

Commissioning Partnership Board Report

Decision Maker	Mark Warren – Managing Director Health and Adult Social Care Community Services (DASS) Mike Barker – Strategic Director of Commissioning and Chief Operating Officer Oldham Council/Oldham CCG
Date of Decision:	25th April 2019
Subject:	Health and Adult Social Care Fee Proposals for 2019/20
Report Author:	Helen Ramsden – Interim Assistant Director of Joint Commissioning and Safeguarding

Reason for the decision:	This report makes recommendations in relation to fees for the following commissioned services for 2019/20, following consultation with the health and adult social care provider market: <ul style="list-style-type: none">• Residential and Nursing Care• Care at Home• Extra Care Housing• Supported Living Services• Personal Assistants
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Summary:	In December 2018, following a market analysis, fee proposals were made to the Oldham care market for the financial year 2019/20. As a result of feedback received, a revised set of proposals were consulted on throughout February 2019. Following consideration of the consultation feedback, it is proposed that the fees for 2019/20, as set out in the second round of consultation are implemented, and that ongoing market engagement and development takes place during the course of 2019/20.
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What are the alternative option(s) to be considered? Please give the reason(s) for recommendation(s):

Revert to the initial set of proposals consulted on in December 2018. This is not recommended, as a revised set of proposals was issued following consideration of responses.

Apply no increases in fees for 2019/20 and hold the 2018/19 position. This is not recommended as the analysis of the market has concluded that an increase in fees is necessary to ensure, as far as is possible, sufficiency and sustainability of supply.

Apply the fees set out in the revised consultation documents, and as set out below, and maintain market engagement and development activity.

Recommendation(s):

Implementation of the proposed fees for 2019/20 as set out in paragraph 1.6, with effect from 1st April 2019, for all council and CCG commissioned care.

Commissioners develop a complex care premium to replace the dementia and mental disorder premiums for care home placements from April 2020.

Commissioners continue to work with providers, and in partnership with CQC, to improve the quality and CQC ratings of providers.

Commissioners work with providers during 2019/20 as part of the implementation of the new care at home commissioning arrangements, to fully understand the local impact of changes to the CQC fee methodology, and to continue to monitor the situation with regard to the recruitment and retention of care staff, which the new commissioning model for care at home seeks to support.

Commissioners continue to review the position in relation to any further legal action with regard to the Court of Appeal's ruling in July 2018 that sleep-in's for supported living services should be paid at a flat rate, rather than on an hourly basis. The Supreme Court has granted permission for an appeal by Mencap (who aren't active in Oldham), with the support of Unison, against the

Court of Appeal ruling. It is anticipated that the case won't be heard until October 2019 at the earliest.

Implications:

*What are the **financial** implications?*

The Adult Social Care Precept (£1,860k) will be applied to the cost of the proposed uplifts, which in total is £3,459k. The option to simultaneously implement a Nursing Premium and Bridging Payment has increased the funding requirement.

Implementing a bridging payment is a one-off cost and therefore an issue for the 2019/20 financial year only, whilst a nursing premium will require recurrent funding. In any event the additional cost will require a reallocation of existing resources to ensure the proposals can be fully financed and may ultimately present a budget challenge.

*What are the **procurement** implications?*

The estimated potential total overall annual cost of the revised proposals is £2,267k for OMBC, £1,192k for the CCG, giving a combined cost of £3,459k. (Danny Jackson and Carol Gibson) Strategic Sourcing understands the reasons for providing the uplifts to the providers and will support the commissioners in meeting the needs of the service users and ensuring market is sustainable. (Rajnish Ahuja, Strategic Sourcing Consultant)

*What are the **legal** implications?*

An outline summary of the legal positions affecting the setting of care home rates is set out below.

When setting a fee the authority should address the effect of its decision in terms of the quality of the service provided and the sustainability of the providers.

The courts have provided some guidance with regard to the appropriate considerations of a Local Authority when setting fees in relation to the actual costs of providing care. A Local Authority has a statutory duty to provide residential accommodation to categories of adults in its area in need of care and attention which is not otherwise available to them. The duty can be discharged by contracting with a private care home provider. Local authorities are responsible for achieving a responsive, diverse and sustainable market of service

providers that can provide high quality, personalised care and support that best meets the needs of people. Local authorities must have regard to the sustainability of the market as a whole including, for example, taking care not to set fee levels below an amount which is not sustainable for providers in the long-term.

Local authorities have to act under the general guidance of the secretary of state who has issued formal statutory guidance in Local Authority Circular LAC (2004) 20 which stated at para.2.5.4 that “councils should have due regard was to be had 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 1999”. It was held by the Court of Appeal that the circular did not prescribe any particular methodology which local authorities had to adopt in order to have due regard to the actual cost of providing care. An arithmetical calculation was one way of carrying out the exercise but it was not the only way. Provided some inquiry was made by the decision maker, it was for the decision maker to decide how much attention to pay to it. In one case the fact that the Local Authority had considered the rates and compared them to others in the region and had sought information from one of the providers and carefully considered its accounts, which was sufficient for the decision of the Authority for it to be robust. In paragraph 3.3 of the statutory guidance “a council should be able to demonstrate that this cost is sufficient to allow it to meet assessed care needs and to provide residents with the level of care services that they could reasonable expect to receive if the possibility of resident and third party contributions did not exist.” Non statutory guidance “Building Capacity and Partnership in Care” points out that local authorities must not use their dominant position to drive down fees. “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.”

Consultation is necessary on this type of decision. As stated above, the statutory guidance states that “local authorities are to

have due regard to the actual costs of providing care and other local factors” and to take account of the legitimate current and future costs.”

The duty to have a balanced budget must be complied with but when making financial decisions the authority must ensure that it takes account of all relevant circumstances and is able to carry out its statutory functions. The council is able to take into account its limited financial resources but must draw a reasonable balance between such limitations and its other duties, including an obligation to make decisions with an awareness of responsibilities under the Equality Act 2010. The public sector equality duties under the Equality Act 2010 extends to cover various protected characteristics, including age and disability, and therefore the Act is relevant here in that there is a potential effect on such people. Under the Act, public authorities have legal duties to have due regard in the exercise of their functions to the need to eliminate discrimination; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The law requires that this duty to pay ‘due regard’ should be demonstrated in the decision making process. Assessing the potential equality impact of proposed changes to policies, procedures and practices is one of the key ways in which public authorities can show ‘due regard’.

Case law sets out some very clear guidance on what organisations need to do in order to have ‘due regard’. In particular, decision-makers need to:

- be aware of their responsibilities under the duty
- make sure they have adequate evidence (including from consultation, if appropriate) to enable them to understand the potential effects of their decisions on different people covered by the duty
- consciously and actively consider the relevant matters, in such a way that it influences decision-making
- do this before and at the time a decision is taken, not after the event
- be aware that the duty cannot be

delegated to third parties who are carrying out functions on their behalf.

Case law also suggests that it is good practice to document how decisions were reached. Equality Impact Assessments are not a prescribed requirement but they provide a structured framework which enables the Council to ensure that it considers the equality impact of decisions, and to demonstrate to others that it has done so.

It is essential that consultation with providers and stakeholders should address the issues raised above to ensure that the Council has the evidence necessary to defend its position when making a decision with regards to uplift of adult social care fees. (Elizabeth Cunningham-Doyle)

Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response and where the consultation spans all or part of a holiday period. Policy makers should consider what if any impact there may be and take appropriate mitigating action. The amount of time required will depend on the nature and impact of the proposal (for example, the diversity of interested parties or the complexity of the issue, or even external events), and might typically vary. The timing and length of a consultation should be decided on a case-by-case basis; there is no set formula for establishing the right length. For a new and contentious policy, 12 weeks or more may still be appropriate. When deciding on the timescale for a given consultation the capacity of the groups being consulted to respond should be taken into consideration. (Salma Yasmeen)

8. Links to Council/CCG values

- An Inclusive Economy: Providing an opportunity for business to new and existing providers. The proposals assist with shaping and stabilising the care market.
- Co-operative Services: Reforming public services and encouraging innovation, leading to better outcomes and delivery. The proposals and the redevelopment of quality incentives underpinned by a quality improvement programme linked to market regulation, recognizes the need for commissioners and

providers to play an equal part in ensuring a sustainable market with services that meet CQC requirements.

9. Communications – comments/implications

9.1 N/A

10. Strategic Sourcing – Comments:

10.1 Strategic Sourcing understands the reasons for providing the uplifts to the providers and will support the commissioners in meeting the needs of the service users and ensuring market is sustainable.(Rajnish Ahuja, Strategic Sourcing Consultant)

*What are the **Human Resources** implications?*

None (Emma Gilmartin)

***Equality and Diversity Impact Assessment** attached or not required because (please give reason)*

Attached.

*What are the **property** implications*

None

Risks:

The increase in fees required to mitigate the risk of a lack of the appropriate capacity and quality of provision to meet needs, will have a financial impact on both the Council and the CCG. However, this should be considered in the context of the wider system impact of an unsustainable care sector.

Has the relevant Legal Officer confirmed that the recommendations within this report are lawful and comply with the Council's Constitution/CCG's Standing Orders?

Yes

Has the relevant Finance Officer confirmed that any expenditure referred to within this report is consistent with the S.75 budget?

Yes

Are any of the recommendations within this report contrary to the Policy Framework of the Council/CCG?

No

Reason(s) for exemption from publication:

Reason why this Is a Key Decision

(1) to result in the local authority incurring expenditure or the making of savings which are, significant (over £250k)

having regard to the local authority's budget for the service or function to which the decision relates; or

- (2) to be significant in terms of its effects on communities living or working in an area comprising two or more Wards or electoral divisions in the area of the local authority.

The Key Decision made as a result of this report will be published within **48 hours** and cannot be actioned until **five working days** have elapsed from the publication date of the decision, i.e. before 30th April 2019 unless exempt from call-in.

This item has been included on the Forward Plan under reference CPB-02-19.

List of Background Papers under Section 100D of the Local Government Act 1972:

There are no background papers for this report

Report Author Sign-off:	
	Helen Ramsden – Interim Assistant Director of Joint Commissioning and Safeguarding
Date:	16 th April 2019

Please list any appendices:-

Appendix number or letter	Description
1	Equality Impact Assessment Fees 2019

Background:

1.1 In December 2018, a set of fee proposals was agreed, on which to consult with providers of the following services:

- Residential and Nursing Care
- Care at Home
- Extra Care Housing
- Supported Living Services
- Personal Assistants

1.2 Consultation documents were issued to providers on 14th December 2018, and a reminder issued on 21st December 2018. The consultation documents are attached as Appendices 2a and 2b. Following representation from providers, the deadline for responses was extended from Friday 4th January 2019 to Friday 11th January 2019, to take account of the holiday period.

1.3 Following consideration of feedback received during the consultation period, a revised set of proposals was developed and approved on 28th January 2019.

1.4 A revised set of consultation documents was issued to providers on 1st February 2019 for a four week period.

1.5 The proposals consulted on are set out in the tables below:

Care homes

	Current rate/week	2019/20 proposals
Base rate	£450	£500
PQuIP engagement	n/a	£10
CQC Good	n/a	£25
CQC Outstanding	n/a	£45
Oldham Quality Good	£45	n/a
Oldham Quality Excellent	£65	n/a
Dementia premium	£45	£45
Mental disorder premium	£84	£84
12 month bridging payment for homes currently rated as "excellent" under the Oldham scheme and Requires Improvement with CQC*	n/a	£10
12 month bridging payment for homes currently rated as	n/a	£20

“excellent” under the Oldham scheme and Good with CQC*		
Nursing premium – payable for all nursing placements	n/a	£30

Non-residential providers

	Care at Home	Extra Care Housing	Supported living non-complex	Supported living complex*	Sleep in's	PA's
Current rates	£15.22/hr £17.22/ hr OL3 area	£14.26/hr	£14.26/hr	£15.70/hr	£80/night	£10/hr (excludes employers NI and pension contributions) £65/night sleep-in's
Proposed 19/20 rates –2.2%	£15.56/hr £17.56/hr OL3 area	£14.57/hr	£14.57/hr	£16.05/hr	£80/night (no increase)	£10/hr (excludes employers NI and pension contributions) £65/night sleep-in's (no increase)

2. Consultation responses

Care homes

- 2.1 Responses were received from eight providers (20% response rate), and at the request of providers, a meeting was held with sector representatives.
- 2.2 Of the written submissions received, five were supportive of the proposals.
- 2.3 Two respondents were not in support of the proposals. One considered the increase in fees insufficient. The other, whilst welcoming the revised proposals was not in support of a fee structure linked to CQC ratings.
- 2.4 The final respondent welcomed the revised proposals but expressed concern about the lack of increase in the dementia premium. However, there was recognition that this would be reviewed during 2019/20, with the intention of replacing it with a complex care premium from April 2020.

2.5 At the meeting with representatives from the sector, the providers expressed support for the revised proposals and welcomed the recognition of provider concerns. There were concerns still expressed about the financial year 2020/21, and the impact of the removal of the 12 month bridging payment. However, commissioners explained that in preparation for fee consultation for 2020/21, a full market analysis would again be undertaken to understand, down to individual provider level, the impact of any proposals prior to consultation.

Non-residential providers

2.6 Responses were received from five providers, which represents an 18% response rate, and includes responses from two of the larger care at home providers in Oldham.

2.7 Two providers cited significant increases in CQC fees as adding cost pressures. Commissioners are aware that CQC have changed their charging methodology from being based on the number of locations (registered offices) to number of service users.

2.8 Two providers welcomed the changes being made to the wider commissioning model but had concerns about their ability to recruit and retain staff.

2.9 One provider expressed concern about the sleep-in rate for supported living services.

2.10 One respondent was of the view that all provision should attract the same rate as provision in OL3 (£17.56), if the United Kingdom Home Care Association recommended rate of £18.93 was not affordable.

3. Proposals:

3.1 Implementation of the proposed fees for 2019/20 as set out above, with effect from 1st April 2019, for all council and CCG commissioned care.

3.2 Commissioners develop a complex care premium to replace the dementia and mental disorder premiums from April 2020.

3.3 Commissioners continue to work with providers, and in partnership with CQC, to improve the quality and CQC ratings of providers.

3.4 Commissioners work with providers during 2019/20 as part of the implementation of the new care at home commissioning arrangements, to fully understand the local impact of changes to the CQC fee methodology, and to continue to monitor the situation with regard to the recruitment and retention of care staff, which the new commissioning model for care at home seeks to support.

3.5 Commissioners continue to review the position in relation to any further legal action with regard to the Court of Appeal's ruling in July 2018 that sleep-in's should be paid at a flat rate, rather than on an hourly basis. The Supreme Court has granted permission for an appeal by Mencap (who aren't active in Oldham), with the support of Unison, against the Court of Appeal ruling. It is anticipated that the case won't be heard until October 2019 at the earliest.