

## **Report to the Cabinet**

Meeting to be held on Thursday, 13 June 2019

### **Report of the Director of Adult Social Care Transformation**

#### **Part I**

Electoral Division affected:  
(All Divisions);

#### **Delivering Sleep-in Services Consultation Outcome**

(Appendices 'A' to 'D' refer)

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#### **Executive Summary**

On 3 December, Cabinet made a decision in response to a successful legal challenge by Mencap in relation to payments for sleep-in services for adults with learning disabilities. Following this decision, the county council was asked by different providers if it would formally consult with all affected providers in relation to the proposed changes to sleep-in fees. Whilst ordinarily this is not a decision which the county council would consult on, Cabinet welcomed the opportunity to hear from providers on what this change would mean for people affected and undertook a formal consultation.

This report summarises the outcome of consultation and the county council's revised proposals in response to key issues raised.

This is deemed to be a Key Decision and the provisions of Standing Order C19 have been complied with.

#### **Recommendation**

Cabinet is asked to:

- (i) Note the findings of the consultation as set out in Appendix 'A' and the Equality Impact Assessment as set out in Appendix 'B'.
- (ii) Approve a revised proposal as follows:
  - To pay a flat rate sleep-in fee from 1 October 2019 that is set at £61.18 based on the assumption that staff are paid £45 per shift.
  - To approve a phasing in period of 6 months with a top up of £13.60 for

the period 1 October 2019 to 31 March 2020 to allow time for service providers to transition to new staff terms and conditions. During the transition period, the total fee payable (£74.78) is based on the assumption that staff are paid £55 per-sleep-in shift.

## **Background and Advice**

Lancashire County Council currently spends approximately £70m each year with external care and support providers supporting over 1000 people with disabilities to live independently in their communities within supported living services.

Within this overall sum, approximately £13m per year is spent on sleep-in services, which are a mechanism to ensure people who might occasionally require care and support during the night have access to support if they require it. Sleep-in shifts are not provided where people require regular night time support. In these situations, alternative arrangements are put in place whereby staff are required to be awake during the night.

In February 2018, as part of the county council's budget setting process, and in order to set a legal budget in 2019/20, around £77m of further savings were identified to be delivered over the next 4 years, in addition to previously agreed savings of around £43m. Adult services was targeted with delivering approximately £79m towards the overall countywide savings over the next 4 years.

During the process of identifying further savings, the Court of Appeal issued a decision on 13 July 2018 on a case brought by a large national charity, Mencap, that overturned a previous ruling in relation to sleep-in shifts. The latest ruling states: *"Care workers who were required to sleep at, or near, their workplace and be available to provide assistance if required, were available for work rather than actually working. Accordingly, they were not entitled to be paid the national minimum wage for the whole of the sleep-in shift, but only for the time when they were required to be awake for the purpose of working."*

In April 2016, as a result of a previous change in legislation, the county council changed the basis of its sleep-in payment to providers from a flat rate fee of £37.19 per sleep-in to an hourly rate of £8.58 (representing a sleep-in cost of approximately £81.50) recognising this ruling required that all time awake and asleep counted towards time worked. This decision cost the county council £7m per year from 2016. The 13 July 2018 ruling therefore provided an opportunity to return to a flat rate fee.

During the summer of 2018, the county council invited all of its supported living providers to a meeting to discuss the outcome of the Court of Appeal ruling and potential fee reductions. Nine (out of 61) providers attended a meeting in September 2018. There was a general agreement that fees needed to change and that sleep-in fees could return to a fixed rate fee. However, providers indicated the fee level should allow for a payment to staff of £45 to £50 with a phased implementation. In light of continued budget challenges for the county council, combined with the recent legal decision, a proposal was presented to Cabinet to reduce the provider sleep-in

fee to £47.43, which sought to balance the need to make savings with the impact on this aspect of the care market as highlighted from various sources.

Cabinet approved the proposal to reduce sleep-in fees to £47.43 payment to providers (based on payment to staff of £36.08) with effect from 1 April 2019. As part of the arrangements cabinet also approved a phasing in period of 6 months with a top up of £11.73 for the period 1 April 2019 to 30 September 2019 (allowing a payment to staff of £45 night), to allow time for service providers to transition to new staff terms and conditions. This proposal would generate savings of £6.9m to county council expenditure.

Further to the 3 December Cabinet decision, the county council was asked by different providers if it would formally consult with all affected providers in relation to the proposed changes to sleep-in fees. Ordinarily, this is not a decision which the county council would consult on. However, Cabinet welcomed the opportunity to hear from providers on what this significant change in the legal ruling would mean for people affected. In light of the approaches from providers the Authority took the decision to undertake a formal consultation with affected organisations.

This report summarises the outcome of the consultation and the county council's response to key issues raised.

## **Consultations**

An electronic questionnaire was developed with the support of an existing service provider. In turn, 61 providers with interests in supported living sleep-in services were emailed to ask them to complete the consultation questionnaire. The consultation opened on 28 January 2019 for eight weeks; closing on 25 March 2019.

In February 2019, during the consultation period, the county council received a letter from the Minister of State for Care sent to all local authorities with social care responsibilities (as set out at Appendix 'C') suggesting how councils should respond to the July 2018 Court of Appeal ruling and a letter from the Lancashire Learning Disability Consortium, which represents a broad coalition of voluntary sector providers of services to people with learning disabilities in Lancashire (as set out at Appendix 'D') requesting that the content of their letter be considered as part of the consultation process.

The county council has not consulted service users or their families, due to the proposed changes relating to contractual terms and conditions with providers who each have different operating and service delivery models. In turn, as per the terms of their contracts with the county council, service providers will be required to implement any fee changes without impacting on the quality of service individual service users receive. However, the county council acknowledges that staffing issues could have an adverse impact on service users. Despite not consulting service users the potential impact on them has been considered as part of the equality impact assessment.

### ***Key themes arising from consultation***

Twenty-two completed questionnaires (representing 36% of providers contacted) were returned online and a detailed analysis of the responses and commentary provided by respondents is included in Appendix 'A'.

As may be expected, in providing commentary responses to the consultation questions, many respondents provided feedback that is unique to them. However responses to each question were grouped into themes in order to quantify the qualitative data as follows.

### ***Staff pay***

Across the sector, the consultation data indicates that 60% of the workforce completes sleep-in shifts. However, for the county council's largest providers that increases to 73% of the workforce. Pay rates vary across organisations but the average staff payment per shift is in the order of £67 per sleep-in shift. Data provided via the consultation also indicates the proposal as presented to Cabinet in December 2018, equates to a 13-14% reduction in pay, or £2,220 - £2,300 per person per year across a predominantly female workforce earning at or close to National Living Wage.

### ***Recruitment and retention***

Respondents were asked a series of open response questions covering recruitment and retention, the financial impact and service delivery impact. The negative impact on recruitment and retention arising from the December 2018 Cabinet decision was referenced across all questions in addition to the specific question on recruitment.

Larger providers indicated retention was more of a problem than recruitment as staff within the industry have become use to payments in the order of £67 per sleep-in shift and a sudden reduction could cause staff to seek alternative employment. In all cases favourable rates of pay was cited as the driving factor behind both recruitment and retention.

The scale of reduction proposed in December 2018 would cause further challenges for recruitment and retention in an already challenged market. The knock on effect of this is an increased use of more expensive agency staff resulting in increased costs for organisations but also potential for reduction in quality of service due to lack of staff continuity or existing staff working longer hours.

### ***Impact on service delivery***

Respondents indicated that service delivery may be impacted by an inability to cover sleep-in shifts resulting from lack of staff availability but also due to staff choosing not to complete sleep-in shifts; sleep-ins are not always contractual and when faced with a significant reduction in pay some staff will decide the level of remuneration is insufficient to compensate for the length of time away from their home environment.

### ***Financial impact***

Nineteen respondents answered this question with 18 indicating the proposal would have a negative impact on their financial position; in the main due to needing to continue to pay favourably for sleep-in shifts in order to prevent recruitment and retention issues.

Providers must balance staff remuneration, staff turnover and income from all sources. Eight respondents (including two of our largest providers) indicated the proposal would lead to their contract with Lancashire becoming unsustainable and a further four smaller providers indicated this would lead to their organisation becoming unviable.

Twenty one respondents indicated the county council fee should include elements for staff costs in addition to national insurance and pension such as apprenticeship levy and holiday pay and 18 respondents indicated that the fee should also include an allowance for management overheads. At the September 2018 provider meeting there was no general consensus amongst the nine providers as to whether management and profit elements should be applied to the sleep-in rate. The basis of the current rate (£9.42) was set in 2016 in conjunction with the Lancashire Learning Disability Consortium and reflects national insurance and pension costs only. It does not include an allowance for management costs or a profit/surplus to be included.

Financial issues are further complicated when providers hold contracts with multiple authorities each paying different rates. Most providers have standard staff terms and conditions so must balance cross subsidy across contracts. A significant change from one commissioner risks not only the sustainability of the single contract but potentially other contracts that it is cross subsidising. It is not possible to quantify the level of cross subsidy with currently available data. However, four providers (including three of our largest providers) stated that other commissioners were not proposing to change the rate in light of the Court of Appeal judgement; data made available via the Association of Directors of Adult Social Services in England (ADASS) confirms that for 2019/20 Lancashire is one of the first authorities to reduce sleep-in fees. Most authorities across the North West have currently chosen to retain sleep-in payments to providers in the order of £70-£100 per shift but are monitoring the Lancashire position.

One provider of services to the county council recently published details explaining how they have set a minimum staff payment of £40 per night with a top up according to contract rates. At Lancashire's existing rate of £9.42 staff working on Lancashire County Council contracts are paid a top up of £20, totalling £60 per sleep-in shift. The reduction to £36.08 would place the county council at the bottom of the table in relation to fees paid by North West authorities.

### ***Other points to note***

On 12 February 2019, during the consultation period, the Supreme Court granted Unison the right to appeal the July 2018 ruling. Five respondents stated that the county council should wait for the outcome of this decision before implementing any changes to the fee structure.

Four respondents indicated that alternative solutions should be found to replace sleep-in shifts.

Four respondents stated they were aware of other providers' staff taking strike action, however, only one respondent said they may find that their own staff take strike action. None of the county council's largest providers mentioned strike action.

## **County Council Response to Issues Raised**

### *Recruitment, retention and financial impact, service delivery*

The authority recognises the value of sleep-in services as the current mode of support and acknowledges that the ability to pay an attractive rate of pay to staff significantly improves the ability to recruit and retain care and support staff and that any reduction in pay would have an impact on staff in the care sector which is generally not well paid. However, the fee paid to providers for sleep-ins translates to a payment staff receive for time when they are not expected to be awake and working and a number of providers have indicated sleep-in fees may not be the best use of public funds.

Furthermore, the county council understands that reducing payments for any services may impact the sustainability of those services. The county council contracts with over 50 different organisations to deliver supported living services and should any organisation experience difficulties, in the first instance it will work with them to explore other ways to maintain service stability.

### *On-costs*

With regard to on-costs and the basis of the sleep-in fee calculation, consultation responses demonstrated a wide range of cost structures across the market, but in all cases respondents indicated the sleep-in fee should include more than national insurance and pension costs. Responses indicated a level of on-costs in the order of 36% of the payment to staff were incurred delivering sleep-ins. The county council proposes to reflect this level of on-costs in the revised proposal.

### *Other points to note*

The county council must be mindful of the current legal and financial situation and balance this with its duties under the Care Act to ensure the market is sustainable.

At this point in time there is some uncertainty as to whether the whole market would adjust accordingly to any changes to sleep-in fees and the timescale over which this would happen.

The decision by the Court of Appeal in July 2018 represents the current interpretation of the law. On 12 February 2019 the Supreme Court granted Unison the right to appeal the July 2018 ruling but it is not possible to accurately predict when the Supreme Court will consider the case or the outcome of their decision. In light of the county council's financial position and the current legal position, the authority feels that it should not delay taking action to align its fees with the current legal position.

## **Final Proposal**

The county council has considered the outcome of the engagement and consultation with providers, in addition to wider market information and its financial situation. In light of continued budget challenges for the County Council combined with the recent legal decision, a revised rate for sleep-in fees has been recommended which seeks to balance the need to make savings with the impact on this aspect of the care market as highlighted from various sources.

It is proposed that the planned implementation of the December 2018 decision relating to sleep-in fees is cancelled. Instead, cabinet is asked to consider the responses to the consultation and approve the implementation of an alternative rate:

- 1) To pay a sleep-in fee from 1 October 2019 that is set at £61.18 (based on the assumption that staff are paid £45 per shift).
- 2) To approve a phasing in period of 6 months with a top up of £13.60 for the period 1 October 2019 to 31st March 2020 to allow time for service providers to transition to new staff terms and conditions. During the transition period, the total fee payable (£74.78) is based on the assumption that staff are paid £55 per-sleep-in shift.

The county council acknowledges that there may be occasions when there is a need for the sleep-in worker to be awake during their sleep-in shift. The county council does not propose to alter the existing position which is that in these circumstances the county council will pay providers the agreed waking hourly rate for each hour spent awake up to a maximum of four hours. Should this be a regular occurrence providers should notify the council at the earliest opportunity so that a full review of the person's needs may be completed.

Following the July 2018 Court of Appeal ruling the additional fee for waking hours does not need to be at National Living Wage. The county council would only need to make up the shortfall between the shift payment and the aggregate of the shift awake hours. For example, if a member of staff is paid £45 for a sleep-in shift and was awake and working for a total of four hours during that shift, the county council would only be required to pay the difference between four x £National Living Wage hours and £45.

### **Implications:**

This item has the following implications, as indicated:

### **Risk management**

### **Legal**

The decision of the Court of Appeal in July 2018 represents the current interpretation of the law. The Supreme Court has now granted Unison the right to Appeal the July 2018 ruling but it is not possible to accurately predict when the Supreme Court will consider the case or the outcome of their decision. In light of the county council's financial position and the current legal position, the authority feels that it should not delay taking action to align its fees with the current legal position.

Section 5 of the Care Act sets out a duty to ensure quality in the provision of service, in performing this duty the Authority must ensure the sustainability of the market.

### **Equality Impact Assessment**

A full equality impact analysis can be found at Appendix 'B'.

This proposal will disadvantage workers earning at or close to national minimum wage in addition to a workforce that is predominantly female. Evidence from the consultation suggests just approximately two-thirds of the workforce would be impacted and this group could face a pay reduction in the order of 14% by implementing the December 2018 Cabinet decision.

Any reduction of this nature would impact the equality of opportunity of those affected employees in relation to meeting financial commitments they may have including supporting their families. For some, it may result in seeking other employment or job roles. It is also possible that any negotiations with staff on terms and conditions which providers carry out arising from implementation of the proposal could result in employees taking industrial action which could include a range of actions including strike action. This could have an adverse impact on employees and service users.

Evidence from consultation responses also indicated concerns from providers about their ability to recruit and retain staff and the potential impact this might have on service users in terms of quality and consistency of service/staff. If suitably skilled, trained and experienced staff no longer volunteered to work on sleep-in shifts or left their current employment this could impact service users who may have to build up rapport with a range of different people which may affect their confidence in using the service.

## Financial

The budgetary implications of the alternative proposal recommended within this report are shown in the table below. This will result in an in-year pressure in 2019/20 of £4.6m and alternative ways of managing this in-year saving shortfall will be required. However, if this cannot be found transitional reserve funding will be required to manage the shortfall, resulting in a reduced balance being available to support the county council's budget in future.

In 2020/21, although the in-year saving exceeds the amount originally profiled, the brought forward pressure from 2019/20 remains and the recurrent pressure from 2020/21 is £2.1m. As noted above, alternative ways of meeting this saving shortfall will need to be identified, however if this is not possible this would need to be added into the medium term financial strategy and therefore increase the budget gap which is currently forecast to be £47m by 2022/23.

	<b>New proposal saving</b>	<b>SC507 saving (Agreed by Cabinet Dec 18)</b>	<b>Financial Impact</b>
<b>2019/20</b>	£1.4m	£6.0m	-£4.6m
<b>2020/21</b>	£3.4m	£0.9m	+£2.5m
<b>Recurrent Impact</b>	<b>£4.8m</b>	<b>£6.9m</b>	<b>-£2.1m</b>

## List of Background Papers

Paper	Date	Contact/Tel
None		

Reason for inclusion in Part II, if appropriate

N/A