when entering short term residential care and are charged based upon the Care Act 2014 framework.

**Background**

- 1.1 The Care Act 2014 ("the Act") together with its associated regulations and statutory guidance provides a legal framework within which the Council must operate if it chooses to charge for services provided under the Act. Section 14 of the Act provides the Council with the power to charge for its services. Where a Council charges for its services, as this Council does, a financial assessment must be undertaken to assess how much an individual can afford to pay. The financial assessment is undertaken in accordance with the details contained in Section 17 of the Act, and in particular, the Care and Support (Charging and Assessment of Resources) Regulations 2014.
- 1.2 The Council has approximately 1,200 people enter short term residential care per year. This may be for the purposes of providing some respite or for longer periods with the exception of those that are placed in permanent residential care.
- 1.3 Prior to the Adult Care Charging Policy, effective 14 April 2020, individuals who entered short term residential care for a period of up to 8 weeks had been charged a "flat rate" for their care. This was a set rate which varied on the age of the individual. The flat rate was a weekly charge of £72.11 for those aged 18-24, £89.16 for those aged 25 to pension credit age and £138.02 from those receiving pension credit.
- 1.4 On the 16 March 2021 the Local Government Ombudsman published a public report following an investigation into how the Council charged individuals for respite care. It found that the policy of charging a "flat rate" did not accord with the Care Act 2014. The Report is attached at Appendix A. The complaint raised concerns around the existence of the fixed flat rate on the basis that the Council did not undertake a financial assessment for these individuals and therefore could not be assured that the charge was affordable for the individual.

- 1.5 The Council has changed the way it charges for short term care. The Adult Care Charging Policy implemented 14 April 2020 changed the approach and confirmed all individuals will be requested to undertake a financial assessment (it should be noted that the Council cannot insist that someone undertakes a financial assessment) so that individuals do not pay more than they can afford to pay. This removed the flat rate charge from 14 April 2020.
- 1.6 Whilst the Council has a power to charge the individual as though they were receiving care outside of a care home, the Council did not propose to exercise that discretion and confirmed the individual would be charged as though they are receiving temporary care in a residential home. This reflects the fact that the care is not long term but also recognises that a stay that may originally have been intended to be eight or fewer weeks may due to circumstances extend beyond that period. This approach ensures that the service is affordable, as the majority of charges remain at a consistent level, but also sustainable for the Council. Under the Care Act, a temporary resident means a resident whose stay is unlikely to exceed 52 weeks or, in exceptional circumstances unlikely to substantially exceed that period. Since 14 April 2020, individuals receive a financial assessment and are charged in accordance with the rules according to temporary care as set out in the regulations and the Guidance.
- 1.7 The Charging Policy effective 14 April 2020 removed the flat rate charge and included the following for those entering residential care:
- For those receiving temporary care (up to 52 weeks), they will be charged in accordance with the rules set for temporary care contained within Chapter 8 of the Guidance and Annexe F.
  - For those placed in permanent care – they will be charged accordingly to the usual residential care rules in accordance with both the regulations and the Guidance in Chapter 8.
- 1.8 The Ombudsman's report recommended that the Council reimburse those identified as overcharged since the Care Act 2014 came into force. The Council has identified and reviewed those cases from April 2015 where the Council believes an individual has been overcharged.
- 1.9 The number of individuals contained in the Ombudsman report is accurate as at 31 July 2019 when the complaint was responded to. Working through to 13 April 2020, a total of 1,525 individuals will be written to offering a reimbursement. Financial modelling suggests the total amount to be reimbursed will be within £0.500m.
- 1.10 As at 11 June 2021, 140 individuals have received a letter confirming they are entitled to a reimbursement. These 140 are individuals whose reimbursement is greater than £500 for their flat rate episode. The largest reimbursement of £2,523 was to one individual, the second highest reimbursement was £1,540.

- 1.11 31 of the 140 individuals have responded and received a reimbursement. The Council has reimbursed £18,600 across the 31 individuals.
- 1.12 Letters continue to be distributed with all 1,525 individuals expected to have received a letter confirming their entitlement to a reimbursement by 31 October 2021 and those who have responded will be paid. A financial assessment to confirm the value of the reimbursement will be undertaken if needed.

## **Legal Issues**

### Care Act 2014

- 1.13 Prior to the introduction of the Care Act 2014, the Council charged in accordance with statutory guidance of CRAG (Charging for Residential Accommodation) which was updated yearly as required. That statutory guidance did not require the local authority to conduct an assessment of the individual's ability to pay for the first eight weeks of any care. It was for the local authority to decide whether it would carry out a financial assessment or whether it would charge an amount that it appeared reasonable for the resident to pay. If it was decided to carry out a financial assessment, the calculation had to be in accordance with Sections 4 to 12 of the Guidance and Section 22(5A) of the National Assistance Act 1948. After eight weeks, the local authority was required to charge the resident at the standard rate for the accommodation and carry out an assessment of his ability to pay.
- 1.14 The above provision did not find its way into the new legislation. Accordingly, charging a flat rate did not comply with the Care Act 2014 legislation once it was implemented in April 2015. There was no provision for the Council to charge a reasonable amount that it appeared reasonable for the resident to pay and therefore the flat rates in accordance with a person's age could no longer stand. The Care Act 2014 is clear that where the Council intends to charge for any services it intends to provide, it must assess the level of the adult's financial resources under Section 17 of the Care Act 2014 and its associated regulations.
- 1.15 The Council now carries out a financial assessment under Section 17 of the Care Act 2014. It charges any individual who receives care (up to 52 weeks) of non-permanent care in accordance with the rules set out for temporary care contained within Chapter 8 and Annex F of the guidance and in accordance with Care and Support (Charging and Assessment of Resources) Regulations 2014.

### The Ombudsman Report

- 1.16 The Report at Appendix A is issued under Section 31 of the 1974 Act. As a result the Report must be made public by the Council and placed before the Council so that it can consider the report and notify the Ombudsman of any action taken or proposed to be taken by the Council in response.

- 1.17 Because the Report deals with matters which fall within the remit of the Executive it must be placed before the Executive.
- 1.18 The Council in responding to an Ombudsman's Report must accept the findings of the Ombudsman unless it judicially reviews the Ombudsman to challenge those findings. Having accepted the findings the Council is not required to follow the Ombudsman's recommendations if it has cogent reasons not to.
- 1.19 In this case the Council has not challenged the findings and issues with the flat rate charge having been identified there are no cogent reasons for not accepting the recommendations.

#### The Role of the Monitoring Officer

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

#### Equality Act 2010

- 1.21 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.
- 1.22 The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

- 1.23 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.
- 1.24 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.
- 1.25 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.
- 1.26 Compliance with the duties in Section 149 may involve treating some persons more favourably than others.
- 1.27 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 decision set out in the report rectifies a finding of maladministration made by the Ombudsman. The proposals for reimbursement will rectify the impact of that maladministration which will have impacted disproportionately on older people and people with a disability.

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

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.

## 1.29 Crime and Disorder

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 and next steps**

- 1.30 The Council accepts the findings set out in the Ombudsman report dated 16 March 2021 and have changed both the process followed and the charges applied for short term care from 14 April 2020.
- 1.31 In addition, those individuals affected by the flat rate charge are in the process of being reimbursed. This is anticipated to conclude 31 October 2021.
- 1.32 Following the Executive's decision a response will be provided to the Ombudsman confirming the actions taken by the Council in response to his report.

### **Legal Comments:**

The Council is required to accept 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. However there are no cogent reasons for not amending the Council's policy and seeking to reimburse those who have suffered detriment as a result of the prior policy.

As the report indicates the policy has now been changed and the process of reimbursement has commenced

The Executive is required to consider the report and is recommended to endorse the actions set out in the report.

**Resource Comments:**

The individuals affected have been identified based on the flat rates charged between 1 April 2015 and 13 April 2020. Individuals are being reviewed on a case by case basis and the reimbursement calculated accordingly. The reimbursements to individuals are included in Adult Care and Community Wellbeing financial position. Resources are in place within financial strategy to ensure all letters responded to are acted upon and individuals reimbursed by 31 October 2021. Wider monitoring of the Adult Care Charging Policy is also in place.

**Consultation**

**Has The Local Member Been Consulted?** - N/A

**Has The Executive Councillor Been Consulted?** - Yes.

**Scrutiny Comments**

The proposed decisions will be considered by the Adults and Community Wellbeing Scrutiny Committee on 14 July 2021 and the comments of the Committee will be reported to the Executive.

**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 | Report by the Local Government and Social Care Ombudsman<br>12 February 2021 |
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**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 |
|---|-----------------------|
| Revised Adult Care Charging Policy and Improvements to Financial Assessments April 2020 | Democratic Services   |

This report was written by Pam Clipson Head of Finance Adult Care who can be contacted on 07775 003614.