

Urgent Decision Taken on Behalf of Cabinet

Report to the Leader of the County Council and Cabinet Member for Adult Services

Report submitted by: Director of Corporate Services

Part I

Electoral Division affected:
(All Divisions);

Distribution of the Infection Control Fund

Contact for further information:

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Executive Summary

This report refers to the consideration of state aid law to a grant of £741,259 to the county council's care homes from the Department for Health and Social Care.

Reason for Urgency

This decision is urgent and cannot await the next meeting of Cabinet on 11th June 2020. The reason for this is that the fund must be allocated urgently to social care providers in response to COVID-19. This decision is therefore being taken on behalf of Cabinet by the Leader of the Council and the Cabinet Member for Adult Services in accordance with the provisions of Standing Order C16(1).

Recommendation

The Leader of the County Council and the Cabinet Member for Adult Services is asked to:

- (i) Approve a grant of £741,259 be made to the county council's care homes from the Infection Control Fund as set out in this report; and
- (ii) Delegate authority to the Director for Corporate Services to finalise the State Aid law advice from DWF Solicitors and should there be any significant changes to this advice it will be reported to the Leader of the County Council.

This decision should be implemented immediately for the purposes of Standing Order C29 as any delay could adversely affect the execution of the county council's responsibilities. The reason for this is that the decision has been designated as business critical by the Director of Corporate Services, and any delay in its implementation would have an adverse effect on the operations of the county council.

Background and Advice

The county council has been asked by the Department for Health and Social Care to distribute the Infection Control Fund (the Fund) to adult social care providers in Lancashire. The allocation for Lancashire is £16.200m. The primary purpose of the Fund is to support adult social care providers, including those with whom the county council does not have a contract, to reduce the rate of COVID-19 transmission in and between care homes. A small percentage of it may be used to support domiciliary care providers and support wider workforce resilience to deal with COVID-19 infections. This funding is being paid as a Section 31 ring fenced grant and is in addition to funding already received.

In order to ensure that the relevant infection control measures are put in place as speedily as possible, the council is required to make the relevant payments to providers as quickly as possible on receipt of these allocations. Any funds not used for the relevant infection control measures must be repaid to the local authorities by the end of September 2020 and if such repayments are not made the local authorities must take such steps as a necessary to recover them.

The county council must ensure that 75% of the grant is allocated to care homes and with certain key requirements; to this end the county council will impose written grant conditions upon providers.

The Department for Health and Social Care has referenced the fact that support given to care providers by councils using the grant paid to them from the Fund may constitute state aid. The county council must comply with relevant state aid legislation when making allocations of the grant.

State Aid is a very technical and difficult area of law to navigate; where aid is identified, there are a number of exemptions which may be applicable but they can be complex and have numerous restrictions upon their use. Advice has been taken from DWF solicitors in order to give due consideration to the application of state aid laws.

The advice from DWF states "*we believe the Fund should be recognised as an extension of the NHS's work to reduce infections. The Fund has been created by the Department for Health and Social Care which, of course, oversees the work of the NHS in hospitals and the wider community. The Department has decided on the interventions which can be made using the Fund as well as setting out other conditions which shall apply, thereby exerting significant control over the Fund. On*

this basis, we believe it is correct to see the Fund as an extension of the healthcare system provided by the Government and implemented across the country".

".....state funded measures to deliver medicines and equipment for the benefit of people at risk has been recognised as part of a State's healthcare system and therefore a non-economic activity. From our experience, we believe the Commission would recognise that this is a Government initiative to avoid unnecessary deaths and infections, which would otherwise place pressure on the NHS during the Covid19 pandemic. We believe these grounds present a strong case for the measure to be regarded as "no aid" taking account State aid case-law".

"We believe there is a strong case for the measure being regarded as no aid, and this is the simplest and least administratively burdensome position to take. However we recognise that the Department for Health and Social Care's guidance does not consider this option in detail and therefore the Council may prefer to go with the "belt and braces" options available to SGEIs".

The county council's care homes will be eligible to receive a grant in the sum of £741,259 and so in that context, as a grant recipient, a decision must be made as to whether, having taken advice, the county council is content to proceed on the basis that the grant does not amount to state aid.

Cabinet should be aware of the consequence that should there be a successful challenge on the basis that of a claim that the grant amounted to aid then the UK Government would be required call upon the county council to recover the grant given. In such instance the county council would be required repay the grant to the government.

Similarly, grant given to private providers by the county council on this same basis would have to be clawed back. In this regard providers will be advised that whilst we consider that there is strong suggestion that there is no infringement of state aid in respect of the grant we cannot give any guarantees and therefore there is a risk, albeit low, of clawback. The provider will be advised to seek their own advice if they are not comfortable with this approach and wish to consider taking a view that the grant could constitute "aid" and thus give due consideration to the application of the potential exemptions outlined in the grant circular.

The alternative option would be to consider that the grant could be deemed to be state aid and seek to apply an exemption. However this would require further consideration. Given the advice from DWF, the fact that the risk of challenge is considered to be low and the need to distribute the grant at speed to facilitate expenditure it is recommended that the county council view the grant as being regarded as no aid.

The report from DWF is in draft form, officers remain in discussion with DWF to finalise. It is not anticipated that there will be any material changes to their current advice which would impact on the advice and recommendations in this report. However should material changes be made it is proposed that Cabinet agree to delegate authority to the Director of Corporate Services to finalise the report with any significant changes reported to the Leader.

Consultations

N/A

Implications:

This item has the following implications, as indicated:

Risk management

As set out in the report.

Financial

The county council has already put in place a provider support scheme for care providers. This new funding does not replace the council's own scheme, however the expectation is that residential providers would initially seek to access support through the government funding scheme before applying to the council's scheme.

List of Background Papers

Paper	Date	Contact/Tel
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None

Reason for inclusion in Part II, if appropriate

N/A

Urgent Decision Taken on behalf of Cabinet: Declarations

Leader of the County Council

Distribution of the Infection Control Fund

Original recommendation, as set out in the report, approved without amendment. Yes/No *

Original recommendation amended and decision as follows: Yes/No *

I have a pecuniary/non-pecuniary interest in this matter. Yes/No *

If an interest is declared please give details below:

.....
Leader of the County Council

3rd June 2020

Chief Officer

I certify that this is an appropriate and accurate record within the terms of Standing Order C30(2) and (3) of the decision taken by the Cabinet Member.

.....
Senior Democratic Services Officer

3rd June 2020

*Delete as appropriate

This decision is to be taken by more than one Cabinet Member and all relevant Cabinet Members must be in agreement with the decision

Urgent Decision Taken on behalf of Cabinet: Declarations

Cabinet Member for Adult Services

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Cabinet Member for Adult Services

3rd June 2020

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