

---

**Meeting of the Cabinet – 11<sup>th</sup> February 2019**

**Report of the Strategic Director People**

**Local Government and Social Care Ombudsman (LGSCO) Findings Regarding Third Party Top-Ups**

**Purpose**

1. For Cabinet to determine whether or not the Council needs to change current practice in relation to Third Party Top-Up payments.

**Recommendations**

2. That the Council continues to permit third party contributions to be arranged between the care provider and the third party without Council involvement

**Background**

3. The Local Government and Social Care Ombudsman (LGSCO) is the national body for handling complaints against adult social care services and the NHS. It will normally only take on cases that have already been through a council's internal complaints process, but where the complainant remains dissatisfied. Each year, the LGSCO issues a letter, summarising the volume of cases received from each council, and this letter must be presented to Cabinet.
4. In addition to this broad overview, the LGSCO letter includes specific comment about the council's policy with regard to the handling of 3<sup>rd</sup> party top-ups for care packages.
5. Consideration of top-ups needs to be made within the context of the financial viability of the residential and nursing care market within Dudley, the costs and financial risks to which the Council would be exposed should it shift to a system of gross payments (where 3<sup>rd</sup> parties pay their top-up to the Council and the Council pays the total charge to the care provider), and the legal duties and responsibilities of the Council. These issues are considered in turn in the body of this report. As a starting position, it should be noted that, notwithstanding the LGSCO's position, most councils do not pay on a gross basis, such that the norm is for 3<sup>rd</sup> parties to pay top-ups direct to the care provider.

**National position**

6. It is nationally recognised that the social care sector is under very considerable pressure. A major factor in this has been the rapid increase in the National Living Wage, which has pushed up costs significantly in what is generally a low-paid workforce.

7. From 1<sup>st</sup> April 2016, the NLW for workers, aged 25 and over came into effect at a rate of £7.20 (an increase of 6%).
8. Previous national government projections were geared towards a NLW of £9 per hour by 2020 but more recent projections suggest a rate of £8.65 per hour by 2020.
9. The NLW for 2018/19 was set at £7.83 per hour (increase from £7.50 per hour).
10. The table below depicts the uplifts granted in 2016/17 and subsequent increases agreed by Cabinet as part of the strategy to manage the cost impact of the NLW.

Service	Years and Uplifts			
	2016/17	2017/18	2018/19	2019/20
Older People Care Homes	0.50%	2%	2%	2%
Care at Home (Home care)	No increase	No increase	2%	2%
WLD (Residential)	0.50%	2%	2%	2%
WLD (Supported Living / Community Based)	No increase	No increase	2%	2%
Extra Care Housing	No increase	No increase	2%	2%

11. Current pricing for 2018/19 is detailed as follows: -
  - Older People’s Residential Homes - **£425 per week**
  - Older People’s Nursing Homes - **£581 per week**
  - Home Care / Extra Care and Supported Living - **£14.12 per hour**
  - Adult disability homes – various rates depending on need / package

### **Comparison to other Local Authorities**

12. The Council’s home care rate is favourable when compared to other Black Country and indeed regional local authorities.
13. The older peoples care home rates are consistent across the Black Country.

### **Older People Care Homes**

#### **Market status**

15. The Council contracts with 56 care homes in the borough whilst funding circa 950 people at any one time within this provision (including short-term placements). This includes over 240 out of borough placements.

16. The uplifted fee for 2017/18 is £413 for residential care. Nursing placements command an additional £156.25 for funded nursing care (FNC) which the Authority pays on behalf of the Clinical Commissioning Group (CCG). There is also an additional dementia premium of £35 per place per week where applicable.
17. The residential care market occupancy levels stand at 95% consistently with the Council funding circa 40% of the market capacity.
18. The nursing care market capacity has decreased. This is in part due to the market exits (see below) and the number of homes available (either with or without a 3<sup>rd</sup> party top up).

### **Exits from the market**

19. Since April 2016, a total of 5 care homes have closed resulting in the loss of over 100 bed places in the borough (5% loss of capacity). Although difficult for those affected, the numbers of places are relatively low.
20. The primary reasons for these closures were attributed to quality / safeguarding concerns and cost which are intrinsically linked.

### **Increased bed rates / above banding / Ombudsman Review**

21. As in most authorities, the true cost of an older people's care home placement is not at the stated banding level. Providers are increasingly setting bed rates, which can vary from an increase of £5 up to £443 per week per place.
22. Although these are being labelled as 3<sup>rd</sup> party top up's / contributions most Dudley family members are unable to pay these increased rates which has left the Council with difficult decisions regarding additional funding for placements.
23. Within the borough, there are number of homes who do not charge a 3<sup>rd</sup> party contribution. The Council (under the Care Act) is obliged to offer people at least 1 care home as an option without an additional third party contribution. This is becoming increasingly difficult within the Borough.
24. There have been a number of complaints in Dudley regarding those 3<sup>rd</sup> party top ups that fall to families and whilst predominantly focussed on the process (information / advice or lack of) there has been a consistent theme around the shortfall of homes without a 3<sup>rd</sup> party top up.
25. This has resulted in the Ombudsman issuing a public report criticising the actions of the Council in this area and which instigated fundamental review of 3<sup>rd</sup> party top charges including how these are managed and communicated to clients.
26. The Ombudsman ruling has instructed the Council to change its payment methods to incorporate the total cost of the package (including 3<sup>rd</sup> party top up) and asks the Council to make provisions to collect the top up directly from the 3<sup>rd</sup> party as opposed to common national practice where care homes arrange for this between themselves and the 3<sup>rd</sup> party. This requirement is not implemented by the majority of Local Authorities in the West Midlands.

27. The LGSCO's proposed approach places the Council at increased risks of: -
- a) Bad debts with 3<sup>rd</sup> parties
  - b) Direct liability to care homes where 3<sup>rd</sup> parties are either unwilling or unable to continue to fund 3<sup>rd</sup> party top ups
  - c) Difficulty in ascertaining the affordability of 3<sup>rd</sup> parties to fund placements (the Council has no legal powers to do this)
  - d) Increased administration of 3<sup>rd</sup> party top up processes (identification / liaising with homes / recording / negotiating / dialogue with families etc).
28. Management of 3<sup>rd</sup> party payments (referred to as gross payments) would see the Council: -
- a) Ensuring that the levels of 3<sup>rd</sup> party top ups are administered through a consistent and proper framework
  - b) Control the levels of 3<sup>rd</sup> party payments / funding on a year by year basis
  - c) Acting in accordance with statutory guidance.
29. To date, the view of the Council has been that these significant disadvantages outweigh the possible benefits that might accrue from a switch to gross payments by the Council to care providers and the collection of top ups from Third Parties by the Council.

### **Steps taken by Dudley MBC to meet LGSCO requirements**

30. Practical Measures
- The Council has now ensured that written top-up agreements are in place for the 13 cases identified in the LGO report.
  - The Council has improved the quality of information and advice provided to everyone considering residential and nursing care. The advice and guidance provided provides clear statements about choice and the potential cost of care including third party top-ups.

### **Finance**

31. Following a desktop exercise completed by Commissioning, with care homes it is estimated that the level of 3<sup>rd</sup> party contributions across DMBC funded client's stands at circa £1.3m.
32. The average top up across care homes stands at: -
- £65 per person per week for residential homes
  - £73 per person per week for nursing homes
33. If the Local Authority were to accept the gross payment approach there would be an increased administrative burden upon the Local Authority for which resources would need to be identified. Should the Council adopt the gross payment approach, the risk of non-debt recovery sits with the Council, therefore assuming a bad debt level of 5% would represent a potential liability of £65k (£130k at 10%).

34. However, the leverage that the Council possesses with clients / families for non-payments is far greater than 'usual' bad debts in that clients can be moved should payments not be forthcoming. This needs to be balanced with the availability of suitable bed placements that do not charge 3<sup>rd</sup> party contributions which as indicated earlier in this report is limited. It should also be noted that moving a person from a residential or nursing home is a complex and distressing process that is often not in the best interests of the person concerned.

## Law

35. The Council has sought legal advice from independent Counsel.
36. Counsel's opinion is that whilst there is no formal definition of "top-up", it can have two meanings. Firstly, where the Local Authority meets the needs of an individual under s.18-20 of the Care Act and the person specifies accommodation that is more expensive than the placement offered by the Local Authority and the additional cost is met by a top-up charge. Secondly, where a payment is required for services over and above those required to meet the needs defined in the individual's care plan/assessment.
37. The Council has changed its processes so that where Choice of Accommodation Regulations apply then any agreement must be between the third-party payer and the Council not the Care Home.
- However, this only applies where:
- a) The Council meets needs pursuant to the S18 duty; or
  - b) The Council exercises statutory power (not duty) under S.19
38. Other than the scenarios above there is no *requirement* for the Council to make a gross payment in all circumstances for the following reasons (all stipulated in the guidance):
- 1) Guidance states that the top up agreement with the Council should state whom the payment is to. If the payment is always to the Council, why is this guidance necessary?
  - 2) The Council should "deter" arrangements where the top-up is paid directly but this does not mean that such arrangements are not permitted.
  - 3) Councils are given the option to make net payments to Care Providers (even though it is not recommended.)
39. The Council has provided a copy of its' legal advice to the LGO by means of response. The LGO has not yet responded to the correspondence and published the 2017/18 annual report which criticises the Council's current position.

40. The Council is therefore of the opinion that the LGSCO requirement for the Council to move from net to gross payment of third party top-ups in all cases is not a statutory requirement of the Care Act and that the Council has the right to exercise discretion to continue to make net payments. Where an individual does meet points a) and b) above the Council will ensure a written agreement is put into place. The Council has also made changes to the Care Home agreement to reflect the points raised above. On that basis, the Council is of the view that it has fully addressed the points made by the LGSCO. The LGSCO, however, remains unsatisfied that the Council is not intending to move to gross payments.

### **Equality Impact**

41. The Council has a duty under the Care Act to ensure sufficient provision of residential and nursing care provision within the Borough. Any potential decrease in income to residential and nursing homes could threaten the viability of registered care provision for older people in Dudley.
42. The Council also has a responsibility to ensure that the top-ups levied a fair and sustainable and applied in line with the Care Act guidance. Excessive application of top-ups by Care Providers will ultimately deplete the resources of families contributing to the cost of care and leave the Local Authority liable for full payment.

### **Human Resources/Transformation**

43. There are no human resource implications directly arising as a consequence of this report.

### **Commercial Implications**

44. There is no opportunity for commercial income to be generated through third party top-ups whether paid on a gross or net basis.

*Martin Samuels*

**Martin Samuels**  
**Strategic Director People**

Contact Officer: Matt Bowsher  
Chief Officer for Adult Social Care  
Telephone: 01384 815805  
Email: [matt.bowsher@dudley.gov.uk](mailto:matt.bowsher@dudley.gov.uk)