

Title of Report:	Funding Arrangements Framework for Domiciliary Care and Non-Residential Services
Report to be considered by:	Executive
Date of Meeting:	29 March 2012
Forward Plan Ref:	EX2320

Purpose of Report: To seek approval for an amendment to the Fair Access to Care Policy to introduce an upper cost parameter for the cost of domiciliary care and non-residential care services that can be used for care packages as a guide.

Recommended Action: That Executive agree the amendment.

Reason for decision to be taken: It is critical that within the context of increasing demand for social care services that resources are managed in an equitable manner to service users and that the Council achieves cost effective care provision

Other options considered: Status quo - this will not provide the policy guidance to manage the cost of care in the community.

Key background documentation: WBC Fair Access to Care Policy

The proposals contained in this report will help to achieve the following Council Strategy priority:

CSP1 – Caring for and protecting the vulnerable

The proposals will also help achieve the following Council Strategy principle(s):

Living within our means

Portfolio Member Details	
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Date Portfolio Member agreed report:	23 February 2012

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Implications

Policy:	The proposal is for an amendment to current policy.
Financial:	There is a £160k saving if every home care client costing in excess of £35k per annum is able to be placed in a residential care placement of £35k per annum.
Personnel:	None
Legal/Procurement:	Legal has been consulted and is quoted in the document.
Property:	None
Risk Management:	WBC is awaiting the outcome of a current Cambridgeshire case in the High court. This challenges the Council's right to take their resources into consideration in considering care options. Should this 'Gloucestershire judgment' be overturned it will have a significant impact on this policy decision.
Equalities Impact Assessment:	<p>As part of the EIA Stage 2 a briefing paper sent to West Berkshire Independent Living Network who agreed to facilitate this consultation process, They sent out the briefing to a range of local groups with an interest in Adult social care. Response co-ordinated by WBILN following a 4 week consultation period.</p> <p>West Berkshire Disability Alliance representing a range of interest groups provided a written response to the consultation process. They believe the legal case quoted in the Council's paper ie Khana 2001 is not a valid one and they 'totally reject the proposal from WBC to introduce an upper cost parameter for the cost of domiciliary care and non residential care services.'</p> <p>ASC sought further legal advice with regard this response;</p> <p>'I think that they are agreeing with what your report highlighted. We are clearly saying that the upper cost parameter should be used as a guide only, that decisions on placement are individual, specific and that resources are but one factor'.</p> <p>The WBDA took the view that the legal case of Khana 2001 was not a valid one as it was 'not concerned with affordability issues'.</p> <p>WBC legal view is ;</p> <p>'The case of Khana did acknowledge that financial pressures were of relevance in determining the extent of the independent living obligation and raised the issue of how 'independence' and 'cost effectiveness' should be balanced. The Gloucestershire judgement which you reference clearly says that in deciding how to meet need, a LA can take account of its resources when faced</p>

with 2 placements which objectively offer a real and present choice of how to meet and individual's need.

Is this item subject to call-in?	Yes: <input checked="" type="checkbox"/>	No: <input type="checkbox"/>
If not subject to call-in please put a cross in the appropriate box: The item is due to be referred to Council for final approval <input type="checkbox"/> Delays in implementation could have serious financial implications for the Council <input type="checkbox"/> Delays in implementation could compromise the Council's position <input type="checkbox"/> Considered or reviewed by Overview & Scrutiny Commission or associated Task Groups within preceding six months <input type="checkbox"/> Item is Urgent Key Decision <input type="checkbox"/>		

Executive Summary

1. Introduction

- 1.1 This policy decision is required to support one of the Service's savings proposals in the Council's Medium Term Financial Strategy for 2012/13. The target is £25,000.
- 1.2 The Council's strategy and the usual preference of an individual in receipt of adult social care services is to remain at home. However, for those with substantial and complex needs the cost of this care at home can exceed the cost of a care home that could also meet their needs.

2. Proposals

- 2.1 That the Council add an amendment to its Fair Access to Care Policy that enables Adult Social Care to introduce an upper cost parameter for the cost of domiciliary care and non-residential care services that can be used as a guide for the cost of care packages compared to the cost of a care home that could meet the individuals needs. The council will in all cases look at the individual's needs before taking a decision.
- 2.2 Where an individual is assessed as requiring a domiciliary care package in excess of the upper-cost parameter and there is an alternative care home placement which meets the individual's assessed needs, the Council may take into account the issue of resources in determining the care provision. However, decisions on placement will always be specific to the individual, taking account of the individual's needs and whether they can be better met in a care home.
- 2.3 The service user may choose to top up the care that the Council will fund to enable them to remain in their home through the use of their cash assets or Equity Release schemes.
- 2.4 This proposal could be contentious for some individuals and may be challenged. Before using the amendment, Adult Social care needs to be sure that by its actions it does not contravene other legislation, for example The Human Rights Act 1998.

3. Conclusion

- 3.1 The Council has a key responsibility to ensure the effective use of resources both in terms of value for money and quality. There is significant demand on Adult Social Care budgets and this proposal is one measure to reduce expenditure.
- 3.2 The Council needs to ensure it provides an equitable service to its service users, taking into account each individual's needs and circumstances.
- 3.3 The Council has consulted with interested groups through the auspices of the West Berkshire Independent Living Network. Their response has been to reject the proposal and to challenge the legality of the Council's proposal. WBC's response is stated in the Equalities Impact Assessment under Implications at the start of this document. However the feedback from the public consultation indicated strong opposition to the principle that residential accommodation would be seen as appropriate for anyone who could be supported in the community. We will therefore put in place regular reporting of anonymised cases to WB ILN where a

decision has been taken to place people in residential settings under these circumstances.

- 3.4 That the attached if accepted as an amendment to the FACS Policy (para 3.1) will provide a tool and guideline to enable Adult Social Care to manage its resources more effectively.

Executive Report

1. Introduction

The Council recognises the right of an individual to choose to be cared for at home. This principle underpins a person-centred approach by acknowledging that self-determination i.e. independence, choice and control are integral to an individual's decision-making process. However, where there are 2 alternatives which meet an individual's assessed need, the Local Authority can take into account its resources when determining placement.

2. Person Centred framework

2.1 The Council seeks to provide a reasonable and equitable approach that:

- no person or group is discriminated against
- pays regard to the individual's preferences
- takes account of properly considered assessments
- focuses on the most effective way of meeting needs based on a consideration of the plurality of providers, (including carers, voluntary sector, independent providers)

3. Financial Arrangements and impacts

3.1 The Council has a key responsibility to ensure the effective use of resources both in terms of value for money and quality. As far as is practicable, affordable and sustainable within assessed resources this framework supports this responsibility by;

- the assessment of how resources are used against the outcomes that can be delivered and achieved for a service user
- choice of a service user to remain at home with appropriate support; and
- exercising other service options to ensure equitable and better use of resources for all clients.

3.2 Generally, the Council will not pay more for domiciliary and non-residential services than it would ordinarily pay to meet the assessed needs of an individual if they were placed in a residential or nursing care setting. In assessing need, account will be taken of both practical needs such as washing/bathing and social, emotional and psychological needs such as the importance of maintaining relationships with family and friends. Where it is demonstrated that an alternative package i.e. care home is available which meets assessed needs at a rate that has regard for safety, affordability, and makes good use of the Council's financial resources, the Council may take into consideration the relative costs of each option in determining placement.

3.3 The Council will only take into consideration expenses it judges to be directly relevant to a service user's needs. For example, expenses such as mobile telephones or satellite television will not be taken into consideration.

- 3.4 The Council will not allow costs where a reasonable alternative is available at lower costs. For example, the provision of take-away meals delivered by food outlets that cost more than the Council's commissioned meals on wheels service.
- 3.5 Adult Social Care currently funds 26 out of 750 older people living in their own home/sheltered living/extra care with care packages in excess of £35,000 per annum (the average cost of a nursing home placement). 2 between £50-60,000, 8 between £40-50,000 and 16 between £35-40,000 per annum. This represents a difference of approximately £160,000.
- 3.6 Should all 26 be moved into care homes the saving would be £160,000. The challenges will be finding care home provision locally as priority is given to hospital discharges to avoid fines and providing evidence that the Council can better meet their needs in a care home when they are settled and choosing to remain in their own homes.
- 3.7 Savings Plan 2012/13
The service has a target of £25,000 with regard this proposal. This is a cautious target due to the following;
- i. each situation must be viewed individually – the Council cannot apply this as a blanket policy
 - ii. the service will be moving some of these high costs service users to the new Alice Bye Court, extra care development which has a separate savings target of £50,000.
 - iii. each individual will require a review – a capacity issue for the service and it needs to be compliant with the legislation
- 3.8 Looking to future service users whose needs will increase, this amendment will give care managers the tool to have the conversation with service users and families and to possibly avoid a care package being set up in excess of £35,000. However as stated, each situation needs to be considered on an individual basis.

4. Mental Capacity and Deprivation of Liberty Safeguards

- 4.1 Where the individual is judged not to have capacity to make a decision to move to a care home the Council will in contentious situations where families disagree with a care home placement, apply to the Court of Protection to decide what is in the individual's best interests about where they should live. Several judges have been very critical of Council's who have made these decisions.
- 4.2 In such situations, the Council will need to apply for a DOLS Authorisation before making a placement as the placement would almost certainly amount to a deprivation of liberty, as the Council would (through the care home staff) be exercising complete control over the person and be refusing carers/relatives request for the person to be discharged (Bournewood).

5. Reviews

- 5.1 Eligible service users who choose to remain at home will be routinely reviewed annually or should their care needs increase. Where it is no longer cost effective or equitable to sustain high cost domiciliary care packages, consideration will be given to alternative placements in line with a re-assessment as outlined at 3.2 above.

- 5.2 Costs arising from personal lifestyle choices outside of the eligibility criteria of the individual will not be allowed. For example the provision of round-the-clock sitting service for companionship or an escort service when transportation is available.
- 5.3 In every case the Council must ensure it complies with legislation and does not reduce care services where there has been no change in need. WBC legal view is

For people already in receipt of a care package, it is very difficult to reduce/withdraw lawfully – there basically has to be a change in assessed need, which of course is not likely to happen for the better.

6. The Council's role

- 6.1 The Council will take account of the individual's desires and preferences. The Council will ascertain all relevant facts, including benefits to the service user in remaining within their own home where they wish to do so in order to meet an individual's needs and identify suitable provision.
- 6.2 The limitations on the Council's obligations to acquiesce to an individual's wishes are not intended to deny the individual choice but to ensure that the Council is able to fulfil its obligations with regard to the safeguarding of adults from abuse and neglect within the resources available for the quality of service provided.
- 6.3 As the Council moves to offering Personal Budgets to all its service users, it will be critical to ensure that there is equity between those on a Personal Budget and those in receipt of a traditional style of service provision.
- 6.4 The implementation of the RAISE finance module this year will give care managers and service users a complete cost of the care services in place and inform further funding decisions.

7. Legal Framework

7.1 The Fair Access to Care Guidance (FACS) – 2003

This states the following;

'Councils are reminded that they should consider potential outcomes for individuals, and the cost- effectiveness of providing care to them, , on the merits or each case. In doing so they should tailor services to each individual's circumstances and should only use upper-cost parameters for care packages as a guide'.

FACS Practice Guidance Q and A 2003 includes the following question;

- Q** How can councils control resources and ensure fairness on a case-by-case basis, if as the guidance says, councils should not set fixed cost-ceilings on packages at home?
- A:** If an individual is eligible for support, the councils should provide services that are cost-effective and appropriate. Cost-ceilings may be used as a guide, but they should not be used rigidly. Councils should always base their decisions on their assessment of a particular individual's needs and if spending above a cost-ceiling

can make a significant difference to an individual, then the council should consider doing so.

7.2 Caselaw – Gloucestershire judgment 1996 and Khana 2001.

The courts have held that a local authority can take into account its resources in deciding between 2 care packages which both meet an individual's needs, but that an individual's needs will be paramount.

Where an individual has been assessed as having needs which would be better met by being in residential care, the Local Authority can legitimately refuse to fund home care even where the service user and /or their family wish for the service user to remain at home.

7.3 Human Rights Act 1998

Should the Council take a decision to place an individual in a residential home as opposed to a care package within the individual's own home it could run the risk of challenge from a human rights point of view (Right to Respect for Private and Family Life – Article 8)

8 Equalities Impact Assessment

The Council has complied with its duties under the Equalities Act 2010. It has completed the Level 1 EIA and to inform the Level 2 has consulted with local interested groups through West Berkshire Independent Living Network

West Berkshire Disability Alliance representing a range of interest groups provided a written response to the consultation process. They believe the legal case quoted in the Council's paper ie Khana 2001 is not a valid one and they 'totally reject the proposal from WBC to introduce an upper cost parameter for the cost of domiciliary care and non residential care services.'

Legal advice has been sought with regard this response;

'I think that they are agreeing with what your report highlighted. We are clearly saying that the upper cost parameter should be used as a guide only, that decisions on placement are individual, specific and that resources are but one factor'.

The WBDA took the view that the legal case of Khana 2001 was not a valid one as it was 'not concerned with affordability issues'.

WBC legal view is ;

'The case of Khana did raise the issue of how 'independence' and 'cost effectiveness' should be balanced. The Gloucestershire judgement which you reference clearly says that in deciding how to meet need, a LA can take account of its resources when faced with 2 placements which objectively offer a real and present choice of how to meet and individual's need.

Further information is found on the EIA Stage 2.

9 Conclusion

Legal advice confirms that the needs of the individual are paramount and resources are but one factor. However, if there are 2 alternatives which meet an individual's assessed need, the Local Authority can take into account its resources when determining placement.

The Council has 26 service users with care packages in excess of £35,000. As these are reviewed or their needs increase this proposal can be used by staff as a tool to introduce and/or implement the cost ceiling for care, taking care that they comply with the legal advice as stated above.

Agreeing this proposal will enable higher costs to be avoided in the future in those situations where the Council can demonstrate it is acting lawfully.

Appendices

Appendix A – Fair Access to Care Policy

Appendix B – Equality Impact Assessment – Stage 2

Appendix C - Analysis of feedback from consultation exercise on savings proposals

Consultees

Local Stakeholders: West Berkshire groups through the WB Independent Living Network

Officers Consulted: Legal Services ; Leigh Hogan
Accountancy ; Andy Walker
Corporate Board

Trade Union: n/a