

DHSC White Paper : People at the Heart of Care

BRIEFING NOTE FOR CARE PROVIDERS

ANTHONY COLLINS SOLICITORS LLP

March 2022



1. INTRODUCTION

- 1.1 This paper is a summary of those elements of the White Paper People at the Heart of Care [White Paper](#) published in December 2021, of particular relevance to independent residential care providers.

The White Paper is part of a wider set of changes to both legislation and guidance which form part of a package of reform measures to meet the challenges faced by adult social care.

There are various fundamental elements to the proposed changes that should be understood by providers, particularly where statements made by government are little more than rhetoric and are not supported by actual changes in legislation or guidance with the result that they will have little meaningful impact on the care sector.

There is much to speculate on when considering the overall package of changes (which is by no means complete and needs to be reviewed as each new element emerges) but providers will need to base their strategy on the actual legal position presented by law and guidance, rather than such speculation

The purpose of this paper is to highlight those elements of the White Paper that impact directly on providers and should be read alongside our other guidance on legislative and regulatory changes as they emerge. The headings below reflect the various sections of the White Paper.

2. SETTING THE SCENE

- 2.1 The Care Act 2014 remains the foundational legislation in respect of the delivery of adult social care. The White Paper indicates the need to build on the Care Act; however, it skirts around the fact that many local authorities simply ignore the spirit and letter of the Care Act and a simple solution would have been to make local authorities' obligations to abide by the Care Act more enforceable, directly by individuals or indirectly by stronger regulation.

The White Paper demonstrates that there is a shift in the government's thinking in terms of the importance that housing plays in providing solutions for people's care needs but there is little by way of mandate from government to local authorities beyond references to a proportion of affordable housing being made available for people in need of care. There still remains a large gap between demand for and the supply of retirement housing, for example, which cannot be solved unless attention is given to the planning system and in particular the obligations of local planning authorities to include such accommodation within their local plans, etc.

- 2.2 A second change of emphasis is on the importance of technology and the important part digital technology in particular will play in creating better and more cost-effective services. However, much like the other pots of money identified in the White Paper, the funding being made available appears to be relatively modest given the need, and

once such pots of money are divided across the local authority network, many of them will amount to very small sums which will have little impact in any area.

- 2.3 Ultimately, the fundamental issue is that social care, where it remains publicly funded, is still grossly under-funded and care providers must keep making that argument. This will be of even greater importance in light of the “care cap” and the introduction of section 18(3) of the Care Act (which will allow local authorities to arrange care for private individuals).
- 2.4 The stated aim of the government is to reduce the costs of care for private individuals, but fundamentally, if providers cannot make any surplus or profit, then they will not invest in new services, technology, nor in rewarding and developing their workforce.

3. SPECIFIC CHANGES BEING PROPOSED

- 3.1 Most of the aims set out in section 2 “*Our 10 year vision for adult social care*” contain nothing new and almost all of it should be deliverable through the existing legislative framework, if local authorities correctly applied the spirit and letter of the law. The Care Act and the accompanying Statutory Guidance is unusually detailed and the main problem is that it is not applied and there are no consequences for local authorities who do not follow it, except where individuals get to the point of making complaints through the courts or through the Local Government and Social Care Ombudsman.
- 3.2 The most far-reaching change being proposed is around the concept of “fairness” in connection with fees. This expectation is explained in the White Paper in the following terms:

“I will have access to the same fee rates for care in care homes that local authorities pay”.

This is a stark statement of the intent to remove the subsidy which currently in many parts of the country is the only way through which local authorities can obtain care services at the rates they are willing to pay. Providers will need to be alert to the impact this intent will have as the financial settlements arising from the “Fair Cost of Care” exercise start to emerge. It is interesting to note that the process is put in terms of the cost of care; clearly from a provider’s perspective what is needed is a fair price for care.

- 3.3 The rhetoric is underpinned by the statement that the government will “*ensure that self-funders can access the same rates for care costs in care homes that local authorities pay, ending the unfairness where self-funders have to pay more for the same care, whilst ensuring local authorities move towards paying a fair cost of care to providers.*” The obvious points here are that the unfairness is not that self-funders have to pay more, but that local authorities do not pay the actual costs of care and that, rather than making local authorities pay the fair cost of care, the government simply asks that they “move towards a fair cost of care”, thus enshrining in the White Paper the intention that the unfairness continues.

3.4 Whilst the government admits that the spirit of the Care Act is not currently being met in full, the suggestion that reforms to the legislation “*will seek to rectify this*”, is unlikely to bear serious examination. The only way in which local authorities will fulfil the law is if there are consequences if they do not. The approach required by Care Act is not adopted by local authorities because they cannot afford to do so and there are no consequences if they adopt ways of working which do not reflect the spirit of the Care Act. It is wishful thinking to suggest that the legislative programme outlined by the government will change this in any meaningful way. How the intention translates into what providers should do when faced with poor commissioning practice remains a moot point. Clearly, the proposed new oversight of local authorities by CQC may have an impact, but the lack of any meaningful consequences, should CQC identify problems, remains an issue. It is unlikely that there will be any fundamental change to the system and providers are likely to face even more challenging situations once section 18(3) comes into force and well informed consumers, looking for better value for money to ensure their care cap is well spent and not exceeded, will become a common feature of the landscape.

4. THE ROLE OF HOUSING

4.1 By making every decision about care a decision about housing, the government does appear to have listened to the long-standing arguments put by provider trade bodies which have lobbied for a greater focus on housing for both working age adults and retirement living; however, there remains a doubt about whether the changes proposed will make the step change that is required. It is questionable whether the changes will deliver the quality and volume of housing that is required across the entire market in each local authority area.

5. INFORMATION AND ADVICE

5.1 The White Paper has a strong emphasis on making sure local authorities up their game in terms of the provision of advice to their local populations, including things such as having clear policies around direct payments, personal budgets and tailored advice for particular situations. However, similar obligations already exist under the Care Act and the approach taken from one local authority to the next is often very different and in some areas is very weak.

5.2 We have continually made the case that providers should be better informed about the rights of the individuals they are looking after so that they can make a real difference to how those individuals engage with the local authorities responsible for their care. We see that this will remain a strong approach as the new regime takes effect.

6. WORKFORCE

6.1 The creation of a culture in which the care workforce was valued and had a high level of motivation and commitment, if it could be delivered, would clearly transform the care landscape. Provided it is recognised that there are fundamental issues relating to pay

(particularly in comparison with other forms of employment) then the gains from such a transformation are sufficiently large that they would justify all providers taking them seriously. This should make providers willing to use whatever the government and local authorities produce to develop a culture in which their workforce is valued and is willing to commit for the long-term.

- 6.2 Alongside being paid properly for the care provided, recruitment and retention will remain the focus of most organisations' strategic concerns for the foreseeable future.

7. SUPPORTING LOCAL AUTHORITIES TO DELIVER SOCIAL CARE REFORM

- 7.1 The key offer made to local authorities is the sum of £3.6 billion for the period 2022/2025 which is explicitly stated to be to enable all local authorities to move towards paying providers a fair rate for care and to prepare local care markets for the implementation of the reforms. The figure is misleading in that only £1.362 billion will find its way to providers, and even then 25% of that can be retained by local authorities for the costs of "operationalising the changes". The offer also includes more money for implementing and strengthening market-shaping duties and commissioning capabilities. The key legislative changes are to grant CQC a new power to review and assess local authority performance and give the Secretary of State for Health and Social Care the power to intervene to secure improvements where there are failings in the discharge of local authority adult social care functions.
- 7.2 We suspect many providers will feel that the additional powers for CQC do not go far enough in creating a "level playing field"; widespread poor commissioning practices on the part of local authorities has led to a situation where providers face the double-jeopardy of being underpaid for services and criticised by CQC for inadequate levels of service. We have previously likened the situation to one in which CQC is acting as a referee but can only penalise one side in the contest.
- 7.3 A fundamental question is how the arrangements for assessing and implementing a fair rate for care will work in practice. Widespread anecdotal evidence already exists that local authorities are acting to minimise the impact of the changes by securing outcomes for the next financial year and beyond which fly in the face of the objective of the reforms, which is to remove the subsidy for local authority-purchased services.
- 7.4 The government has suggested that when self-funders are able to ask local authorities to make care arrangements for them, this will allow local authorities to achieve greater oversight of their local markets. This does not necessarily follow and the idea that local authorities will engage more in strategic planning misses the glaring points that it is highly unlikely that local authorities will underwrite either capital investment in care services directly or guarantee income streams unless they change their practices significantly. It seems likely that investment will continue to flow into services where there is a strong market for private-pay facilities, but where such markets are weak there seems little prospect that local authorities will take it upon themselves to underwrite the necessary investment in new services. Whether the reforms will move

the balance of services more towards care being delivered in people's own homes and develop a stronger approach to providing suitable housing remains to be seen, but such a change will not happen swiftly.

- 7.5 We have never considered that market-shaping is a realistic and attainable objective for local authorities because they seldom have the skills or the resources with which to do so. The essential reform that could help is an obligation on local authorities to commission and publish accurate and meaningful data that demonstrates the level of need in each area so that investors can make choices about the potential to invest in new facilities.
- 7.6 Providers will remain in the position they currently are, which is to either accept a rate below actual cost to provide services to local authorities and those they are arranging care for, or to focus on recovering the full rate from all of their residents. The dynamics of fee arrangements for residential care will change significantly, both as a result of the Fair Cost of Care exercise, but also due to the introduction of first-party top-ups in which individuals will be able to choose a more expensive home provided they are prepared to pay additional fees for it. The extent to which first-party top-ups are operating in personal care settings is unclear, and it is possible that homecare providers will also look to change their approach as the changes impact across the entire sector, covering both personal care and residential care.
- 7.7 There will remain a significant argument about the "tariff" which local authorities will wish to impose as their "fair cost for care" being the price at which, they will argue, individuals will be entitled to have their care delivered, notwithstanding that the proposed change (even under the government's own White Paper) is not designed to deliver a truly fair cost.
- 7.8 With regard to the changes in terms of CQC's new powers to assess local authorities, we would expect there to be many requests by providers to investigate poor commissioning practice, given the widespread failure to honour the terms of the Care Act on the part of many commissioners. Dynamic purchasing systems do not offer the choice and control at the heart of the Care Act and of the White Paper.

8. CONCLUSION

This paper merely sets the scene for how the reforms proposed will unfold. The key will be the detailed legislative changes, some of which are currently out for consultation and which will be the subject of further briefings in due course.

Anthony Collins Solicitors LLP

Date: March 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 03/2022

