

<b>MEETING:</b>	<b>CABINET</b>
<b>MEETING DATE:</b>	<b>12 JUNE 2014</b>
<b>TITLE OF REPORT:</b>	<b>RESIDENTIAL AND NURSING HOME FEES FOR OLDER PEOPLE</b>
<b>REPORT BY:</b>	<b>DIRECTOR FOR ADULT WELLBEING</b>

## **Classification**

Open

## **Key Decision**

This is a key decision because it is likely to result in the council incurring expenditure which is, or the making of savings which are, significant having regard to the council's budget for the service or function to which the decision relates.

And

This is a key decision because it is likely to be significant in terms of its effect on communities living or working in an area comprising one or more wards in the county.

NOTICE has been served in accordance with Part 3, Section 9 (Publicity in connection with key decisions) of The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.

## **Wards Affected**

County-wide

## **Purpose**

To seek a decision on the usual price the council pays for the purchase of residential and nursing home care for older people (persons aged 65 or over) with assessed eligible needs. Specifically to:

- a. set out the methodology used to develop options for setting a usual price
- b. Present a recommended option for Cabinet to approve
- c. Present an implementation plan for approval

## **Recommendations**

**THAT:**

- (a) Sets the usual price for the spot purchase of publicly funded places in**

**residential care homes and nursing homes for older people as follows:**

- I. residential care and residential care with dementia - £451.75 per week**
- II. nursing home care - £518.00 per week;\***<sup>1</sup>

- (b) Agrees the implementation plan set out in paragraph 8.21; and**
- (c) Requests the Health and Social Care Overview and Scrutiny Committee to undertake regular progress reviews on implementation.**

\*<sup>1</sup> providers will also receive a further payment for funded nursing care (currently £112.70 per week from the NHS)

## **Alternative Options**

- 1 As outlined in paragraphs 25 to 59, five options were considered:
  - a. A: Use average cost of care from all care homes in Herefordshire participating in our review, less 16% to reflect budget pressures – recommended option**
  - b. B: Use average cost of care for the fifty percent of care homes in Herefordshire with the lowest cost of care participating in our review
  - c. C: Leave the current usual prices unchanged
  - d. D: Use the average cost of care from all homes participating in the Open Book Review
  - e. E: Use the cost of care for the single lowest cost provider for each category of home participating in the review

## **Reasons for Recommendations**

- 2 The council purchases individual (spot price) residential and nursing placements for older people assessed as having eligible needs. The budget for 2014/15 is based on 396 older people in such placements, accounting for less than 30% of the total residential and nursing market capacity in the county. Most of the remaining placements are purchased by those funding their own care (known as “self-funders”).
- 3 The recommendations in this report relate solely to the price the council pays for individual placements for older people in residential or nursing care. The recommendations do not cover the price paid for:
  - a. block contracts (where there is a predetermined fixed price with a provider for a set number of beds), or
  - b. the price paid by self-funders, or
  - c. the price paid for residents whose medical needs are such that their care is fully funded by the NHS as a continuing NHS health care service.
- 4 Government guidance on council funded residential and nursing care emphasises that there is a general presumption in favour of individuals being able to exercise reasonable choice over the service they receive. This is sometimes referred to as the “Choice Directive”. The limitations on the council’s obligation to provide an older person’s preferred accommodation are not intended to deny individuals reasonable freedom of choice but to ensure that councils are able to fulfil their obligations in relation to the quality of service provided and value for money. Local authorities must

make all reasonable efforts to maximise choice as far as possible within available resources. To help service users, their families and carers to choose a care home it is essential that the council is clear what amount it will pay for placements and which care homes are willing to accept placements at that price.

- 5 The council has a statutory duty to set out the price it would normally expect to pay for residential and nursing care, this is known as the usual price. The council may set a different usual price for different types of placement (e.g. residential, nursing and residential care for those with dementia). A more detailed explanation of the statutory guidance is included in paragraphs 72-73 of the Legal Implications section of this report.
- 6 The council must ensure there are enough care homes in the county willing to contract with it at the usual price so as to ensure there is choice for service users. This does not mean that all Herefordshire care homes must be willing to accept placements at the usual price as council placements only utilise a small proportion of all available care home beds in the county.
- 7 The council believes that the proposed rates are viable, are consistent with the benchmarked costs from the neighbouring authorities and will result in a sufficient number of providers willing to contract at the proposed prices. The local authority only requires less than 30% of the available capacity in the county and believes that there is not an excess of demand for beds over existing places (nationally occupancy rates in care homes are at approximately 90%).
- 8 Service users can choose to go to more expensive homes than those that accept the usual price provided a third party is able and willing to make up the difference. This is known as a third party contribution or “top-up”. A more detailed explanation of the statutory guidance is included in paragraphs 76-80 of the Legal Implications section of this report.
- 9 When setting the usual price, statutory guidance (*Local Authority Circular (2004)20*) requires the council to have due regard to:
  - a. The actual costs of providing care; and
  - b. Local factors; and
  - c. Best Value requirements under the Local Government Act 1999.

Each of these factors is considered below.

## Key Considerations

### 10 The Actual Cost of Providing Care

- 11 To understand the actual costs of providing care in Herefordshire, in July 2012 the council commissioned an Open Book Review (OBR) of residential and nursing care costs for older people. An OBR is an accounting method that allows providers to share their financial data with commissioners, so as to enable the council to understand the costs and other aspects of service delivery. Information was received from 22 homes in the initial consultation, of which the data for 16 was sufficiently robust for inclusion. Care homes with block care contracts for a specified number of beds were not included in the review.
- 12 Following completion of the OBR, a report was presented to Cabinet on 20 June 2013 setting out proposals for the new usual price. A usual price for residential care and

for nursing care was approved subject to the outcome of further consultation with providers. Delegated authority was given to the then Director for People's Services, in consultation with the Cabinet Member for Health & Wellbeing, having due regard to the outcome of the further consultation, to finalise the usual price at which it purchases. Following the Cabinet decision, the council received a formal letter from a solicitor representing thirteen care home providers in Herefordshire. This challenged the authority's decision making process and indicated the possibility of judicial review. In the council's response letter it was agreed that the decision on setting the usual price would be referred back to Cabinet.

- 13 In light of the above and feedback from provider consultation, the OBR was extended through October and November 2013. Responses were received from a further ten providers, but one of the returns received was from a home in Worcestershire and was therefore discounted making a total of 25 out of 41 homes. The full report for the extended OBR (which considered all 26 homes providing returns) is available as Appendix A.

#### **14 Local Factors**

- 15 The emerging national policy agenda, in particular the Care Bill (published 10 May 2013), prioritises promoting people's well-being by "enabling" them to prevent and postpone the need for care and support. When considered within the context of the demographic pressures facing the county, this will affect the shape of the local older person's residential and nursing care market:

- a. Increasingly more people will be supported to live independently in their own homes and community, there is likely to be a corresponding decline in demand for standard residential care. Locally, the number of social care supported older people entering standard residential care has been decreasing since 2011 (numbers receiving standard residential care did not increase in 2013/14 although older people numbers were expected to increase by 3%).
- b. As more people live longer with multiple and complex needs, those that do need residential care will be more likely to need nursing provision or specialist dementia support. Demand for dementia care is of particular significance as the number of people in the county with dementia is projected to almost double within the next 20 years.

- 16 The Care Bill emphasises that local authorities have a duty to manage the local market to ensure there is sufficient quality care available to meet local need and support service user choice and control. As a key commissioner of local services, some of the ways the council can shape the market include the price paid and how care is purchased from the market.

- 17 As outlined in paragraph 2 the council is responsible for commissioning only a small proportion, less than 30%, of the residential and nursing care beds for older people within Herefordshire, with the majority purchased by self-funders. Therefore, whilst it is essential to contract with sufficient care homes at the usual price so as to provide reasonable service user choice (and ensure that individuals do not have to wait an unreasonable length of time for their assessed needs to be met), the council does not necessarily need to contract at the usual price with every local care home

- 18 Trends in service user numbers indicate the need for more dementia and nursing care in future years, and a reduction in residential only care. The recommended option gives due regard to the OBR cost data, but also ensures that the Council

achieves best value having regard both to present levels and anticipated future levels of demand for council funded placements and budget pressures.

19 Approximately 30% of the clients in residential care receive a basic care package, whilst 70% are funded for dementia care. The majority of residential care homes also offer dementia care (five out of 22 do not), therefore a single rate for residential care which includes dementia care is more representative of the client base within Herefordshire and reflects anticipated changes in care needs.

20 Current average length of stay (based on a review of client turnover) of two years has been used to model the financial implications of the recommendation to not reduce fees for current clients but to allow natural turnover. The financial implications are noted in paragraphs 67-68.

## **21 Best Value**

22 The council remains committed to supporting people to live full and independent lives within their local communities. When people are eligible for social care support, the aim is to support them in a way that reflects their preferences and the outcomes they wish to achieve. However, this must be balanced against the council's responsibilities to make best use of all available resources and to ensure those resources are distributed in a fair and transparent manner amongst all persons who are eligible for support.

23 Due to reductions in funding from central government the council will need to have delivered savings of £67m from 2011/12 to 2016/17 to stay within budget and to continue funding services that support its strategic priorities to:

- keep children and young people safe and give them a great start in life;
- enable residents to live safe, health and independent lives;
- invest in projects to improve roads, create jobs and build more homes.

Therefore the council must stop or reduce funding for non-priority services. However it must also seek to generate efficiencies and appropriate cost savings and achieve best value in areas of provision that support its strategic priorities, such as residential and nursing care services for older people. This includes ensuring contracted services are compliant with the Care Quality Commission (CQC) Essential Standards for Quality and Safety and meet the assessed needs of service users but in a manner that is financially efficient and delivers best value.

24 Whilst it is fully recognised that benchmarking comparisons cannot be used in isolation as a method for setting fees it is nevertheless useful to understand the market at a sub-regional level. A comparison has been made with neighbouring authorities on fees. Rates for 2014/15 have been confirmed by two out of three neighbours, the third one is subject to local consultation. The indicative rates provided show that the fees recommended in the report will be 17% higher for nursing and 9.5% higher for residential with dementia care than the average of the three neighbouring authorities. The benchmarking comparisons can be seen in more detail in Appendix B. Further evidence that the recommended fees are reasonable in the local market.

## **25 Options for Consideration**

26 When shaping the care market, the council must ensure it obtains best value for money from all of its providers on behalf of the public, and the funds it has available

are used effectively to meet eligible need. As the council does not necessarily need to contract at the usual price with every local care home the usual price does not need to be at a level that every local care home will choose to contract with the council. Setting a usual price at a level where sufficient local care homes choose to contract with the council so as to ensure that current and anticipated local demand for funded placements can be met in a timely manner whilst offering real choice to publically funded service users is likely to encourage efficiency and innovation in the market. Conversely, setting the usual price too high will not encourage efficiencies and innovation in the market.

27 The options identified are considered in light of the council's duty to have due regard to actual costs, other local factors and best value. They are set out in summary in the table below and in more detail in Appendix B.

28 All the options considered below (except for option C - no change) are based on the CQC classification of care homes, and include an allowance for return on capital based upon the current market price for care homes for sale within the county in 2014. All options assume a 5% allowance for profit prior to the application of a budget pressures reduction - option A.

## 29 Options for Usual Weekly Price Per Person and Comparison to Budget

<b>Recommended Option</b>	<b>Nursing (Excl. FNC*<sup>1</sup>) (<i>prpw</i>)</b>	<b>Residential with dementia (<i>prpw</i>)</b>	<b>Annual Financial Impact Cost / (<i>saving</i>)*<sup>2</sup></b>	<b>2014/15 estimated Cost / (<i>saving</i>)*<sup>3</sup></b>
	<b>£</b>	<b>£</b>	<b>£'000</b>	<b>£'000</b>
<b>A – average cost reduced by 16% for budget pressures</b>	<b>518.00</b>	<b>451.75</b>	<b>2</b>	<b>260</b>

<b>Alternative Options</b>	<b>Nursing (Excl. FNC*<sup>1</sup>) (<i>prpw</i>)</b>	<b>Residential with dementia (<i>prpw</i>)</b>	<b>Annual Financial Impact Cost / (<i>saving</i>)*<sup>2</sup></b>	<b>2014/15 estimated Cost / (<i>saving</i>)*<sup>3</sup></b>
	<b>£</b>	<b>£</b>	<b>£'000</b>	<b>£'000</b>
B - Bottom 50%	545.07	463.64	<b>392</b>	<b>292</b>
C – Current fee * <sup>4</sup>	570.24	445.89	<b>296</b>	<b>296</b>
D – OBR costs	615.71	537.86	<b>1,886</b>	<b>1,258</b>
E- Lowest cost provider	507.99	401.21	<b>(651)</b>	<b>(205)</b>

All options are evaluated based on the 2014/15 budget for client numbers

\*<sup>1</sup> Funded Nursing Care (FNC) of £112.70 NHS funding in nursing placements

\*<sup>2</sup> The financial cost / saving reported above is the total estimated cost / saving when revised pricing structure is fully implemented

\*<sup>3</sup> 2014/15 impact assuming 1 August implementation and fee reductions applied to new clients only.

\*<sup>4</sup> Weighted average fee based on budget client ratios - planned saving not achieved

**30 Option A: Average cost from all participating homes with a 16% reduction applied for budget pressures**

31 This option is based on the average cost of all participating nursing homes and the average cost of all participating residential and residential with dementia care homes in the OBR. Due regard has been given to the actual cost of care from the participating providers in the OBR. Due regard has been given to the actual cost of care which has been collated through the OBR but the difficult question on the allocation of resources available has indicated that a 16% reduction is required to the actual average price evidenced in the OBR. The 16% reduction will create a short term budget pressure for the Council whilst the current clients flow through at the higher fees but will enable the Council to operate within the approved budget once all clients are on the new tariff, assuming client numbers remain stable.

32 Approximately 60% of the care homes elected to participate in the OBR, the remainder did not. The clients which participated have a higher occupancy of local authority clients (34%) than the non-participating homes where comparable occupancy was 20% giving an average local authority occupancy of 30%. They therefore have greater reliance on local authority fees and an incentive to maintain the existing high fee rates. Given that overall local authority need for places is approximately 30% of existing market capacity it is believed that the proposed prices will find sufficient engagement with providers to meet local demands as it is better for a bed to be filled at a local authority rate than unoccupied. Most homes operate at circa 90% capacity indicating that there is not an excess self-funding client demand to fill these beds if not occupied by council funded clients.

33 The benchmarking data is shown in Appendix B and indicates that the new rates will still be higher than the average of the three neighbouring English authorities, higher than all nursing rates and higher than two out of three residential / residential with dementia rates.

34 The table below shows the difference between current fees and proposed fees for the recommended option

	Current Fees (i)	Proposed Fees (ii)	Fee Change up / (down)	% Variance
	£	£	£	
Residential and Dementia* <sup>2</sup>	445.89	451.75	5.86	1.3%
Nursing	570.24	518.00	(52.24)	(9.2%)

\*<sup>2</sup> The current fee above is a weighted average of the separate fees for residential and nursing based on budgeted client numbers

**35 Conclusion: This option is recommended because:**

- a. It will ensure that persons in need of council funded care are able to exercise genuine choice over where they live;
- b. It will ensure that individuals do not have to wait an unreasonable length of time for their assessed needs to be met;

- c. **The accommodation provided will meet the Care Quality Commission Essential Standards;**
- d. **It pays due regard to the cost of providing care in Herefordshire, by considering the costs provided by a number of homes;**
- e. **It pays due regard to best value requirements;**
- f. **It allocates the scant resources of the council and over time will balance the Adult Wellbeing budget; and**
- g. **It pays due regard to other local factors including current and anticipated levels of demand for council funded placements**

**36 Option B: Average Cost for bottom 50 percent of providers**

37 This option uses the average cost of the lowest 50 percent of providers of nursing care and residential and dementia care.

**38 Conclusion: This option is not recommended because:**

- a. This approach is likely to be subject to judicial review; and
- b. Using the average of the lowest 50 percent is not adequately robust and does not give sufficient regard to the actual cost of providing care in Herefordshire

**39 Option C: Leave the usual price as is**

40 This option proposes to continue with existing rates as the usual price.

**41 Conclusion: This option is not recommended**

- a. This takes no account of budgetary pressures; and
- b. No regard is given to best value requirements as efficiency in the market is not promoted.

**42 Option D: Open book review (OBR) rates as the usual price**

43 The OBR provides average costs of care based on information supplied by providers who took part in the review. Adopting the OBR rates as the usual price would incur significant additional council expenditure.

**44 Conclusion: this option is not recommended because:**

- a. It does not pay due regard to best value requirements as efficiency in the market is not promoted; and
- b. It does not address the allocation of resources and it would require very substantial savings to be made in other services to enable the council to set a balanced budget

**45 Option E: single lowest cost provider**

46 This option proposes to set the usual price upon the data provided by the lowest cost provider for each of the two categories (residential care with dementia, nursing).



47 **Conclusion: This option is not recommended because:**

- a. It is not adequately robust as it only relies on data from the lowest cost provider in each category. Accordingly it may give insufficient regard to the actual costs of providing care in Herefordshire

48 **Implementation**

49 The council has as part of the consultation and engagement process with providers also discussed:

- a. a core contract that enables all parties to be clear what is provided where the council is funding the placement, with clear core terms and conditions;
- b. the process for implementing the new contract; and
- c. introduction of new guidance on third party contributions (“top ups”)

50 **Application of the new usual price**

51 In conjunction with the introduction of a new contract, the new usual price shall be applied from 1 August 2014 using the following rationale:

- a. New usual prices will apply to all new service users from 1 August 2014;
- b. Existing service users on rates **below** the proposed new usual price shall have their rates increased to match the new usual price with effect from 1 August 2014; and
- c. Existing service users on rates **above** the proposed new usual price shall remain on their current rates and will not be affected by the rate reductions introduced on 1 August 2014

52 The usual price will be reviewed annually to consider the impact of inflation and other changes such as minimum wage increases.

53 **Introduction of a new contract**

54 The council intends to introduce a new contract for care homes which includes the council’s new standard core contract and terms and conditions. The contract sets out the council’s expectation that providers will be required to meet the CQC’s Essential Standards and does not place any higher requirements on providers.

55 Existing and new providers will be invited to participate in an accreditation process through which they agree to the new contract. To allow time for participation in this process the new contract will be applied after the conclusion of these discussions. Following the introduction of the new contract the council will only be able to make new placements with care homes that have been accredited and agreed to the new contract.

56 The accreditation process shall establish two approved provider lists– those that agree to contract at the usual price and those that agree to contract but at a higher price (and therefore would require top-ups). The establishment of approved lists will enable providers to market themselves as an approved supplier both to publicly funded service users and self-funders.

57 A small core group of providers will be invited to self-nominate to ensure effective implementation of the new approach and usual price.

### **58 Third party contributions guidance**

59 Third party contribution guidance and information for service users has been developed collaboratively with input from providers and carers and is currently in the process of being finalised for publication.

## **Community Impact**

60 As identified in the Corporate Plan, the council is committed to operating efficiently and effectively by making best use of the resources available in order to meet the its priorities. Within the council there is a priority to enable residents to live safe, healthy and independent lives, these proposals seek to ensure that vulnerable older people continue to receive quality and reliable residential and nursing home services that support them to stay safe, healthy and as independent as possible for longer.

61 In setting the usual price the council must have due regard to local factors. As outlined in paragraphs 8.5 and 8.6, of particular significance to Herefordshire is the need to shape the county's residential and nursing care market to be responsive to the current and future needs of local people.

62 The evidence base to support these proposals is comprehensive and ensures community impact is given thorough consideration. Evidence used includes the OBR which 58% of the market responded to, consultation with providers (including provider meetings), data about existing and projected levels of service use, quality monitoring data and national research and studies.

## **Equality and Human Rights**

63 These proposals pay due regard to Herefordshire Council's public sector equality duty. The proposals aim to ensure all current and future service users receive quality, reliable and safe services that meet the CQC's Essential Standards and that providers receive a fair price for the level of service they provide. Implementation of the proposals through an accreditation process will help the council ensure that services contracted are of the quality required.

64 An Equality Impact Needs Assessment for this project has been undertaken and is attached as Appendix E. Analysis of service use identifies that this proposal impacts upon older people - particularly the very old, women and those with a disability (including frailty). The recommendation takes account of any potential negative impact on service users by including the following mitigating actions:

- a. Adoption of an OBR approach to analyse actual costs of care;
- b. Not applying any reductions in usual price to existing service users;
- c. The introduction of updated contractual terms and conditions that clarify service delivery expectations and promote compliance with the CQC essential standards; and
- d. The implementation of third party contribution guidance

65 These proposals, in conjunction with the development and introduction of a Third Party Contributions policy and service user guidance, seek to support service users' right to choose the home they wish to live in.

- 66 As a public sector organisation contracting services, accredited providers will be required to meet the requirements of the Equality Act 2010.

## Financial Implications

- 67 The 2014/15 budget for the spot purchase of residential and nursing care for older people is £13m of which £9,934k relates to clients placed in Herefordshire care homes at current rates, some clients are accommodated out of county. Because all existing service users will remain on current rates a balanced budget is not estimated to be achieved until the end of 2017/18. This creates a budget pressure of £260k in 14/15. The council will mitigate pressure through a combination of bringing forward savings planned for 2015/16 and demand management.
- 68 It should be recognised that client numbers are volatile and therefore savings are an estimate based upon the most recent information and are consistent with the detailed budget planning assumptions for 2014/15.

## Legal Implications

- 69 Section 21(1)(a) of the National Assistance Act 1948 provides the council with the power to make arrangements for providing residential accommodation for persons aged eighteen or over 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 section also places the council under a legal duty to do so where so directed by the Secretary of State. The council is thus under a duty to comply with the Choice of Accommodation Directions 1992 (“the Directions”), the National Assistance Act 1948 (Choice of Accommodation) (Amendment) (England) Directions 2001 and the National Assistance (Additional Payments and Assessment of Resources) (Amendment) (England) Regulations 2001 (“the Regulations”). The Directions are intended to ensure that when the council makes placements in care homes or care homes providing nursing care, that, within reason, individuals are able to exercise genuine choice over where they live.
- 70 Guidance on the council’s statutory duties in relation to the Directions and the Regulations are set out in *Local Authority Circular (2004) 20*. This guidance emphasises that there is a general presumption in favour of individuals being able to exercise reasonable choice over the council funded residential and nursing care they receive. The limitations on the council’s obligation to provide an older person’s preferred accommodation are not intended to deny individuals reasonable freedom of choice but to ensure that councils are able to fulfil their obligations in relation to the quality of service provided and value for money. Local authorities must make all reasonable efforts to maximise choice as far as possible within available resources. The legal implications for the matters set out in this report are outlined in the following paragraphs.
- 71 Requirements to set a usual price**
- 72 Councils are required to set a usual price that they would normally expect to pay for residential accommodation:
- a. This should be set at the start of a financial or other planning period, or in response to significant changes in the cost of providing care;
  - b. The usual price should be sufficient to meet the assessed care needs of supporting residents in residential accommodation;

- c. Service users should not be asked to pay more towards their accommodation because of market inadequacies or commissioning failures;
- d. Where the cost of providing accommodation to specific groups is different, the Council may set more than one usual price; and
- e. In setting and reviewing the usual price councils should have due regard to the actual cost of providing care as set out in LAC 2004, other local factors and best value requirements under the Local Government Act 1999.

**73 Service user's right to choose their own home**

74 If a service user with assessed eligible needs for residential or nursing care has a preference for a choice of home, the council must arrange for care in that home provided that:

- a. the accommodation is suitable in relation to the person's assessed needs;
- b. to do so would not cost the authority more than it would usually expect to pay for someone with the individual's needs (the 'usual price');
- c. the accommodation is available; and
- d. the person in charge of the accommodation is willing to provide accommodation subject to the authority's usual terms and conditions for such accommodation

**75 Accommodation more expensive than the usual price (*including third party contributions*)**

76 The guidance recognises that some care homes charge prices greater than the council's Usual Price and some service users explicitly choose to enter accommodation which is more expensive than that which the council would normally expect to pay. Such accommodation should not require the council to pay more than they would normally expect to pay having regard to the assessed needs. If an individual requests it, the council must arrange for care in more expensive accommodation provided a third party or, in certain circumstances, the resident, is willing and able to pay the difference between the council's usual price and the actual accommodation cost (known as a third party contribution or "top up").

77 However, 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 price to meet the assessed care needs of the service user, the council should make a placement in more expensive accommodation and the council should make up the cost difference between the resident's assessed contribution and the accommodation's fees.

78 The threat of judicial review referred to in paragraph 12 was partly founded on a perceived failure by the council to properly take into account "actual care costs, capital costs and profit incurred by and necessary to Herefordshire providers." These matters are all addressed in this report.

79 The view taken by the courts is that the questions of affordability and allocation of resources are for the democratically elected Councillors and that affordability is in general a highly relevant consideration to be taken into account by any local authority in making its decisions on rates to be offered to service providers, subject to the local authority being able to meet its duties at the rates it offers. This view was taken by the High Court in *R (Birmingham Care Consortium) v Birmingham City Council*, which referred to *R v Newcastle upon Tyne City Council ex p Dixon* and also the *Cleveland*

Care Homes Association case. More recently, that view has been endorsed by the High Court in the Newcastle City Council decision in 2012 which emphasised that where local authorities have a difficult decision to make about where to allocate scant resources, the court will be reluctant to interfere. The budget pressures, which the council faces are set out above. The council has a duty to decide how it should allocate its resources. Provided that it has used an evidence based system to ascertain the actual costs of care, it is then for the council to make a decision about the allocation of resources.

## Risk Management

80 The risks to the council if the proposals in this report are agreed:

<b>Risk</b>	<b>Mitigation</b>
Providers will reopen their application for judicial review and the Council will incur costs.	The report has addressed the matters raised in the provider's solicitor's letter and formulated proposals based on both actual costs and best value as well as meeting the eligible needs of service users. Counsel's advice has been used in the preparation of this report.
Providers will not supply services at the new usual price	The recommended usual prices have due regard to the actual costs of providing care in the county and are higher than the prices paid by surrounding councils.

81 The risk to the council if the proposals in this report are declined:

<b>Risk</b>	<b>Mitigation</b>
The council will have insufficient funds to maintain either existing or new placements in residential care and nursing homes	The council would need to divert additional funds to this service area requiring further cuts in other services and creating a risk of not meeting statutory obligations.
The council will be failing to obtain best value	The council could be open to challenge. The OBR and consultation process has taken into account statutory responsibilities and previous legal judgements and case law to ensure that council is working in a fair and legal manner.  The new prices will over time deliver the savings required, whilst minimising the threat to vulnerable clients.
Reductions in rates may impact on the quality of care	The accreditation process will require all care homes that the council contracts with to meet the Care Quality Commission Essential Standards.

## Consultees

- 82 A comprehensive programme of engagement with providers and partners has been undertaken. This includes:
- a. Invitation to providers participate in the OBR to help establish the actual average cost of care in Herefordshire (which included opportunities to meet and discuss figures with the OBR accountant);
  - b. Seven week consultation on the draft contract agreement and third party contributions policy with providers. Through this consultation providers also fed back views on various other aspects of the project. There has also been further consultation with providers on a revised draft contract;
  - c. Provider meetings with the Director for Adult Wellbeing;
  - d. Overview and Scrutiny Task and Finish Group for Older Person's Residential and Nursing Fees; and
  - e. Clinical Commissioning Group representation on the Older Person's Residential and Nursing Fees Project Board
- 83 The key themes that emerged from the consultation, and how these have been responded to are identified in the table below:

Consultation theme	Response
The need for a differential usual price for dementia	A single rate for residential care with dementia is recommended due to the small number of homes which provide residential only care.
Concerns around the Open Book Review	Concerns about the first OBR were addressed by extending the period for the OBR. In the additional time providers were encouraged to discuss the findings with the OBR Accountant
The council needs to improve communications with providers	The council is continually listening and acting on provider feedback - e.g. establishing new contact databases, establishing provider meetings and monthly provider forums
Concerns that a reduction in price will impact on quality	The council has analysed its quality data, including care homes in quality concerns, and can find no evidence of correlation between price and quality. In addition, the council proposes to honour existing price arrangements at rates above the new usual rate and increase any existing placements at rates below the new usual rates
Issues with the draft contract agreement	The entire draft contract agreement has been revisited and further consultation with providers undertaken
Greater clarity and transparency needed over how placements are allocated	An information sheet about the broker process and how this relates to the Choice Directive has been shared with all providers. The accreditation process will also promote openness and transparency

- 84 A list of all questions raised and corresponding responses are included at appendix F.

## **Appendices**

- A. Open Book Review (December 2013) Full Report with redaction of specific costs identified home by home
- B. Finance Table for the Five Options and Benchmarking Comparison
- C. Methodology for Open Book Review
- D. Care Home Local Data
- E. Equality Impact Assessment
- F. Consultation Summary

## **Background Papers**

- Pre-action Protocol Letter 2 July 2013, Alison Castrey Solicitor to Director of People's Services.