

Meeting:	Cabinet
Meeting date:	9 May 2016
Title of report:	Unified residential and nursing contract between the local authority and Herefordshire Clinical Commissioning Group (CCG), fee increase for care homes and change in payment process.
Report by:	Cabinet member health and wellbeing

Open

Key decision

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

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

Countywide

Purpose

To approve the approach to develop and implement a unified contract between the Herefordshire Clinical Commissioning Group (CCG) and Herefordshire council, agree to change policy to pay fees on a gross basis instead of net, and agree the rate to be paid to care home providers (Providers) for 2016/17.

Recommendation(s)

THAT:

- (a) a unified contract to be developed by the council and commissioning the CCG for future spot placements Providers, with the intention of implementation from September 2016 subject to agreement with the CCG and providers;**
- (b) the council approves the change in approach to pay Providers on a gross basis (i.e. inclusive of any client and third party contribution) rather than net, and to paying in arrears rather than the two weeks in advance and two weeks in arrears; effective from the implementation of**

- the unified contract and subject to agreement with providers;**
- (c) as lead commissioner the council undertakes a procurement exercise with a view to establishing an accredited list for the council and CCG of Providers in Herefordshire; and**
 - (d) the Provider fee rate increase of 1% is agreed for 2016/17 (excluding placements still on the higher old usual price rates).**

Alternative options

1. The council and CCG each continue to purchase placements separately on a case by case basis on their respective terms and conditions. This approach is not recommended as it does not support outcome based commissioning and is not person centred. In addition, the existing contracts build inefficiencies into the system as they take different approaches on a number of common issues.
2. The council continues to pay Providers on a net basis and Providers continue to collect client contributions, and if appropriate third party contributions. This approach is not recommended as it leaves the council open to the risk of unplanned debts and has been criticised by the Local Ombudsman as exposing residents and their families to unreasonable risk.
3. The council does not pay any increase to the current usual price paid to Providers or pays a larger increase. This is not recommended as the council is required to consider an annual increase as provided for in the contract whilst also taking into consideration the wider economic climate. Analysis shows there have been a number of increases in the cost of operating care homes. The recommendation figure of 1% represents a balance between recognising the cost pressures facing care home providers and the funding available to the council.
4. There are no alternative options for undertaking a procurement exercise due to Public Contract regulations 2015.

Reasons for recommendations

5. The council and the CCG between them fund in the region of 900 placements in residential and nursing care homes across Herefordshire, at an annual net cost of around £27m, with the largest proportion of £19m being spent on council placements and the remaining £8m by the CCG. This is due to the greater number of placements adult social care makes compared to the CCG. In order to facilitate choice for service users, as required by the Care Act 2014, the council and the CCG should secure placements on an individual 'spot' basis. To ensure fairness, the council set a rate for the cost of care each year, for older people residential and nursing placements, with a third party being able to pay a top-up if they choose a home where the fees are higher than the rate. The recommendations are designed to align the council and CCG contractual arrangements, to address issues in the current contracts, and ensure that the rate for 2016/17 reflects the actual cost of delivery.
6. It is envisaged that collectively that these recommendations will ensure transparency and

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consistency of placements with Providers which are cost effective and value for money.

7. The proposed recommendations will ensure that the council is able to achieve transparency and continuity in its commissioning approach which will strengthen its position in shaping and supporting the market place. The recommendations will in the council's role under the Care Act 2014 to support the wider care market in delivering a range of sustainable, high quality services to meet the demands of the community.
8. The recommendations will facilitate the personalisation agenda, identifying needs and aspirations and ensuring choice and support for individuals to live their lives the way they want. The recommendations will deliver better outcomes not only for the council and CCG, but also for the Providers, the individual service user and their family.

Key considerations

Unified contract

9. The council and the CCG currently manage placements separately, and providers work to two separate sets of terms and conditions, depending on which organisation funded the placement.
10. The Managing the Care Home Market project was identified as a pool within the Better Care Fund (BCF). The project aims to deliver integrated care decisions which will deliver better outcomes for the service user. It is intended that the unified contract will act as the proposed mechanism which deliver the outcomes identified in the BCF care home market management pool by bringing together the council and the CCG's funded placements under one set of terms and conditions.
11. Neither the council nor CCG currently commission under an outcomes basis. One of the rationales for adopting a unified contract is to enable both parties to be clear of their respective roles and responsibilities in conjunction with outcome focused service specifications which are drafted to ensure that the service will deliver on better outcomes for each service user. This will mean that the voice of the service user and what they want will be at the forefront of all decisions regarding their wellbeing.
12. The unified contract will also streamline and rationalise the terms and conditions used by the council and CCG to simplify contracting arrangements for our Providers as well as the service users and their families. The terms and conditions will apply to all placements by the council and CCG, ensuring consistency between Providers, but also clarity and clear terms for service users in relation to the scope, quality and standards which they are entitled to expect from the service.
13. The unified contract will seek a move to outcome based commissioning which will be person centred and appropriately monitored to ensure that service users' needs are met, and will be phased in by working with Providers, staff and service users.
14. In developing the unified contract, efforts have been made to engage closely with Providers, through open forums to which all Providers have been invited. During which, broader issues have been discussed, and through a smaller working group with a number

of representative Providers, who have reviewed the proposed elements of the new contract in detail. Key proposals, in alignment with CCG, include:

- development and implementation of an agreed suspension policy
- a change in payment after death from 5 to 3 days
- a change in payment for the absence of a resident (usually hospital admission)

A summary of these proposals can be found in appendix three.

Moving to gross payment

15. The council has historically paid net to Providers; which has resulted in the council only contributing towards the cost of an individual placement that falls to the council directly. The assessments of the client contribution and any third party contributions are completed by the council but it is subsequently the Provider's responsibility to collect these outstanding payments directly from the client, and from any third party, if such an agreement is in place.
16. The proposed recommendation to pay care home providers gross will enable the council to comply with the guidance contained in a recent report 'Counting the cost of care: the council's role in informing public choices about care homes' based on lessons learning from complaints September 2015' by the Ombudsman clearly state that where there is a top-up agreement in place, the council remains responsible for the full cost of the placement to the provider. This report does not recommend third party top-up and client contributions being paid directly to the Provider and states that it is even to be discouraged.
17. Although currently the Provider is responsible for collecting client contributions or any top up the council remains responsible for the placement as a whole. Therefore, if the Provider cannot collect the client contribution or, if applicable, a third party fee, the council still remains accountable for the totality of the funding. This has resulted in a number of council staff spending considerable dealing with the unpaid client or third party contribution. This results in complaints and unplanned debt for the council, putting the council's budget at risk. The proposed recommendation would alleviate these issues and enable council staff to concentrate on more strategic tasks and reduce the expenditure on administrative functions.
18. It is recognised nationally that some Providers have asked service users directly for an increase in their contribution, thereby increasing the overall cost of the placement without knowledge of the council, which is poor practice. This is done without the third party having a financial assessment carried out to ensure that they can afford to pay the provider the increase, and can leave the individual without the sufficient income to sustain themselves. Implementation of the recommendation to pay gross instead of net will ensure the practice described does not happen. Council officers will have control of the process, ensuring policy and practices are both adhered to in order to protect all individuals concerned.
19. The majority of councils already pay gross rather than net and Herefordshire therefore seems to be out of step with other councils in this regard.

20. The recommendation to pay gross instead of net is being considered as a positive step forward by Providers. This has formed part of the charging consultation. It will also improve debt management as client contributions will be managed by the council debtors' team.
21. The council has engaged with Providers on the unified contract in workshops and at Provider forums. Issues relating to payments have arisen many times and the Providers are keen to see a move to gross payments as this would take some risk away from them.
22. Paying gross will benefit the service user and the family as they will only have to deal with the council regarding any issues relating to funding, simplifying the process so their discussions with Providers can focus on meeting the needs and wellbeing of the individual.
23. Whilst the council has taken into account concerns from Providers that they are facing increased cost pressures and the proposed annual increase will not cover these costs; the proposal to pay gross rather than net has received a positive response and is generally welcomed by Providers. This support will be a key incentive for Providers to agree to the new unified contracts terms and conditions.
24. The council has the systems and staff in place to set up the collection of both client contributions and third party payments, and this can be done in a consistent way rather than the different systems and approaches that each Provider may take.
25. The charging policy consultation asked whether the council should consider changing the charging policy and pay providers gross rather than net when future contracts are reviewed. A total of 73% (90) said yes and agreed with the proposal to pay gross and 27% (33) said they didn't agree.
26. The Third Party top up policy will be amended to reflect these changes to the system.

Payment changes

27. The current council contract with Providers pays two weeks in advance and two weeks in arrears. Under the unified contract payment will be monthly in arrears. This will be in line with other council contracts.
28. Whilst the proposal to pay in arrears will have a one off cash flow benefit for the council, it will also reduce the exposure of the council to Provider failure, and the cost implications, time and resource the council has to put in to recover the debts if this happens.
29. The proposal to move to payment in arrears, rather than the current two weeks in advance and two weeks in arrears, will be consistent with the CCGs current approach.
30. Providers are concerned about the possible delays that changing the payment system to arrears may cause. The current payment process can sometimes lead to delays as there is a requirement for alignment with the completion of care plans, financial assessments and purchase orders required to be in place and agreed by all parties. Therefore, the council

will need to ensure its payment systems are efficient and accurate and do not cause any delays to providers receiving their payments. This will include working with internal staff and Providers regarding the process and seek to resolve some of the delays encountered.

Provider rate increase

31. From April 2016, the government has introduced a national living wage (NLW) for workers aged 25 and above, of £7.20 per hour. This increase will place additional financial pressure on the care home market where it is already a difficult market to recruit and retain staff, in particular nursing staff. Although most staff are already paid above the NLW, the need to ensure that the sector is able to attract workers means that there will still be a cost pressure and the 1% increase will not cover all of these additional cost pressures.
32. As required under the terms of the contract with Providers, the council has reviewed the rates paid to Providers, having regard to the retail prices index and other relevant information. The NLW rate from April 2016 has also been taken into consideration.
33. The Care Act (2014) and the supporting Care and Support Statutory Guidance (March 2016) sets out the market shaping duties for local authorities. The Guidance states that: "When commissioning services, local authorities should assure themselves and have evidence that contract terms, conditions and fee levels for care and support services are appropriate to provide the delivery of the agreed packages of care with agreed quality of care". It also references a number of tools that local authorities may wish to consider including the Laing and Buisson tool kit to understand the fair price for care.
34. Cabinet considered fee rates on 12 June 2014 and paid due regard to the "actual cost of care" in an "open book exercise." The work collated cost data from a number of providers into a cost model which was based on the Laing & Buisson model but was adjusted for local factors such as land and property costs. Cabinet considered the outcome of this exercise and set the usual price at that time and this is considered to be a reasonable basis for subsequent uplifts in light of the historical low inflation rates.
35. The recommended increase of 1% in the usual price for older people's residential and nursing placements takes account of the increase in the national living wage for over 25 year olds from 1 April 2016 and builds on the inflationary uplift of 1% applied in October 2015 to the older persons 'usual rate' to reflect the minimum wage applicable from that date. For consistency a 1% uplift will be applied for other care packages (excluding those still on the higher old usual price rates), these care packages are on a case by case basis dependent upon need.
36. The statutory guidance also stresses that local authorities must not undertake any actions which may threaten the sustainability of the market as a whole including setting fee levels below an amount that this not sustainable for providers in the long-term. It also emphasises the need for commissioning local authorities to have regard to the cost effectiveness and value for money in publically funded services. The council is able to make placements at the current rates ensuring choice is available to people.
37. The Local Government Act (1999) established a Best Value duty and requires the council to pay due regard to continuous improvement in the exercise of its statutory functions

through a combination of economy, efficiency and effectiveness. Therefore, the council must also consider overall social value when commissioning and procuring services and forms part of a continuing discussion with the care market.

38. Taking into consideration the factors set out above, it is considered that there should be a rate increase of 1% on the 'usual rate' for residential and nursing placements for older persons, learning disabilities and mental health placements, based on these factors and the affordability for the council (further information can be found in appendix three).
39. The proposed increase is in line with the contract increase from the CCG of 1%.
40. The Care Act 2014 places a duty on councils to understand their local care market and makes them 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. Moving to an outcome focussed approach will reflect the needs of individuals and also the developing quality assurance framework will ensure support is provided where appropriate to improve quality. This includes making sure Providers are sustainable and that councils are paying in line with national requirements.
41. Bench marking against other councils' care home rates on the 'usual price' for residential and nursing for older people, suggests that the rates proposed for Herefordshire are in line with the rates paid by other local councils. Please see table below. Please note: this is a comparison of 2015/16 fee rates, as other councils have not agreed their fee rates for 2016/17.

Weekly fee rate	Herefordshire 15/16	Herefordshire Proposed 16/17	Worcestershire 15/16	Shropshire 15/16	Gloucester 15/16	Telford 15/16	Walsall 15/16
Residential inc dementia	£457.46	£462.06	£417	£411.53	£520.92	£445.78	£383.53
Nursing (excluding Free Nursing Care FNC)	£523.18	£528.54	£435	£412.54	£511.00	£458.47	£372.39

Accredited provider list

42. The council proposes to put in place an approved/accredited list of Providers which can be used by both the council and the CCG to make placements. The value of the combined contracts will mean that procurement under the Public Contract Regulations 2015 will be required.
43. The procurement exercise will commence in July. Prior to the procurement starting workshops will be held to support Providers through the procurement process and advise

of the mobilisation considerations to enable the council to meet the anticipated contract start date, 5 September 2016. To facilitate the council's ability to meet the anticipated rise in demand for this service, a procurement exercise will be conducted under a dynamic purchasing system. This will act as an open framework which will continue to operate in perpetuity for the duration of the contract so that care homes are able to join at any time. In addition, this will be used for out of county placements or any new providers who come into the market and would be precluded in joining the service, if the council adopted a conventional closed framework approach. (Please see appendix two Care home procurement timetable).

Community impact

44. The recommendations will support the Health and Wellbeing strategy aim to ensure "Herefordshire residents are resilient, lead fulfilling lives, are emotionally and physically healthy and feel safe and secure." Specifically it will support priority three: 'For older people-quality of life, social isolation, fuel poverty' and the future work to ensure care plans are in place for every older person in residential and nursing home care and; services and care organisations working more proactively together to avoid over reliance on hospital care. With an ageing population, people are living longer, developing complex health needs, therefore commissioning in partnership is essential to manage future demand.
45. The recommendations support 2 of the 4 priorities of the corporate plan to:
 - Enable residents to live safe, healthy and independent lives. Although people maybe in a care home, they still need to have their outcomes met, living in a safe environment. The council and the CCG will work with Providers to ensure that it commissions services that enable this for all individuals.
 - Secure better services, quality of life and value for money. The change in payment to pay gross and the increase in the rates will help support providers to meet the challenges faced with increasing cost.
46. The recommendations in this report will seek to help support, sustain and develop the care home market both now and in the future.
47. The managing the care home market project to jointly commission the service will reflect the national commissioning standards to ensure it is person-centred and outcome focused, well led and promotes a sustainable diverse market.
48. The project will take into account the new National Institute for Health and Care Excellence (NICE) material, which covers guidelines such as planning and delivery of social care and support for older people with social and care needs and multiple long term conditions. It promotes an integrated and person-centered approach to delivering effective health and social care services.
49. The contract will seek to ensure quality and choice is available to all social care and continuing health care placements, enabling people to have a choice on where and how they live their lives.

Equality duty

50. The council is committed to equality and diversity using the Public Sector Equality Duty (Equality Act 2010) to eliminate unlawful discrimination, advance equality of opportunity and foster good relations.
51. It is not envisaged that the recommendations in this report will negatively disadvantage the following nine groups with protected characteristics: age, disability, gender reassignment, marriage and civil partnerships, pregnancy and maternity, race, religion or belief, sex and sexual orientation. (Please see appendix one, Equality Impact Assessment).

Financial implications

52. The budget for residential and nursing rates includes an assumed uplift of 1%.
53. The unified contract brings some potential benefits for the council in relation to cash flow and debt management. It may also have some small financial benefits through the unification of the terms and conditions. The impact is likely to be of relatively low value and will be quantified once the changes are finalised. The move to paying gross rather than net has potential benefits in terms of debt management as it will enable the council to pursue and resolve debt issues earlier and more effectively than the current process, resulting in a lower risk of bad debt.
54. The proposed change to pay gross will have a cash flow implication on the council but will be balanced once the proposed payment in arrears begins and the client contribution and third party contribution begin to come in.
55. The additional administration for the council will be managed with the current resources and project support to set it up. The intention will be to get service users and third party top individuals on a direct debit to reduce administration. This will, however, need to be reviewed if the current available staffing is not sufficient to manage the administration arrangements.
56. In order to support providers transition from a payment of two weeks in advance and two weeks in arrears, modelling has been done on the impact for the council and providers on the upper quartile (top 25% of the highest paid providers) and the average care homes paid in terms of the monthly payment they receive from the council. The council is working with providers to manage the risk and impact in preparation for the contract; this will include allowing a three month phased approach before the change to paying a month in arrears is fully implemented.

Legal implications

57. The council has a number of statutory duties that it must comply with regarding the commissioning of care. These are primarily contained within the Care Act (2014) and the supporting regulations. Under section 1 Care Act (2014), the council has a general duty in exercising its functions in relation to an individual's care and support, to promote that individual's wellbeing. The council discharges its duty in relating to an individual's care and support by entering into contractual arrangements with the providers of residential care homes.

58. The Care and Support Statutory Guidance (March 2016) states that when local authorities commission services they should assure themselves and have evidence that providers deliver services through remuneration to promote the retention of staff. Further, that remuneration must be at least sufficient to comply with the national minimum wage legislation. Failure to comply with the legislation would leave the council open to potential legal challenge.
59. The Care Act (2014) also places a number of new duties on the council. These duties include market shaping and to promote the efficient and effective operation of the market for adult care and support as a whole. This in essence means that the council will need to be aware of its responsibility to meet needs of all people in Herefordshire whether publically funded or people with the own means to fund care (self-funders).
60. The legal duty to pay due regard to the “actual cost of care” is set out in “Building Capacity and Partnership in Care” (2001). This duty requires the council to set rates that reflect the legitimate current and future costs.
61. Section 75 of the National Health Service Act 2006 contains powers enabling NHS bodies (as defined in sections 275 and 276 of the NHS Act 2006) to exercise certain local authority functions and for local authorities to exercise various NHS functions. The council and the CCG entered into an agreement in exercise of those powers under and pursuant to the NHS Regulations 2000.
62. Under that agreement the council and the CCG committed to better integration of NHS functions and the council’s health-related functions to achieve the aims and outcomes set out in the agreement. Where the council wishes to let contracts for social services and the lifetime value of those contracts exceeds €750,000 (equivalent to £589,148), then under Regulation 74 of the Public Contracts Regulations 2015 the council is required to let contracts for social services in accordance with provisions of section 7 of the Public Contract Regulations - the light touch regime.

Risk management

63. A risk management plan has been developed for this project and is regularly reviewed by the project board to ensure milestones are reached and risks are highlighted at an early stage and mitigations are put in where appropriate.
64. A key risk identified is whether providers agree to sign up to the unified contract, there will be an expectation that Providers will accept the terms and conditions. The council and CCG have mitigated the occurrence of risk by allowing time to discuss the key changes with Providers. A case by case approach will be taken in respect of those who do not accept the terms and conditions.
65. Another key risk is for Providers who have stated the increased cost pressures they are facing such as the requirement to make pension arrangements for staff and the NLW. Discussion with Providers on these issues is ongoing and the council and CCG will continue to look at how they can support Providers in different ways.
66. A key risk for the council and CCG if the recommendations are not agreed will be that any potential efficiency will not be delivered if a consistent fee structure is not put in place.
67. The service specification in the unified contract focusses on outcomes. The risk for the

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local authority of how this will be implemented and monitored will be mitigated by a proposed 12 month development process which will include close working with Providers, service users and council.

68. The change to payment for Providers from two weeks in advance and two weeks in arrears to four weeks in arrears will be managed by phasing in the changes to help mitigate cash flow risks to the Provider.

Consultees

69. Providers were asked to provide information by filling out a model to evidence cost pressures in September 2015.
70. Consultation on the proposed change to gross has been completed through the charging policy consultation which ended on 11 March 2016.
71. The care home market is aware of the development of the unified contract and has been continually engaged in the general principles and the implications of the new terms and conditions of the contract. Detailed discussions with the market, either in a group setting or on a 1-2-1 basis has been ongoing since September 2015.
72. The care home market has been engaged with through the care home market provider forums held bimonthly.
73. In addition smaller contract meetings have been held to discuss in detail some of the proposals in the unified contract, to understand potential impacts and resolve any issues.
74. Providers have been consulted on the draft service specification for both nursing and residential care homes.

Appendices

Appendix one EIA

Appendix two Care home procurement timescale

Appendix three Care home contract principles and financial model

Background papers

None identified.