

WIRRAL COUNCIL

CABINET

2 FEBRUARY 2012

SUBJECT:	FEES FOR RESIDENTIAL AND NURSING HOME CARE
WARD/S AFFECTED:	ALL
REPORT OF:	GRAHAM HODKINSON, DIRECTOR OF ADULT SOCIAL SERVICES
RESPONSIBLE PORTFOLIO HOLDER:	COUNCILLOR ANNE MCARDLE
KEY DECISION?	YES

1.0 EXECUTIVE SUMMARY

- 1.1 Councils have to negotiate with residential and nursing home providers regarding fees paid for care services. This would ordinarily take place during the Provider Forums on an annual basis. There have, however, been two legal judgements in the last 12 months which have resulted in the need to take account of the actual cost of providing services. There must now be a transparent consultation process relating to fee setting.
- 1.2 The Council introduced new contracts for residential and nursing home care in April 2011. The contract includes a clause relating to the annual review, and the setting of fees. The process requires consideration of changes in the market and cost pressures in the local economy for both home providers and for the Council.
- 1.3 The majority of homes provide residential places for Older People. Feedback from residential homes that provide places for people with learning or physical disabilities or mental health issues and their resistance in signing a contract with the Council has led officers to conclude that fees for these Adult residential homes need to be considered separately. At present 70% of residential places for Adults with learning or physical disabilities or mental health issues are purchased on a bespoke cost basis. A detailed review of how these costs are determined, focussing on delivering greater consistency and transparency is to be consulted on.
- 1.4 A process of consultation and engagement with home providers and with service users has therefore been put in place in order to minimise the risk of challenge, particularly through Judicial Review proceedings, in relation to how the Council has set its fees for 2012/13. In order that effective consultation can take place, Members are advised that the consultation will extend beyond the Budget Setting Council meeting in February 2012 with fees backdated to April 2012. Until such time that a definitive position on the fees is reached by the Council, the current fees will continue to be apply.

- 1.5 In order to ensure the process complies with statutory obligations it is necessary to develop a model of best available “indicative actual costs” as a basis for consultation with care home providers. This will be informed by data to be provided by the care homes during the consultation period demonstrating the actual costs incurred by them.
- 1.6 The suggested timeline to meet these new requirements is outlined in this report.
- 1.7 An area of concern has been identified in relation to compliance with legal advice and best practice, regarding the collection process for “third party top ups” i.e. additional private contributions to the cost of an individual’s care fees. Members are advised that the Directorate will need to realign procedures in order to ensure that vulnerable people are safeguarded in relation to this process. Financial risk in relation to payment of top ups would transfer to the Council in the event of a defaulting third party.

2.0 RECOMMENDATIONS

- 2.1 That the Consultation process as outlined in Appendix 1 is approved and the Director of Adult Social Services, in consultation with the Cabinet Portfolio for Adult Social Services, be authorised to undertake such steps (including a fee proposal) considered necessary to ensure effective Consultation with all relevant providers, partners and other stakeholders.
- 2.2 That approval is given to revise the process for payment and collection of third party top ups
- 2.3 That a further report be presented to Cabinet in June 2012 to agree the new fee levels and implementation of the revised third party top ups payment and collection process; and in the interim the current fee arrangements shall continue.

3.0 REASON FOR RECOMMENDATIONS

- 3.1 The Council must consult with all relevant home providers, partners and stakeholders, in determining the fees to be paid in the 2012/13 financial year for the provision of residential and nursing home services. The Council must take account of the actual costs of service delivery in determining the fees. The fee setting process is an important annual requirement and enables the Council to invite and consider views from relevant home providers, partners and stakeholders before any final decision is taken in relation to the fees to be paid.
- 3.2 The Council should manage the process of identifying third parties and collecting top ups from them where additional contributions are required over and above the Council’s contract price in order to safeguard vulnerable people.

4.0 BACKGROUND

4.1 CONSULTATION ON FEES

4.1.1 Councils have always had to consult with residential and nursing home providers, partners and stakeholders regarding any changes to the level of fees paid by councils for care services. There have recently been, however, a number of high profile legal cases regarding fees paid by local authorities to care homes. Notably:

i) Sefton Care Association and others v. Sefton Council (November 2011)

4.1.2 The Claimants asked the Court to review a decision taken by the Sefton Council in December 2010 to give no increase in the fees it paid to care homes for residential and nursing care for the second year in a row. The Claimants asserted that the Council had failed to take various required factors into account including the actual cost of care and consultation with care providers.

4.1.3 The Council argued that the “usual cost” of care (the fees it had set) had “nothing to do with the actual cost of care”. It argued that if the Council, by virtue of its dominant market position, could obtain care at less than its actual cost, then the “usual cost” could be less than the actual cost. The Council further argued that if it could meet the needs of residents for this lower “usual cost”, then it would have fulfilled its obligations to service users.

4.1.4 The Court disagreed with the Council and stated that there should not be a significant imbalance between the fees set by the Council and the actual cost of care. If a local authority consciously fixes the usual cost of care at a figure much less than the actual cost, this would cause an “inevitable reduction in the quality of service provision”, which “may put individuals at risk”.

4.1.5 The Court decided that the Council should have asked providers to substantiate their argument that the Council’s placements were under-funded by submitting detailed information regarding the actual cost of care.

4.1.6 The Court also directed that the Council should take into account local factors, such as local pay levels and property costs. Interestingly, the Court also held that the Council should consider its own dominant market position and the effect that position has in making care homes vulnerable if fees do not reflect actual costs.

ii) Forest Care Homes Ltd – Local Authority Fees Ruling (December 2010)

4.1.7 On 21 December 2010, the Administrative Court in Cardiff quashed the decision made by Pembrokeshire County Council regarding fee levels paid to care homes for 2010-11. The provider at the centre of the case (Forest Care Homes) challenged the fee setting decision made by Pembrokeshire County Council, by way of a Judicial Review.

- 4.1.8 The court held that Pembrokeshire's decision was unlawful for a number of reasons. Importantly, although it had taken its own budgetary constraints into account, it had failed to document the other factors it had considered when setting its fees rate. It also failed to show that it had adequately considered the consequences of its decision, particularly in relation to the human rights of the residents in the homes, whose interests are at the heart of the commissioning of care services.
- 4.1.9 The ruling sets a clear precedent: 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. The fees need to be adequate to enable providers to meet the specifications set by the commissioners together with regulatory requirements. Local authorities that fail to follow the principles in the case sufficiently may find themselves the subject of judicial review.
- 4.1.10 Clearly the Council has a duty to set its fees in line with the actual cost of care and to consult residential and nursing home providers, partners and other stakeholders on any changes to those fees. Following initial discussions with home providers, officers are updating a model developed by Laing and Buisson and giving consideration to the assumptions and validating the local factor(s) it takes into account. In 2011 home providers independently commissioned Laing and Buisson to undertake a data collection exercise with Wirral based homes and submitted it to the Council after the fees for 2011/2012 had been agreed by Cabinet. It is planned that from this work an initial fee proposal will be shared, with home providers, partners and other stakeholders as part of the formal consultation exercise that will commence on 27 February 2012.
- 4.1.11 The Council must provide sufficient information to providers, partners and other stakeholders with regards its proposals, which must include details of the fees being proposed for the 2012/13 financial year. The consultation exercise will enable all providers, partners and other stakeholders the opportunity to consider, evaluate and provide a response to the Council's proposals. The Council will thereafter consider all responses received before definitively deciding the level of fees it seeks to introduce for residential and nursing home services. The Council has also received representations from Wirral Care Homes Association who represent a significantly proportion of homes and officers are considering their offer to negotiate directly with the Council on behalf of these homes.
- 4.1.12 Appendix 1 outlines the Review and Consultation process. In relation to the Wider Consultation it is proposed to meet with service users, families of service users and representative groups and other stakeholders to consider the quality aspects of provision in more detail. These consultations will consider a range of quality issues and the changing expectations of people requiring care. The overall process is expected to be completed in June 2012.

4.2 THIRD PARTY TOP UPS

- 4.2.1 Guidance makes it clear that the Council, through DASS, must arrange to provide care in a person's preferred accommodation:

- subject to the accommodation being available and suitable to her/his needs; and
- provided that it does not cost more than the Council would usually expect to pay for care for someone with such needs.

4.2.3 Where a person is unable to make a choice because of ill health, then the wishes of the carer should be taken into account.

4.2.4 Guidance sets out that the cost test is not whether a cheaper option is available but what the Council would normally pay to meet a person's needs by the provision of residential care.

4.2.5 If a person chooses a more expensive option, the placement may be arranged by DASS providing a third party (e.g. a family member or friend) is prepared to meet the difference. In such cases, DASS should normally pay the full charge and recover the extra cost from the third party. Third party top-ups should only be happening where the third party has agreed to pay the additional amount in order that the person entering care can enter a particular home which is more expensive than the Council considers reasonable

4.2.6 If the Council has placed an unreasonable restriction on the amount which it considered reasonable, or if the person's needs can only be met by being placed in a particular home, a request for a third party top-up payment may be improper and may be open to legal challenge.

4.2.7 Any decision to enter into a third party agreement regarding more expensive accommodation must be informed by a risk assessment of the third party's commitment and capacity to sustain an agreement.

4.2.8 The Council must ensure that all additional payments are as a result of an informed choice, and that the rationale for the additional payments is fully transparent, for example, the rationale could be an optional additional service or an experience-based preference on the part of the service user.

4.2.9 It is anticipated that a further report will be brought to Cabinet in June when the consultation has been completed, reporting the outcome of the consultation process regarding fees and the implementation of a revised third party top up process. Subject to the outcome of the consultation, fee levels will be back dated to April 2012.

5.0 RELEVANT RISKS

5.1 If the Council does not follow the appropriate consultation process and fails to show due regard to the actual costs of providing care, any decision regarding revised fee levels would be likely to be subject of legal challenge.

5.2 The Council must demonstrate that it has considered the potential impact of any changes it makes in its relationship with the care home market and the fees it pays. It is therefore proposed that a full equality impact assessment will be completed to ensure the Council is not discriminatory in its actions.

5.3 The Council contract includes a clause relating to third party top ups. The reasons for such arrangements vary but should represent additional benefits to the service user. The Council must be compliant with legislation relating to third party payments and the current position is therefore to be reviewed and aligned with Best Practice. Failure to follow best practice could put vulnerable people at risk of exploitation and could be legally challenged.

6.0 OTHER OPTIONS CONSIDERED

6.1 None are available.

7.0 CONSULTATION

7.1 The purpose of the report is to agree the consultation process outlined above and in Appendix 1

8.0 IMPLICATIONS FOR VOLUNTARY, COMMUNITY AND FAITH GROUPS

8.1 A number of homes involved in the consultation will be from the voluntary, community and faith sector, they will be consulted in accordance with the agreed process.

9.0 RESOURCE IMPLICATIONS: FINANCIAL; IT; STAFFING; AND ASSETS

9.1 Post consultation the detail of the financial implications of the outcome of fee level consultation will be available. It is recognised however that commissioning approaches would be required in order to contain any increase in fee levels in the overall DASS budget.

9.2 A specific project will scope the level of change required in contracting processes in order to facilitate appropriate practice in relation to third party top ups. A further report will be made available relating to the cost of this action.

10.0 LEGAL IMPLICATIONS

10.1 In reviewing the fees and tops ups paid, the Council will look to ways of ensuring that all people in receipt of a service are supported by a provider with whom there is a binding contract that provides certainty in relation to the fees/top ups charged/payable and enables improvements to be made to service provision and the manner in which they are delivered. A key outcome will be greater transparency in relation to provider costs and what people are being charged by providers.

11.0 EQUALITIES IMPLICATIONS

11.1 Equality Impact Assessment (EIA)

(a) Is an EIA required?

YES

(b) If 'yes', has on been completed?

12.0 CARBON REDUCTION IMPLICATIONS

12.1 No specific carbon reduction implications have been identified at this stage

13.0 PLANNING AND COMMUNITY SAFETY IMPLICATIONS

13.1 Planning permission is not required.

REPORT AUTHOR: **Steve Rowley**
Head of Finance and Performance Branch
telephone: (0151) 666 3662
email: stephenrowley@wirral.gov.uk

APPENDIX

Review and Consultation Schedule

REFERENCE MATERIAL

SUBJECT HISTORY (last 3 years)

Council Meeting	Date
Health and Wellbeing Overview and Scrutiny Committee: Progress Towards the Transformation of Adult Social Services Contracts For Personal Support	1 November 2010
Cabinet: Transformation of Adult Social Services Contracts for Personal Support	9 December 2010
Cabinet: Transformation of Adult Social Services - Contracts for Residential and Nursing Home Care and Personal Support	17 March 2010

Review and Consultation Schedule

Week beginning	Week	Details
16-Jan-12	1	Residential Forum - Consultation Launch with Home Owners' Forum 17 January 2012 Consultation Questionnaire sent out 18 January 2012 and revised time line
23-Jan-12	2	
30-Jan-12	3	
06-Feb-12	4	Return of Consultation Questionnaire and comments from Home Owners deadline 10 February 2012
13-Feb-12	5	Wider Consultation Launched
20-Feb-12	6	
27-Feb-12	7	Residential Forum Meetings at which Initial Fee Proposal will be shared with Home Owners. Owners given 4 weeks to consider following this meeting
05-Mar-12	8	Wider Consultation Completed 9 March 2012
12-Mar-12	9	
19-Mar-12	10	Initial Fee Consultation Completed 23 March 2012
26-Mar-12	11	
02-Apr-12	12	
09-Apr-12	13	
16-Apr-12	14	Residential Forum Meeting - Revised Fee Proposal taking into account home owner feedback. Owners given 4 weeks to comment on revised proposal following this meeting
23-Apr-12	15	
30-Apr-12	16	
07-May-12	17	Revised Fee Consultation Completed
14-May-12	18	Draft report to Cabinet for Director
21-May-12	19	
28-May-12	20	
04-Jun-12	21	Cabinet Meeting (date to be confirmed)