WHAT IS THE PROCESS TO CHALLENGE A LOCAL AUTHORITY FOR OLDER PERSON CARE FEES?

Challenging care home and supported living care fees for people over the age of 65 is not a straightforward process and relies on the care provider having considered numerous steps. The following material is designed to help navigate those steps and to consider the options providers might have.

1. INTRODUCTION

1.1 This guide has been prepared as a general note. In the first instance, we suggest providers use this guide to write to Local Authorities with the aim of getting the Local Authority to the negotiating table.

2. BACKGROUND

2.1 This guide focuses on supported living and residential care services for older people services, it is not intended to cover services for working-age adults.

2.2 Social care has been under unprecedented financial pressure for a considerable time. Fee uplifts from Local Authorities over the past few years have simply not kept pace with increases in costs or have been non-existent. Providers' costs have been subject to high inflation, particularly in the last 12 months. Employees and candidates have access to alternative jobs at National Living Wage (NLW) and above which take them out of the care sector and these labour shortages have driven large increases in the use and cost of agency services. The result is that many services are incurring substantial and unsustainable losses.

2.3 We have prepared this practical guide for providers to use when seeking fee uplifts. It is set out in sections covering different scenarios:

- where you have a current, written contract
- where the written contract has expired without renewal
- where there has never been a written contract.

2.4 Should providers require specific letters drafting, we suggest the reader contact their legal professional. Care England has a panel of law firms that can provide legal support.

2.5 Providers will need to factor in that whatever route a provider decides to take, the Local Authority may not commission any new placements and there may be an impact on the relationship with the provider.

3. WHAT SHOULD I CONSIDER IF I HAVE A CURRENT CONTRACT WITH A LOCAL AUTHORITY?

3.1 Often, providers are likely to have an overarching contract between them and the Local Authority which is the starting point for the analysis of the options.

3.2 There are also likely to be Individual Placement Agreements ("IPA") for each resident which must also be reviewed.

3.3 Whilst the whole contract with the Local Authority should be reviewed, we only comment below on those provisions contracts may include that may be relevant to fee uplifts.

3.4 **Fees** – Most Local Authority contracts include various provisions for reviewing fees. Where there is a contractual provision for an increase it may be linked with a formula to calculate the increase. If any contracts with Local Authorities have such provisions, then the provider can insist on the increase. Should the Local Authority refuse, they will be in breach of contract. We suggest providers seek further advice if this situation arises and we can assist further.

3.4.1 Often contracts include provisions for fees to be reviewed annually, at the Local Authority's discretion. Most Local Authorities implement annual fee uplifts on 1 April of each year and usually follow some sort of formal procedure before then to seek the views of providers or otherwise assess market conditions. Local Authorities then usually set a fixed % increase (if any) to their 'standard' fee rates or more generally. For some providers this year the rates offered have fallen well short of inflation and therefore represent a real shortage in the fees being paid. It is often not clear what criteria are used by the Local Authority when they make their decision. Reviewing Cabinet Papers for decisions made may identify some or all of these criteria, however, making a Freedom of Information Request (FOI) pursuant to the Freedom of Information Act 2000 is one way of trying to obtain the criteria used by a Local Authority. A local authority is likely to decline an FOI if the information is already in the public domain and is therefore sensible

to review public papers prior to submitting an FOI request to avoid FOI processing delays.

3.4.2 It would be implied in a contract where the Local Authority had given itself such discretion that it must act fairly when reviewing fees. Where discretion is given to a party to a contract the Courts often imply a duty to act in good faith, in other words in a way commercial parties would consider fair. Ignoring inflationary pressures, their wider statutory duties (see paragraph 7 below) or government guidance when setting fees may amount to a breach of such a duty. This could form the basis of a claim by the provider for the losses arising from the failure to offer a proper fee review. Given any such dispute is likely to be against a background in which the actual costs of the placement are not being met by the fees paid by the provider, this may be persuasive as an argument.

3.5 **Variation** – If there is a variation clause, providers may have the option to propose fee uplifts by way of a variation. The relevant clause will need to be considered to ascertain whether this is a possibility. Usually, either party may be entitled to propose a variation to the contract and there needs to be agreement by the other party and the written agreement of both parties for it to take effect. See also the section on fee uplifts (see 3.4 above) if the variation has to be considered by the Local Authority it may be that it is under an obligation to do so fairly.

Some variation clauses say the Local Authority will only agree to a variation in the fees unless there is a "*substantial change in the service*." Asking for a formal re-assessment of the individual's care needs could assist with a request for a fee uplift if the needs of the individual have changed since they joined the provider.

3.6 **Notices** - although we assume it is unlikely, should providers need to serve any form of formal notice (potentially seeking a variation/serving a termination notice) then they will need to do so in accordance with the terms of the contract. Usually, notices must be served in writing and the contract will often say by what method, ie first class post/by hand. The correct procedure should be followed to avoid the Local Authority/individual alleging the notice is invalid. If it is invalid, it is likely to delay matters whilst the provider serves a further notice in compliance.

3.7 **Dispute Resolution** - whilst it is hoped that fee uplifts can be achieved through negotiations with Local Authorities, should a provider need to raise the issue (or any other) as a dispute, it will need to do so in accordance with the procedure set out in the

contract. The threat of a formal dispute resolution process could be effective in bringing Local Authorities to the negotiating table.

3.8 **Reassessments** - As stated above, new care assessments could also have a bearing on fees. Should it be found that the individuals' needs have changed increased fees should also be payable. The Local Authority is under a duty to reassess wherever there is a material change of needs (which is likely to be triggered by notice terminating the contract) or once every twelve months.

3.9 **Termination**

3.9.1 Termination provisions can be relevant in three situations:

- where the provider no longer wishes to work with the local authority whether due to low rates or other issues;
- where the provider wishes to exert pressure on the local authority by threatening termination; and
- where the provider wishes to terminate the existing contract with the intention of agreeing a new contract at higher fee rates.

3.9.2 How the contractual options available to terminate are deployed will require careful consideration depending on the objective. If the provider is happy to 'walk away' it might be straightforward but if the approach is tactical then the communication employed will need to be carefully considered so that the consequences of the range of potential responses from the Local Authority are well thought through. For example: what alternative options does the Local authority have, the consequences caused by the early termination, and what new terms does the provider wish to offer to form the basis of a new contract after the existing one is terminated? Providers also need to consider the implications of termination on Local Authority residents who are protected under section 73 of the Care Act 2014 by virtue of the provider being deemed to be a public authority for the purposes of the Human Rights Act 1998.

3.9.3 It may be possible to use termination creatively by offering to continue only at the higher fee rates the provider is contending for. There is case law in support of such an approach

but specific advice is needed in each case to ascertain whether the desired effect will be achieved.

3.9.4 Contracts usually set out the circumstances in which there can be a termination (which need to be checked carefully) and providers must also strictly follow the procedure for termination set out to avoid being in breach of the contract themselves which would defeat the object and risk a dispute and damages being awarded against them (see 3.6 above). For example, there could be a specified notice period or termination may only be possible if there has been a material breach of the contract by the Local Authority.

3.9.5 Often, Individual Placement Agreements also have termination provisions which must be considered. It may be that the provider wants to terminate only those individual placements on which they are making losses rather than terminating the entire contract with the Local Authority. This may be possible by reference to IPAs whose termination provisions will therefore also need to be considered.

4 WHAT SHOULD I DO IF MY CONTRACT HAS EXPIRED WITHOUT RENEWAL?

4.1 Individual circumstances would need to be considered to know the exact legal position. However, usually either a new unwritten contract will have formed between the parties or the conduct of the parties will show they are continuing to operate on the basis of the expired contract on the same or varied terms.

4.2 Providers should consider carefully the approach to be taken towards the end of the contract as substantial benefits can accrue if the contract expires and the provider has indicated that the fees payable following expiry will be at their actual cost of care. Providers should not agree to contracts 'rolling over' on already unsatisfactory terms which just perpetuates the problem of lower fees.

4.3 Where a new contract or an extension has not been agreed upon and where the expired contract contains an express term for an uplift in fees, providers should assert that the Local Authority should honour further uplifts given the parties have continued to operate on the basis of the expired contract.

4.4 Where a provider is not being paid the actual costs of care, a provider can assert the old contract has expired and confirm the provider's rates going forwards and commence invoicing the Local Authorities on this basis. It may well be that the Local

Authority refuses to pay the disputed sum so the provider may then have to commence legal action against the Local Authority for the shortfall. This course of action will crystallise the rate due based on the actual costs of delivering the services rather than the Local Authority's standard rates. (See also paragraph 8 below, for alternative options to consider).

5 WHAT ARE MY OPTIONS IF THERE HAS NEVER BEEN A WRITTEN CONTRACT WITH THE LOCAL AUTHORITY?

5.1 As above, where a provider is not being paid the actual costs of care, a provider can assert there is no contract and confirm the provider's rates going forwards and commence invoicing the Local Authorities on this basis. It may well be that the Local Authority refuses to pay the disputed sum so the provider may then want to commence legal action against the Local Authority for the shortfall.

5.2 Where a provider has never had a written contract with the Local Authority, a provider would normally have to give 'reasonable notice' to the Local Authority to terminate the arrangement. 'Reasonable notice' can vary depending on the circumstances, however, we would recommend 1 to 2 months' notice generally and we suggest providers seek advice on the individual circumstances.

6 WHAT EVIDENCE SHOULD I INCLUDE WHEN MAKING A REQUEST FOR AN INCREASE IN FEES

6.1 Providers should include evidence of their costs when seeking an uplift in fees from a Local Authority to justify their request. This is to both support the provider's assertion of its actual costs and as evidence, the Local Authority ought to take into account. Details of their income and expenditure should be provided particularly for those placements a loss is being made or where the provider is merely breaking even. This will help evidence the fees being paid fall below the actual cost of care.

6.2 Providers should present this information in a format the Local Authority will understand. Providers should first seek to understand if the Local Authority has a tool or a format they use to determine the cost and placing provider costs into their model is a helpful way to illustrate the cost of care and to call out costs which are not included in their model.

6.3 Providers should also explain to the Local Authority what the consequences would be if a reasonable fee uplift is not granted. This could include, but not be limited to, termination of placements/contracts, risk of insolvency of the provider, and safeguarding issues.

7 WHAT STATUTORY OBLIGATIONS NEED TO BE CONSIDERED WHEN CONSIDERING A FEE UPLIFT?

7.1 When writing to Local Authorities seeking fee uplifts, we would suggest providers remind them of their duties pursuant to the Care Act 2014.

7.2 For a provider's services to remain sustainable, there is a requirement for continued investment and accordingly providers must receive the appropriate rate of return on the capital they invest. The Statutory Guidance issued in connection with the Care Act 2014 helpfully elaborates on Local Authorities' obligations to ensure sustainability.

7.3 Below are a few examples from the Care Act 2014 that can be referenced:

Paragraph 4.33

*"Local authorities **must** work to develop markets for care and support that – whilst recognising that individual providers may exit the market from time to time – ensure the overall provision of services remains healthy in terms of the sufficiency of adequate provision of high-quality care and support needed to meet expected needs. This will ensure that there are a range of appropriate and high-quality providers and services for people to choose from."*

Paragraph 4.35

*"Local authorities **must not** undertake any actions which may threaten the sustainability of the market as a whole, that is, the pool of providers able to deliver services of an appropriate quality, for example, by setting fee levels below an amount which is not sustainable for providers in the long-term."*

Paragraph 4.69

*"Local authorities **must** understand local markets and develop knowledge of current and future needs for care and support services, and, insofar, as they are willing to share and discuss, understand providers' business models and plans."*

Paragraph 4.101

"Local authorities should ensure that where they arrange services, the assessed needs of a person with eligible care and support needs is translated into effective, appropriate commissioned services that are adequately resourced and meet the wellbeing principle of the Act."

Paragraph 11 of Annex A

*"In all cases, the local authority **must** have regard to the actual cost of good quality care in deciding the personal budget to ensure that the amount is one that reflects local market conditions. This should also reflect other factors such as the person's circumstances and the availability of provision.*

8 ARE THERE ANY ALTERNATIVE STEPS TO CONSIDER?

8.1 There are other steps providers can consider to achieve an increase in fees. A formal complaint to the Local Authority can be pursued. Should a formal complaint not be successful, providers **may** have the right to refer the matter to the Local Government and Social Care Ombudsman.

8.2 It is often useful to seek the assistance of residents and their families to support requests for fee uplifts. This could cover both the use of direct payments (for non-residential provision) and the Choice of Accommodation regulations. This would mean that unless the Local Authority can offer a genuine choice of alternative, suitable care to meet the assessed needs it has to pay the private rate.

8.3 Engaging with a national and/or local care association may also prove successful. Sometimes a group action collectively by providers may have more impact.

8.4 Should raising a formal dispute with a Local Authority not be successful consider legal action, ie a Judicial Review. We would be happy to discuss this further with providers.

Please note there is a 3-month time limit to issue proceedings from when the Local Authority made their decision. A provider will have been expected to review the above and all historic data leading up to this prior to seeking a judicial review so must act swiftly.

9 CONCLUSION

9.1 As explained above, there are various levers providers can use with the aim of getting Local Authorities to the negotiating table.

9.2 Other factors providers should bear in mind are:

9.2.1 Providers should review the prices being proposed at the initial referral stage of a placement and how providers are responding. Providers should ensure the price is at the right level at the outset.

9.2.2 Providers should exert pressure on the relevant Local Authorities to carry out re-assessments of individuals should their needs change and at least on an annual basis.