



Report of the Director of Adult Social Services

Report to the Executive Board

Date: 7th September 2011

Subject: Adult Social Services Procurement Efficiencies 2011/12 Care Home Fees

Are specific electoral Wards affected? If relevant, name(s) of Ward(s):	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input checked="" type="checkbox"/> Yes	No
Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: 10.4 (5) Appendix 2 and 10.4 (3) Appendix 3	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

Summary of main issues

1. Fees¹ paid by this Council for publicly funded residents of independent residential and nursing care homes in Leeds are higher than those paid in most comparator and all neighbouring Local Authorities. During the budget setting process for 2011/12 Adult Social Care developed a procurement target saving of £5.75m to be gained by negotiating a reduction in the level of fees paid by the Authority to independent sector care providers in Leeds. The achievement of this target would put Leeds into the mainstream of fees paid by others.
2. Subsequent to the budget being set, a significant legal ruling has been made in relation to an Authority taking similar action to that proposed for Leeds. Furthermore, in the same time period, considerable and well publicised financial issues have been reported in relation to the Southern Cross group which has 7 homes within Leeds.
3. Both these factors pose significant challenges to the Authority in seeking to achieve the original procurement savings in the way originally intended. Specialist Counsel advice in relation to this is attached at confidential Appendix 2.
4. This has resulted in a reflection on the overall approach to fees for residential care for older people in the City, the sustainability of the market and opportunities for the sector

¹ A brief definition of this term and background to how payments for residential and nursing care are made up is provided at Appendix 1

which arise as a consequence of the proposed changes to the Local Authority residential care covered in the companion report “Better Lives for Older People”.

5. The overall budget position of Adult Social Care remains extremely difficult. The achievement of these targeted procurement efficiencies would help to deliver a balanced position both in this and future financial years. However, it is now apparent that the efficiencies cannot be achieved in one year. This report sets out the recommended approach to address this issue within the broader strategic and financial context

6. Recommendations:

The Executive Board are recommended to:

- i) Note the difficulties in achieving the targeted procurement efficiencies in fees paid to independent sector providers to support publicly funded residents of residential and nursing care homes for older people in Leeds.
- ii) Approve the immediate commencement of a negotiated implementation of a revised temporary fee structure for publicly funded residents taking up placements in Leeds homes from October 1st this year.
- iii) To note the content of confidential Appendix 3 to this report which sets out the indicative level of temporary fees that would be negotiated with Independent sector providers should recommendation (ii) be adopted by the Executive Board.
- iv) To confirm the inflationary payment standstill initiated in April 2010.
- v) Approve the establishment by the Director of Adult Social Services of an advisory board to include representatives of all groups with a direct interest in commissioning, providing and receiving sustainable high quality care for older people.
- vi) The Board membership to be agreed with the Executive Lead Member for Adult Social Services.
- vii) To approve the negotiation of terms of reference for the board proposed at (v) above, which will include that the board to be given the primary remit of bringing forward a long term sustainable fee settlement framework which incorporates the development of a quality framework linked to the fee settlement. This to include proposals to deal with the issue of sector inflation against a background of reducing Council funding in the medium term, to ensure that any equality issues arising out of its work are assessed and addressed and to examine, with reference to best practice examples elsewhere in the country, the means by which quality standards could be embedded within the overall fee settlement framework.

1.0 Purpose of this report

- 1.1 To provide information on the current position in achieving procurement efficiency targets in respect of fees paid to Leeds independent sector residential and nursing care homes and to detail issues that have arisen since the original budget setting process for 2011/12 was concluded.
- 1.2 To recommend ways forward in seeking to drive forward efficiency, service modernisation and quality in this sector which take into account the wider strategic position set out in the companion report ‘Better Lives for Older People’.
- 1.3 In doing so to generate more equitable long term funding solutions for this type of care within the City.

1.4 To acknowledge that changes to the previous system of independent quality assurance of care undertaken by the Care Quality Commission (CQC) requires review with care providers to determine the most effective and efficient means of assuring and raising quality standards going forward.

2.0 Background information

2.1 As part of the overall Corporate efficiency targets in relation to procurement, Adult Social Care agreed to target a very challenging total reduction of £5.75 million from the current aggregate spend (£37.1M) on Local Authority supported residential and nursing care placements for older people in Leeds. The target was felt to be challenging but achievable, with the rationale set out below.

2.2 Expenditure on this type of care is the largest overall item of procurement expenditure within ASC in terms of the overall aggregate spend on residential and nursing care for older people, the total budget being £48.2 million (net). Of this figure, 23% is spent on placements which are outside Leeds, thus leaving a net £37.1 million from which the target saving was envisaged².

2.3 The £5.75 million target represents an overall reduction of contract values of approximately 15% from the current value of residential and nursing care funded by the Local Authority. From the outset, officers had recognised that the pursuit of fee reductions on the scale envisaged was likely to be a very challenging and potentially protracted process given the extensive negotiations and occasional disagreements which have intermittently taken place over the course of the preceding 10 years. The settlements reached through that process have shaped the current fee structure in the City and, whilst significant steps have been taken to ensure rationality and fairness within the fee structure, significant anomalies continue to exist.

2.4 On two occasions in the recent past, Judicial Reviews have been threatened by care home owners seeking to address anomalies in the fee structure and, on occasion, perceived low levels of fee settlement.

2.5 From the Local Authority perspective, one of the most significant anomalies that has arisen is that, for a number of years, Leeds has paid a higher level of fee relative to its neighbours and comparators by as much as £80.00 per week in some instances (- comparators Liverpool and Birmingham, neighbours, Wakefield and Calderdale).

2.6 To balance this, Leeds has consistently avoided unfavourable judgements by the Care Quality Commission with regard to the quality of care on offer in the City with no homes being rated as 'poor' and few as 'adequate'. (the vast majority rated as either good or excellent). It is also the case that over 600 new bed spaces in residential, nursing and extra care facilities have been developed in the City over the last 3 years and further schemes are in the process of being built or planned to open in the near future.

2.7 The funding formula, which Leeds adopted several years ago which has helped to create both market stability, well supported by high fee settlements, was discontinued at the beginning of the 2010/11 financial year with no fee uplift to cover

² The Council currently pays for out of area placements at the rate at which the local authority in which the care home is situated (the host local authority), has set. Any variations to this price are made in accordance with the current prices that are set by the individual host local authority.

inflation then being paid in that financial year. That has been repeated in this financial year with no inflationary uplift for the second year in succession.

- 2.8 Even with this position in mind, officers believed that some of the major providers (suppliers) would be able to consume no inflationary uplift for a second consecutive year and at the same time, cut their margins so as to reduce the fee they charge.
- 2.9 Prior to the commencement of face to face discussions in the winter and spring of this year, Experian credit checks on the main suppliers confirmed that this was likely to be a high risk strategy in relation to some providers (Southern Cross et al) who had already been widely reported as being close to receivership and administration.
- 2.10 Clearly no benefit would accrue to the Authority were homes to close as a consequence of fee reductions destabilising the financial integrity of particular companies.

3.0 Main Issues (Actions Taken to Date)

- 3.1.1 Following the agreement of the target efficiency, a programme and methodology was developed with negotiations commencing with the residential and nursing providers who had the greatest overall payments in 2010/11. The aim of the preliminary negotiations was to advise providers of the difficult financial circumstances faced by the Authority and to discuss potential avenues to rebase the fee structure with each of these companies for each of their homes.³
- 3.1.2 It was established that, given the overall projected spend with the top 10 providers during 2010/11, an efficiency saving of 18% of that overall spend would yield a saving of just over £3 million, leaving a further £3.0 million to be made from the remaining majority of smaller providers.
- 3.1.3 During December 2010, ASC commissioning officers identified the top 10 providers in terms of spend with that provider from the Council's Financial Management System. Senior staff within each of the provider organisations were invited to attend meetings during January and February 2011 with ASC's negotiating team consisting of the Deputy Director Strategic Commissioning, the Head of Adult Commissioning and the Commissioning Manager (Contracts).
- 3.1.4 Three negotiation templates were developed in conjunction with Corporate Procurement colleagues to assist in the discussions with providers. These were:
- A negotiation strategy for the meetings:
 - A market conditions sheet which gave some information on the overall number of placements ASC has, new beds that have opened in Leeds, possible new developments, and relevant cost factors which would affect the price.
 - A home fact sheet which gave details of the establishments a provider has in Leeds (number of beds, number of LCC placements, current fee etc), Experian credit check details on the parent company details of other homes in the area and their costs, the fee level with reductions of 18%, 10% and 5% applied and cost comparisons with other local authority fees regionally and major cities.

³ Leeds, unlike some other local authorities, does not have a standard fee payable for residential or nursing care across all homes, but negotiates a price with the provider for each individual home, an arrangement designed to more accurately reflect the different market conditions which exist in different parts of the city.

3.1.7 All providers who attended the meetings were informed of the reductions ASC are seeking, both in terms of a percentage cut and an overall figure that would need to be achieved. Providers were given suggestions as to how these savings may be achieved, such as cost and volume contracts etc, and were asked to consider all options available to achieve the necessary savings. Providers were requested to put their proposals to the Council, in writing, by the middle of March.

3.1.8 Despite reminders to the providers few offers were forthcoming.

3.2 Issues rising since budget setting

3.2.1 There are a number of existing and new issues that have come into play during or since budget setting which may affect the ability to achieve the full £5.75 million saving. These are:

- The judicial review outcome for Pembrokeshire Council;
- The Council's previous stance on fees and previous legal challenges;
- The national picture on fees and possible increases in 2011/12;
- The current financial position of some providers in the city, including Southern Cross.
- The Local Authority plans for its own directly provided facilities.

Implications of the Pembrokeshire Judgement:

3.2.2 In May of this year, Pembrokeshire County Borough Council lost a judicial review on the way that it had set its fees with care homes. Whilst the way Pembrokeshire had set its fees is different from the method Leeds has used, the principles established in the case will apply to the way Leeds sets its fees. Initial analysis of the judgement by the Department of Health has stated that whilst Councils can set fees which take into account their available resources, they cannot ignore everything else and will need to take account of the impact of the decision on providers as well as service users. There must also be consultation prior to any new fees being set. Specialist legal advice has been sought on this matter and related matters with specialist Counsel opinion provided at confidential Appendix 2.

3.2.3 After careful reflection it is believed to be unreasonable to seek to unilaterally reduce the fees paid by the authority in respect of existing residents under its current contractual arrangements. Such a course would require terminating the existing contracts and attempting to enter into new contracts at lower fees in relation to more. It is also the case that significant consultation with those residents and their relatives would need to be undertaken with regard to such an action. From a range of perspectives, particularly from that of existing residents, this report recommends seeking a revised negotiated temporary fee for prospective new residents only.

3.2.4 In terms of the likelihood of legal proceedings being initiated as a consequence of the position outlined at 3.2.3 since 2006, ASC has negotiated fees individually with each home in the City. This was established using a proforma devised by Laing and Buisson⁴ which allowed the provider to state their costs for each bed per week. This was then used as a basis for the negotiation of the fee for that home and the agreement of a fair price for care banding within the City. However, despite this

⁴ Laing and Buisson are an independent firm of market analysts specialising in the specialising in the health and social care market.

process being undertaken, Leeds Care Association have on a number of occasions over the last few years, threatened legal action over the level of fees that are being paid. On each occasion, the Council has been able to avoid this legal action based on our argument that we have established fees fairly in the sector based and on the fact that we do not set an arbitrary rate but have taken into account particular circumstances for each provider.

- 3.2.5 Adult Social Care officers are aware that a number of English local authorities have now been threatened with or have become subject to, legal action over the level of fees paid for care home placements. In two Authorities challenges have been mounted in relation to the host Authority declining to pay inflationary uplifts on fees. The usual vehicle for this form of legal challenge is Judicial Review and although Counsel opinion provided to the Authority is believed to be robust and the proposals for ways forward materially different in this Authority relative to others under challenge, the risk of similar challenge to the proposals contained in this report cannot be ruled out.
- 3.2.6 In proposing a temporary revised fee rate, an indicative version of which is appended at Confidential Appendix 3, for new residents, officers have taken into account the specific circumstances of each provider based on the discussions held with providers earlier in the year.
- 3.2.7 Finally, although it is the case that Leeds pays a higher average amount than comparators and neighbours, there is no national benchmark on fees in residential and nursing care homes. The main independent sector guide to a “fair” price for care is published by Laing & Buisson, the fees they quote are typically higher than those paid by most authorities. However, Laing & Buisson mainly represent the independent sector in this respect. Given the judgement in Pembrokeshire, a number of local authorities have chosen to increase their rate this year. The table below indicates the fee settlements in the rest of the region for 2011/12:

Authority	Fee Setting 2011/2012
Barnsley	0% uplift following 0% uplift 2010/2011
Bradford	0% uplift, DWP increase to be passed to providers (DWP passported)
Rotherham	2.89% uplift following 0% uplift 2010/2011
East Riding	0% uplift, 2.2% uplift 2010/2011
North East Lincs	0% uplift
Leeds	All placement costs individually negotiated with homes – were looking to make reductions of up to 18%
Sheffield	1% reduction with no DWP passported following 1% uplift 2010/2011
Wakefield	0% uplift for next 2 years with no DWP passported following 1.5% uplift 2010/2011
North Yorks	0.5% uplift for Dementia placements only

- 3.2.8 Currently, the position of the market in Leeds is one where supply outweighs demand. A number of providers have indicated that they have significant vacancies in their homes and this would seem to be particularly relevant where the home mainly relies on local authority placements rather than people who fund their own care. During 2010, there were 2 home closures in Leeds, due to financial circumstances, in contrast to the preceding three years when there were none. So far this year, three smaller homes have closed and two further homes have contacted ASC to indicate

they are in financial difficulties. Officers continue to support organisations experiencing difficulties of these kinds and to work alongside and encourage new entrants to the Leeds market to attain high levels of quality in the care they offer in new facilities.

- 3.2.9 The position with regard to the £11m spent on placements outside the city is unpredictable. Using the information presented in the earlier table as a guide, it would seem that Leeds is likely to achieve little more than a standstill on the level of spend, although this will be closely monitored.
- 3.2.10 Finally, a companion report to the Executive Board today, “Better Lives for Older People” sets out a broad strategic vision for the future, care, support and accommodation needs of older people and which includes a plan for the decommissioning of Local Authority residential care facilities. The report recommends increasing and formal engagement with independent and third sector providers as being the most sustainable mechanism for the provision of this kind of non-specialist care in the future. Active partnership with independent sector providers will be key to the achievement of an extensive range of strategic goals.
- 3.2.11 This report proposes that the growth in use of independent sector provision by the Local Authority will occur if the recommendations of the companion report are accepted and implemented. This must be accompanied by a long term agreement on the fees paid by the Local Authority which will be sustainable in relation to both the market and with regard to the prospective financial position of the Local Authority.

3.3 **Options available to the Council**

- 3.3.1 A number of options could be considered however, there are variable levels of risk with each of these:
- i) Imposing a new lower fee on the provider – this would be the most contentious option for the provider and given the Pembrokeshire judgement, we would not be able to do this without consultation or consideration of the implications of doing this for each provider. Providers could also serve notice to terminate contracts with the Council, requiring that we remove all residents from the home. As set out at 3.2.3 this option is regarded as unreasonable in the circumstances.
 - ii) Propose the placement of new residents in Leeds homes from the 1st October under a temporary revised fee structure designed to bring Leeds into the mainstream of the fee structures operated by its neighbours and comparators pending the formation of an advisory board which would bring forward recommendations in relation to an equitable long term and sustainable fee settlement for the City, in the light of all developments including those set out in the companion Executive Board report ‘Better Lives for Older People’.
 - iii) To suggest that providers increase 3rd party top ups – this option would not achieve the savings required, as it could not be imposed on residents who entered the home without a 3rd party top up and it may contravene guidance/directions on choice. Also, the council is ultimately responsible for the total fee including the 3rd party top up therefore, if there was any default in the payment, the council would need to refund this to the provider.
 - iv) Terminating the contracts and remove residents to a provider where we had agreed a fee – this would be a highly contentious situation for both residents and providers, would be reliant on being able to agree fees with enough homes

to allow the Council to place people and would almost certainly result in a legal challenge.

- 3.3.2 The option that would pose the least risk of legal challenge would be option (ii). The proposed board would need to consult widely with both residents and providers on future changes to fees for all publicly funded residents to ensure the Council is complying with its duty to consult under legislation. Any such negotiation would also need to be on the understanding that the eventual fees agreed, would need to be affordable within the overall level of the Council's medium term funding. The project would also be able to utilise open book accounting, to establish the cost of care throughout the city, with specialist accounting input from the Council's auditors.
- 3.3.3 Confidential Appendix 3 to this report sets out the indicative level of temporary fees that would be negotiated with Independent sector providers should this recommendation be adopted by the Executive Board. The indicative fees have been worked through on the basis of benchmarking overall fees currently paid in the City with rates paid by neighbours and comparators and with reference to both the costs incurred by providers in the provision of such services and their particular business circumstances. Clearly the figures are indicative and would be subject to negotiation with individual providers whose circumstances may have changed in the currently volatile financial environment.
- 3.3.4 Adult Social Care officers are aware of a number of other local authorities that operate a payment for quality system, in which fees to providers are based on an assessment of the quality of services provided to residents. Unfortunately, a number of these quality payment schemes were based on the CQC rating system however, CQC have now abandoned this rating system leaving some authorities to reconsider this quality payment.
- 3.3.5 There are, however, a number of options that could be introduced that could link payment of fees to the quality of service provided. Firstly, CQC are introducing a new excellence standard in the future and this is currently out to consultation. This will not be a rating system as previously used, but a single award possibly accredited, at a cost, through an independent accreditation agency. If Adult Social care was to develop its own quality system, any such system would need to be workable within the current resources that are available to monitor that system.
- 3.3.6 In addition to those systems mentioned above, the Department of Health have recently introduced a national standard contract for nursing homes that are commissioned by the NHS. This contract contains a Commissioning for Quality and Innovation (CQUIN) payment framework. The CQUIN framework is a nationally agreed framework for locally agreed quality improvement schemes for commissioned services. Currently, NHS Leeds are in the process of introducing the CQUIN scheme for the nursing homes it commissions in Leeds and will be refining this throughout the remainder of the financial year. There is a possibility that any quality payment scheme introduced by Adult Social Care could be linked to the CQUIN scheme and which will have been agreed by nursing homes and then transferred to residential homes Adult Social Care commissions.
- 3.3.7 Further work is necessary to establish a scheme that will be suitable for the Council's contracts, will allow payments to be made on an equitable basis throughout the city and will be workable within the financial and resource envelope available. Further consultation on any proposed scheme would need to be undertaken to ensure compliance with our legal duty and to ensure an equitable and workable scheme can

be introduced. This can be achieved through a project specifically to establish fees for 2012/2013

4 Corporate Considerations

4.1 Consultation and Engagement

4.1.1 Consultation will be conducted with all key stakeholders as part of the work programme of the board it is proposed to establish to bring forward proposals in relation to the creation of a sustainable long term settlement on residential and nursing fees and to ensure compliance with the Public Services Equality Duty.

4.2 Equality and Diversity/Cohesion and Integration

4.2.1 An equality impact assessment will be undertaken as part of the work programme of the board it is proposed to establish to bring forward proposals in relation to the creation of a sustainable long term settlement on residential and nursing fees.

4.3 Council Policies and City Priorities

4.3.1 The work to review the residential and nursing care home fees will fall within the Health and Wellbeing City Priority Plan and the overall objectives of the Adult Social Services 'Better Lives for Older People' programme.

4.4 Resources and Value for money

4.4.1 A number of events have arisen since the setting of the original budget target, which have significantly affected the ability of Adult Social Care to achieve the savings target originally set e.g. the judicial review in Pembrokeshire and the current financial state of some major providers in the city (Southern Cross), which are set out in the report.

4.4.2 The recommendations set out in this report are designed to achieve a sustainable long term fee settlement for the City which delivers greater efficiency and value for money, enabling people to access good quality facilities at a price which is affordable to the Local Authority.

4.5 Legal Implications, Access to Information and Call In

4.5.1 There are significant legal risks which are apparent in seeking to achieve reductions in fee levels during 2011/12.

4.5.2 Information in Appendix 2 to this report has been deemed exempt under Access to Information Procedure Rule 10.4 (5) as it contains information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. Information in Appendix 3 to this report has been deemed exempt under Access to Information Procedure Rule 10.4 (3) as it contains financial information relating to individual homes. The information in both appendices is exempt if and for so long as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

4.5.3 This report is subject to call-in.

4.6 Risk management

- 4.6.1 There is a significant risk of legal challenge in pursuing reductions in the care home fees. In order to lessen this risk, a project to renegotiate fees is proposed which would incorporate a consultation exercise with providers and, subject to the extent of progress made and agreement reached, an equality impact assessment in relation to residents.
- 4.6.2 Crucially, given that the care market is open, providers are under no obligation to accept a prospective resident at the fee rate offered by the Local Authority under this proposal. Were the market to adopt such an approach widely, the Authority would face significant difficulty in making placements at the volumes budgeted for (approximately 600 in ½ a year). As well as being a poor outcome for the individuals concerned other difficulties are likely to be experienced by people waiting longer than necessary in hospital when a long term placement is required and unavailable within a reasonable time.
- 4.6.3 To seek to mitigate this risk it is proposed that negotiations take place with the care providers designed to ensure that, alongside seeking agreement on the implementation of the temporary fee structure, appropriate assistance is made available to them to help them generate the envisaged efficiencies.

5 Conclusions

- 5.1 Given the scale of the risks, legal, strategic and practical involved in achieving re-based fees and the significant complexities both local and national that have arisen since the setting of the procurement efficiency target, the Director of Adult Social Services recommends that a board involving all key stakeholders is established to thoroughly examine the residential and nursing care fee structure in the City and to bring forward recommendations designed to generate future efficiencies, address current anomalies within a fees within an agreed framework which seeks to reward the provision of high quality care.
- 5.2 It is proposed that steps are taken to establish the board with immediate effect with an initial report back to the Executive Board in February next year.

6 Recommendations

The Executive Board are recommended to:

- i) Note the difficulties in achieving the targeted procurement efficiencies in fees paid to independent sector providers to support publicly funded residents of residential and nursing care homes for older people in Leeds.
- ii) Approve the immediate commencement of a negotiated implementation of a revised temporary fee structure for publicly funded residents taking up placements in Leeds homes from October 1st this year.
- iii) To note the content of confidential Appendix 3 to this report which sets out the indicative level of temporary fees that would be negotiated with Independent sector providers should recommendation (ii) be adopted by the Executive Board.
- iv) To confirm the inflationary payment standstill initiated in April 2010.
- v) Approve the establishment by the Director of Adult Social Services of an advisory board to include representatives of all groups with a direct interest in

- commissioning, providing and receiving sustainable high quality care for older people.
- vi) The Board membership to be agreed with the Executive Lead Member for Adult Social Services.
 - vii) To approve the negotiation of terms of reference for the board proposed at (v) above, which will include that the board to be given the primary remit of bringing forward a long term sustainable fee settlement framework which incorporates the development of a quality framework linked to the fee settlement. This to include proposals to deal with the issue of sector inflation against a background of reducing Council funding in the medium term, to ensure that any equality issues arising out of its work are assessed and addressed and to examine, with reference to best practice examples elsewhere in the country, the means by which quality standards could be embedded within the overall fee settlement framework.

7 Background Information

Fair Price for Care – Published by Laing & Buisson