MARKET SUSTAINABILITY AND FAIR COST OF CARE FUND 2022-2023

BRIEFING NOTE FOR CARE PROVIDERS

ANTHONY COLLINS SOLICITORS LLP

April 2022

1. INTRODUCTION

1.1 This paper is an analysis of the **Guidance on Market Sustainability and Fair Cost of Care Fund 2022-2023, published on 24th March 2022 ('the Guidance'**). The briefing highlights for care providers the issues that arise from the government's proposals to oblige local authorities to ascertain a "fair cost of care" in the context of the government's wider Care Funding Reforms.

1.2 It is hard to overstate the potential impact of the production of fair cost of care figures by each local authority, particularly in residential care settings. The level set for such costs, once the exercise has been completed and the fees are starting to be applied, will have a significant impact on every local market.

1.3 It seems inevitable that there will be winners and losers amongst providers. The shortfall in the overall funding settlement that is implied by the new funding promised to date will drive defensive behaviours by local authorities, which are obliged to make detailed submissions by October about how they asses the fair cost of care locally. The issues arising from this Guidance are therefore of profound importance to every care provider.

1.4 This briefing note should be read alongside the other briefing notes we have produced in this series:

- DHSC White Paper: People at the Heart of Care;
- Impact of the proposed implementation of Section 18(3) of the Care Act 2014 for residential care; and
- Operational Guidance on Implementation of the Care Cap.

2. A FAIR COST TO WHOM?

2.1 The other briefings in this series have focused on proposed changes in legislation and regulation arising from the government's reforms to the funding of social care. This paper focuses on what is likely to be the most far-reaching change for many providers, namely the move towards closer alignment between the fees for residential care paid by local authorities, and those paid by private individuals.

2.2 It is undoubtedly this particular change that is the most far-reaching amongst the reforms and the one which will have the most effect on care providers, some of whom may benefit significantly and others whose very existence may be threatened. Given the importance of the subject, we set out in the following section the historic position regarding local authority fee setting for older people's residential care and the legislative context in which such costs are meant to be calculated. We then go on to explain the exercise which local authorities will be obliged to carry out between now and October 2022 to survey their markets and produce information which will be available to the public about how they assess the fair cost of care in their area. Those costs will form the basis of both local authority fee rates and the rates they will set for individual personal budgets, being the rate to be set for individuals who ask the local authority to organise their care under section 18(3) of the Care Act 2014 ('the Care Act'). We also highlight the practical steps providers might consider taking to protect their positions as the fair cost assessments take place.

3. LOCAL AUTHORITY FEE SETTING

3.1 The Care Act and the Care Act Statutory Guidance issued under it ('**the CASS Guidance**') create a detailed picture of how local authorities ought to establish the cost of care services for those it is responsible for. The central element of this is the obligation in Section 26 of the Care Act for local authorities to specify in writing a personal budget for each resident. This is rarely undertaken in practice for older people's residential care because one of the main objectives of a personal budget is to establish what the local authority will offer the individual by way of a direct payment to purchase their own care and direct payments are not available for residential care. The CASS Guidance expands on Section 26 stating:

"The personal budget must be an amount that is the cost to the local authority of meeting the person's needs. In establishing the "cost to the local authority", consideration should therefore be given to local market intelligence and costs of local quality provision to ensure that the personal budget reflects local market conditions and that appropriate care that meets needs can be obtained for the amount specified in the budget."

3.2 The Guidance goes on to make reference to the risk that direct payments for care may be set at a lower amount than is required to purchase care, due to the local authority's "bulk purchasing" arrangements. However, the Guidance states explicitly that:

"..by basing the personal budget on the cost of quality local provision, this concern should be allayed."

3.3 Elsewhere in the CASS Guidance, local authorities are directed to ensure that fees allow care providers' staff to be properly remunerated, particularly by reference to National Living Wage levels, and to cover effective training and development and encourage the retention of staff. It goes further, explaining the importance of local authorities ensuring sustainability of the market so there is a range of appropriate and high quality providers and services for people to choose from. Rates should be set at a minimum level so as to assure the market that a reasonable rate of return by independent providers is available, and the use of various costs models such as the Laing & Buisson Toolkit to understand Fair Price for Residential Care, and the ADASS Paying for Care Calculator to ensure this, is encouraged. The Choice of Accommodation regime also references the need to meet the actual costs of care and the importance of a choice of care services being made available in each case and explicitly demands that no arbitrary rates should be set by local authorities.

3.4 Generally speaking, local authorities have chosen to ignore much of this guidance and adopt such things as dynamic purchasing systems (reverse auctions) by which they can drive down costs by seeking bids for particular care packages from a range of providers on a Framework. This is wholly against the spirit of the Care Act and is susceptible to challenge on public law grounds or by way of complaint to the Local Government and Social Care Ombudsman.

3.5 Providers, or more particularly care provider associations, have, over the years, sought to challenge local authority care fee setting through the Courts usually by way of judicial review. Although some claims were successful, the positive outcomes have generally been limited to such matters being referred back to the local authority to reconsider their decision-making. The Courts have been reluctant to interfere in what they see as commercial negotiations and have also shown a significant amount of sympathy to local authorities who are faced with an impossible task of meeting care costs out of diminishing budgets. However, it must be the case that the much more objective approach taken to the calculation of a fair cost for care set out in the Guidance will give rise to more opportunities to challenging fee setting and get away from any unfair precedents that have been set to-date which, broadly speaking, have given local authorities a significant amount of discretion in what they do or do not take into account when setting residential care fees for older people, which has been detrimental to the market and the individuals concerned.

4. HOW THE FAIR COST OF CARE WILL BE CALCULATED

4.1 The Guidance makes reference to the Competition and Markets Authority's ('**CMA**') findings in 2017 regarding the differential between what self-funders pay and what local authorities pay. That report stated that self-funders pay 40% more than local authorities for the same services, the CMA found this was due in part due to Councils' monopsony buying power but also to a lack of consumer empowerment. The Guidance makes unsubstantiated assertions that "*more recent evidence on the difference between self-funded and local authority fees is limited, stakeholder and sector experts suggest a "gap" remains."* However, the CMA findings reflect a consistent feature of the residential care landscape for many years, and certainly the level of the subsidy that exists has not been significantly affected by the reforms instituted by the Care Act since 2015. Local authority-funded placements represent around 40% of the market (with additional public sector support for some individuals either with partial funding or through continuing healthcare funding via CCGs) so the subsidy creates an enormous challenge to the sustainability of that part of the market which engages with local authority funded care. It is also widely acknowledged that the system is unjust to private payers who directly subsidise the care of other people, often in the same home.

4.2 The government has made it an express objective of the Funding Reforms that the funding gap must be reduced (but not removed in its entirety). Simplistically this suggests that providers will need to adjust their business models to accommodate lower private fees in return for higher local authority rates but the unknown factor is what the new fair cost of care rates will be.

4.3 Unpicking the consequences of the new policy, given the complexity of the market, its variability across different areas of England, and the unpredictable impact of the introduction of Section 18(3) of the Care Act, will be difficult. However, what is clear is that unless providers assert themselves to ensure that the proposed calculations of the fair costs of care (which will be undertaken by local authorities over the next few months) are a true reflection of the actual costs of providing a care service, the levelling up across public and private funding will not be achieved to anything like the level it ought to. If it is not, the gross unfairness of a system in which homes are required to ask private payers to pay much more for the same service so as to subsidise public sector-funded residents in the same home will just continue.

4.4 The Guidance gives us an interesting insight into the government's expectations, but appears to create a degree of flexibility that some local authorities may be tempted tp exploit to engineer the results of their fair cost of care surveys with a view to keeping the figures as low as possible. Given that the rate set by reference to the fair cost of care will impact on much larger numbers of residents (including many who are now paying privately) we do not think it is overstating things to say that these changes are likely to create an existential threat to some care homes. It is therefore vital that providers get to grips with the proposals and are able to influence their commissioners to carry out a fair exercise and to challenge them if they do not. We set out below some specific examples from the Guidance of the obligations on local authorities to engage with providers and to conduct the fair cost surveys in a certain way.

4.5 There are extensive explanations as to the level of engagement which local authorities are expected to have with the provider community in the Guidance. Local authorities are incentivised to do the exercise correctly, as future funding is conditional upon them having done so.

4.6 The Guidance contains initial figures for the amount which will be made available in 2022/23 and the next two financial years to each local authority to meet the increases in care funding arising from their assessments, but these sums seem to be substantially less than the sums required to bridge the funding gap. We expect local authorities will be lobbying very hard on this issue.

4.7 In summary, the Guidance contains 3 conditions for receiving extra funding which comprise the practical steps required of them:

Condition 1 – submit cost of care returns which reflect local costs including staff pay and travel time, and an appropriate return on capital in care homes and return on operations in both care homes and domiciliary care, by 14th October 2022;

Condition 2 – submit a provisional market sustainability plan, assessing the impact of current fees and risks to the market and the impact of the introduction of Section 18(3), a provisional version in October 2022 and a final version by February 2023; and

Condition 3 – submit a spending return detailing how their initial funding for 2022 to 2023 is being spent, by 14th October 2022.

4.8 The Guidance goes on to set out in detail the approach to be taken by local authorities to the various actions that are expected of them when fulfilling those conditions. This references the use of the LGA and ADASS costing tool (which will be available "shortly"). The form of the return is a spreadsheet which must meet certain conditions and methodology covering 4 categories of care homes, with or without nursing and with or without enhanced needs (being people who "*draw on care with significantly higher acuity of need (but not at the level of NHS Continuing Healthcare*"). There is further clarification of the approach to be taken to return on capital and return on operations, but the treatment of occupancy is unsatisfactory in that the costs are to be stated at a per resident per week basis, taking into account average occupancy in 2021-2022 which, due to the pandemic, is likely to create a misleading picture. It appears to us that a more theoretical approach where a reasonable allowance is made for voids should have been adopted.

It may be useful for providers to review the data collection format and the guidance on the return on capital approach comprised in Annexes A and E to the Guidance, links to which can be found here annex-a-example-grant-template.xlsx (live.com) Annex E: further detail on return on capital and return on operations - GOV.UK (www.gov.uk) so that a full understanding of the approach can be reached.

4.9 The Market Sustainability Reports also has to follow a certain pattern, but it is far from clear whether many local authorities have the sophistication required to complete such an exercise without considerable assistance. This will be the case particularly if they are making judgements about a market which will develop over the medium term as new services are added to the local market and others are closed.

5. WHAT PROVIDERS SHOULD DO

5.1 There are numerous occasions referred to in the Guidance where local authorities ought to engage with providers during the exercise to ascertain the fair costs of care. Trade bodies and local care associations, are also given significant roles in working with local authorities in the context of setting a fair price for care. Holding local authorities to account to ensure that they honour these obligations is the very minimum that should be undertaken, but a much more proactive approach would be beneficial, particularly in terms of engaging with trade bodies who are actively looking at care cost models in order to facilitate discussions about how fair costs should in fact be calculated so as to produce a realistic figure for the costs of providing care services. Promoting such models and ensuring that a consistent approach is taken across local authority areas by care providers working through care associations is a vital way of achieving this. Local authorities will find it difficult to ignore evidence if it is presented, so even if local authorities undertake a comprehensive survey of their local area, this should not prevent individual providers and associations of providers submitting their own evidence.

5.2 If, as a result of the exercise, fair cost calculations are published which do not reflect accurately the fair costs of providing care services, then providers will need to be prepared to challenge those rates unless they wish to be left with inadequate rates not only for their existing local authority funded places but also an increasing number of private payers. We imagine this will concentrate the minds of some providers who might be particularly affected by these changes and who will need to be robust in asserting their interests.

Anthony Collins Solicitors LLP

Date April 2022

Our Ref: JHW

Disclaimer. Whilst every effort has been made to ensure the accuracy of these materials, advice should be taken before action is implemented or refrained from in specific cases. No responsibility can be accepted for action taken or refrained from solely by reference to the contents of these materials.

© Anthony Collins Solicitors LLP 04/2022